the new mandatory minimums.

CHART A
AMENDMENT IMPACT ON SAFETY VALVE QUALIFIERS

	CURRENT	PROPOSAL 1 & 2
Offense Level 60 grams	28	32
Safety Valve 60 grams	26	30
Sentencing Range - Safety Valve	63 - 78	97-121

JUSTIFICATION FOR CHANGE

The Practitioners Advisory Group has some doubt that any need for changes in methamphetamine policy actually exists. There are no studies which show that continually ratcheting up drug penalties has any impact on the use and distribution of controlled substances.

Also, the Practitioners Advisory Group asks that the Commission closely examine the studies used to attempt to establish that methamphetamine use and distribution were significantly on the increase in the 1990s.

The Dawn data charted in Figure 2 of the Commission's November 1999 methamphetamine report shows emergency room "mentions" of drug abuse involving methamphetamine were relatively constant for the years 1992, 1993 and 1996, with increases for 1994, 1995 and 1997. However, the Dawn methodology has certain limitations which should be factored. In an article entitled "Describing Dawn's Dominions," authors Jonathan Caulkins, Patricia Ebener and Daniel McCaffrey caution policy makers about drawing definitive conclusions from these reports because Dawn samples only metropolitan areas, its criteria is somewhat vague, the report has sampling errors and because the nature of emergency room activities place more value on treatment than data collection which is not critical to the treatment needs of the patient.

Particularly pertinent here, emergency "mentions" encompass patient drug

abuse self reports as well as staff notations of symptomatic observations. According to the 1998 publication, Buzzed: The Straight Facts About The Most Used and Abused Drugs, authored by three professors at the Duke University Medical Center (Kuhn, Swartzwelder and Wilson), the newly popularized youth drug, Ecstasy (MDMA, MDA, MDEA), produces symptoms identical to methamphetamine. Id. Page 71. Thus some of the "Meth" increases reported by Dawn probably are attributed to misidentifications of Ecstasy abuse.

The TEDS data also charted in Figure 2 actually shows a decrease in treatment episodes from 1995 to 1996. Also, the increase in treatment data for other years may be more properly attributed to the increase in the prescription practices of doctors regarding stimulants such as Ritalin. In a Journal of the American Medical Association study reported by Erica Goode in the New York Times and reprinted in The Charlotte Observer on February 23, 2000, Dr. Julie Mango Zito of the University of Maryland Medical School notes that significantly more children in the 1990s were being treated pharmacologically for attention deficit hyperactivity disorders. The Practitioners Advisory Group believes that when young people are prescribed increasing numbers of stimulants, such drugs are more readily available to be diverted for abuse. Thus, the TEDS data might not reflect a rise in clandestinely manufactured stimulants at all but instead may show an increase in the abuse of legitimately manufactured drugs.

Finally, the fact that more persons are currently being sentenced for methamphetamine violations than were sentenced ten years ago simply means that more violators are being prosecuted which can occur because of increased enforcement and not necessarily because of increases in methamphetamine use and distribution.

CONCLUSION

Any changes in the methamphetamine guidelines should await a broader review of drug sentencing by this Commission. The current proposals are unnecessary, were not mandated by Congress, are inconsistent with Congressional policy toward first offenders and might not be consistently enforced by judges and prosecutors whose current practices belie any need for harsher guidelines. No action should be taken on this issue.[1]

5. Implementation of the Identity Theft and Assumption Deterrence Act

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[1] The Practitioners Advisory Group wishes to thank Jessica Rosen, a third year public policy major at Duke University for providing technical and research assistance regarding this issue.

BACKGROUND

The "Identity Theft and Assumption Deterrence Act of 1998" ["the Act"] creates a new offense under 18 U.S.C. Section 1028 where a person

> knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid and abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable state or local law.

Pub. L. No. 105-318 (1998). The Act also creates a maximum fifteen-year term of imprisonment where the offense "involves the transfer or use of 1 or more means of identification if, as a result of the offense, any individual committing the offense obtains anything of value aggregating $1,000 or more during any 1-year period," and a three-year term of imprisonment otherwise. Additionally, the Act creates a maximum term of imprisonment of twenty years if the offense is committed "to facilitate a drug trafficking crime," "in connection with a crime of violence," or "after a prior conviction under this section becomes final." The statute directs the Sentencing Commission to review and amend the Sentencing Guidelines and its policy statements to provide an appropriate penalty for each of the offenses contained in Section 1028.

Two proposed amendments to the fraud guideline to implement this directive have been published for comment. Option One would increase the offense level by a proposed two levels if the offense involved either "(A) the use of any identifying information of an individual victim to obtain or make any unauthorized identification means of that individual victim; or (B) the possession of [5] or more unauthorized identification means" and would create a floor offense level, proposed at ten to thirteen. The definitions make clear that "individual victim" as used in this option "does not include a fictitious individual" and that "unauthorized identification means" are new means of identification that are obtained using another individual's identifying information without the permission of that person. Additionally, this option would modify the application note regarding consequential damages to provide that, "in a case involving unauthorized identification means, loss includes any reasonably foreseeable, consequential damages incurred by the individual victim." Finally, this option provides for the possibility of an upward departure where the "offense level does not adequately address the seriousness of the offense," for example, because another person is arrested or denied a job as a result of the defendant's use of unauthorized identification means, or because the defendant established many unauthorized identification means in the name of one person, essentially assuming that person's identity. The background commentary indicates that the minimum offense level is intended to account for the fact that it is often difficult for the victim to detect that unauthorized

means of identification have been obtained and for the fact that some of the harm to the victim may be difficult to quantify, such as inconvenience or damage to the victim's reputation or credit rating.

Option Two would require an increase of two levels in the offense level and provide a minimum offense level proposed at ten to twelve if the offense involved more than minimal "harm to an individual's reputation or credit rating, inconvenience related to the correction of records or restoration of an individual's reputation or credit standing, or similar difficulties." This option would also increase the offense level by two levels "[i]f the offense involved the production or transfer of 6 or more identification documents, false identification documents, or means of identification," not to be applied if the defendant's conduct already resulted in an increase under the previous adjustment. An application note would be added regarding the upward adjustment for harm to the individual's reputation stating that the upward adjustment should be made only if the harm caused was not minimal. The application note also states that an upward departure may be appropriate where the harm caused was not adequately addressed, for instance where the wrong person was arrested because of the fraudulent use of that person's means of identification or where an individual's identity was taken over.

The Commission also invited comment on a number of issues related to implementing the sentencing provisions of the Act, which are discussed in the Sentencing Commission's Economic Crimes Policy Team Final Report. The Final Report identified four possible approaches to implementation of the Act, including: (1) creating an adjustment in Chapter Three whenever any identification means is used to commit, aid, or abet any unlawful activity that constitutes a violation of federal law or a felony under any applicable state or local law; (2) providing enhancements and/or departures in the theft, fraud, counterfeiting, tax, and money laundering guidelines for the fraudulent use of any identification means in the course of the offense conduct; (3) providing enhancements and/or departures under the fraud and theft guidelines for the fraudulent use of any identification means in the course of the offense conduct; or (4) establishing a general upward departure under Chapter Five whenever an offense involving the fraudulent use of identification means causes harm not adequately taken into account in the guidelines.

THE PAG'S RECOMMENDATION

A. *Further Study*

The PAG recommends further study before a guideline amendment addressing this statute is implemented. The Act is an extremely broad statute with the potential to be applied in many different types of cases. This soon after its enactment, it is

impossible to predict how it will be used. Until more information is available regarding the types of cases that will be brought under this statute, it would be premature to amend the guidelines based on assumptions regarding the offenses that may be charged under it.

The Commission has previously acknowledged the problems that can result from the drafting of guidelines in the absence of information regarding the offenses that would be charged under the statute. In its report to Congress regarding the money laundering guidelines, the Commission explained:

> Without benefit of either sentencing experience or settled jurisprudence interpreting the new statutes, the Commission necessarily based the guideline penalties for money laundering offenses upon its own understanding of the types of conduct about which Congress was most concerned, and on information from DOJ about how it expected to employ the new laws. The relatively high base offense levels for money laundering were premised on the Commission's anticipation that prosecutors would address "money laundering activities [which] are essential to the operation of organized crime," and would apply the money laundering sentencing guidelines to those offenses where the financial transactions "encouraged or facilitated the commission of further crimes" or were "intended to ... conceal the nature of the proceeds or avoid a transaction reporting requirement."

UNITED STATES SENTENCING COMMISSION, *Report to the Congress: Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report*, September 18, 1997, at 3-4 (citations omitted).

The Commission found, however, that in practice "money laundering sentences are being imposed for a much broader scope of offense conduct, including some conduct that is substantially less serious than the conduct contemplated when the money laundering guidelines were first formulated." The result has been that

> the intended relationship between the harm caused and the measurement of the offense seriousness under the money laundering sentencing guidelines has become distorted. Individuals who engaged in essentially the same offense conduct received substantially higher or lower sentences, depending on whether they were charged, convicted, and sentenced under the underlying offense-related statute, or the money laundering statute, or both.

Id. at 7. The Commission also noted that "judicial dissatisfaction with the broad reach of the money laundering guidelines has often resulted in a determination that the actual conduct for which the defendant was convicted was outside the 'heartland' of the money laundering guidelines as drafted by the Commission, thereby justifying a downward departure." Id. at 8.

Drafting guidelines to implement the new Identity Theft law without awaiting further information would again place the commission in the position of being forced to make assumptions regarding the types of cases in which charges will be brought. The legislative intent behind the enactment of the Act appears to have been to target conduct such as the fraudulent procurement of new means of identification and the use of fraudulently procured identification means to facilitate further offenses or to assume another person's identity. However, the statute itself is written so broadly that it also applies to offenses of a much less serious nature. For example, the possession of a false driver's license or other false identification is a felony under the law of many states, meaning that the statute would apply where a teenager uses false identification to buy alcohol. With respect to federal law, the Economic Crimes Policy Team identifies 216 statutes and statute subsections to which the statute could potentially apply, including not only the types of serious offenses contemplated in the Act's legislative history, but also such offenses as false impersonation of a 4-H club member, 18 U.S.C. § 916; false pretenses on the high seas, 18 U.S.C. § 1025; and false claims for postal loss, 18 U.S.C. § 288.

It must be recognized that even if a guideline amendment is drafted with the intention of reflecting the seriousness of the conduct that the Act is meant to reach, the Act is so broadly drafted that any amended guideline might also be applied in cases in which the offense conduct is much less serious than was contemplated. Without empirical data regarding the types of cases in which charges are actually brought under Section 1028, it is premature to attempt to implement an amended guideline. To avoid problems similar to those that arose out of the implementation of the money laundering guideline, it would be more prudent to avoid rushing into a guideline amendment and instead to wait until more information is available regarding the types of cases in which offenses under the Act are actually charged.

B. *An Encouraged Upward Departure*

Should the Commission determine that it is appropriate to implement an amended guideline without waiting for empirical data, the PAG would recommend providing a general upward departure under Chapter Five of the guidelines when an offense involving the use of unauthorized means of identification causes harm not adequately taken into account in the guidelines. Given that it is not clear which types of conduct both fall within the statute and are sufficiently egregious to justify an enhancement, district court judges may be in a better position to determine when an

enhanced sentence is justified. District court judges will be able to consider actual cases, rather than the abstract possibilities that the Commission is presently faced with, and evaluate them individually to determine whether an upward departure is warranted. The Commission would then be able examine cases as they are decided and evaluate what factors are present in the cases in which upward departures were granted. After the caselaw has developed, the Commission could revisit the issue and utilize the collective wisdom and experience of the entire judiciary to make a more informed decision regarding any possible guideline adjustments.

C. *Proposed Amendments Published for Comment*

With respect to the proposed guideline amendments published for comment, the PAG is concerned that the upward adjustments created under either proposed amendment have the potential to create extreme and unwarranted disparities in sentences imposed under the fraud guidelines. Under either proposed amendment, a defendant would receive a two-level upward adjustment and be subject to a minimum offense level based on factors that are intended to account for the likelihood of harm to the victim's reputation or credit rating. Under Option One, the two-level upward adjustment and minimum offense level will also be imposed where the offense involved more than a proposed minimum of five unauthorized identification means. Option Two requires a two-level upward adjustment where the offense involved the production or transfer of more than six identification documents, false identification documents, or means of identification. It is not difficult to visualize cases in which either of these proposed upward adjustments could result in dramatically increased sentences based on conduct that has little impact on the defendant's level of culpability. For instance, without the upward adjustment, a defendant who used another person's identifying information to obtain a credit card, then used the credit card to fraudulently purchase $1500 worth of merchandise would be subject to an offense level six, which results in a sentencing range of zero to six months at criminal history category I. Under the amendment proposed in Option One, that defendant would be subject to a minimum offense level proposed to be set between ten and thirteen, resulting in sentencing ranges of six to twelve and twelve to eighteen months, respectively. Under the most severe version of the proposed amendment, the maximum term of imprisonment for such a defendant could therefore triple based entirely on the fact that the offense conduct involved the creation of an unauthorized means of identification rather than some other type of fraud. The same increase in sentence would occur under Option One where the offense involved the possession of a proposed five or more unauthorized means of identification.

Similarly, without the upward adjustment, a defendant who participated in the transfer six stolen credit cards, for instance by transporting the contents of stolen wallet from one location to another, would be subject to an offense level of nine if the loss involved was greater than $10,000 Under Option Two, the offense level for such a

defendant would increase to eleven. At criminal history category one, that would result in the minimum term of imprisonment doubling, from four months to eight months, and the maximum term of imprisonment increasing by forty per cent, from ten months to fourteen months.

In light of the large increases in sentences that would result from the upward adjustments and minimum offense levels under either of the proposed guideline amendments, consideration must be given to the question of whether the factors that result in such increases make the offense conduct so much more egregious as to justify such increases. The adjustments are intended in part to account for the harm that is not captured by the amount of loss, such as harm to the victim's reputation and credit history, as well as the inconvenience that is involved in correcting such matters. While these types of harm are not measured in the amount of loss, they are quantifiable and are routinely measured in the context of civil lawsuits. Because it takes a fairly large increase in the amount of loss to move from one offense level to the next, it is entirely possible that if these harms were quantified and taken into account in the amount of loss, they would not result in a two-level increase in the offense level, and often might not result in any increase to the offense level. This raises the question of whether the fact that these harms are difficult to quantify should result in their having a disproportionate impact on sentencing relative to more easily quantifiable losses.

For these reasons, the PAG recommends against the adoption of either of the proposed guideline amendments. Certainly, if one of the proposed amendments is nonetheless adopted, the Commission should consider modifying the amendment to provide for an upward adjustment of one rather than two offense levels. Additionally, the PAG would recommend that the minimum offense level be set at eight rather than a higher level to minimize the possibility of unwarranted disparities in sentencing under the amended guideline. Finally, the PAG would suggest limiting the application of any amended guideline to cases involving unauthorized means of identification and individual victims, as Option One does, to make it more likely that sentencing will be affected under the amendment only where the harm that the Act is intended to target actually occurred.

CONCLUSION

Because the Commission is faced with the task of implementing sentencing guidelines under a broadly written statute that has the potential to be applied to conduct involving a wide range of culpability, the PAG respectfully suggests that the Commission delay making any guideline amendments to implement the statute until more information is available regarding the types of cases in which the statute will be applied Alternatively, the PAG would recommend the adoption of an encouraged upward departure in cases involving unauthorized means of identification where the harm caused by the offense is not adequately taken into account in the guidelines. The

PAG recommends against the adoption of either of the proposed amendments to the fraud guideline, because both of the proposed amendments have the potential to create large and unwarranted disparities in sentencing under that guideline.

6. Implementation of the Wireless Telephone Protection Act

The PAG cautions against making any changes to the fraud guidelines during this amendment cycle.

As an initial matter, the PAG is concerned about the apparent trend to incorporate upward adjustments into offense levels based on the means used by a defendant to commit a certain type of crime. While there will certainly be occasions where the means of committing the crime (e.g., use of a gun) justifies an upward adjustment in a defendant's offense level, the Commission should tread carefully in this area. Here, the PAG does not comprehend why fraud committed via a telephone cloning device is more heinous than fraud committed using other forms of technology (e.g., obtaining credit card numbers by invading a secure internet site).

In addition, in light of the ongoing debate about the economic crime package and the possibility that the Commission may significantly revise § 2F1.1 during the next amendment cycle, it does not make sense during this amendment cycle to increase the offense levels for crimes that fall within the ambit of this guideline section. If the Commission during this amendment cycle increases the offense levels for certain kinds of fraud offenses and then during the next cycle increases the severity of the loss table for all fraud offenses, the individuals who fall in the former category will be subject to disproportionately higher sentences. It makes most sense to consider the issues relating to offense levels within the broader discussion surrounding the economic crime package, and not on an ad hoc basis.

If the Commission decides to move forward in this area, the PAG recommends Option 1, which essentially tracks the statute. In light of the concerns mentioned above, it would be imprudent to revise more broadly the fraud guidelines.

7. Offenses Relating to Firearms

Amendment 7 contains a number of proposed amendments dealing with firearms. Several of the proposals are in response to Public Law 105-386, the so-called "Bailey fix" legislation.

Proposed amendment 7A would adopt the definition of "brandish" that Congress added to 18 U.S.C. § 924(c). We do not think it advisable to apply that definition throughout the guidelines. Congress developed that definition for a single offense, an

offense that requires the presence of a real gun. The Commission's definition of brandish has been in place for over 13 years. That definition is settled and familiar to bench and bar. No matter how much the new statutory definition may resemble the current guideline definition, there inevitably will be litigation about it. We recommend that the Commission apply the statutory definition only to § 2K2.4, the guideline applicable to violations of 18 U.S.C. § 924(c).

Proposed amendment 7B makes two changes in § 2K2.4. First, it adds language to the text of the guideline specifying that the term of imprisonment required under the guideline is the minimum term in the statute. Public Law 105-386 changed 18 U.S.C. § 924(c) from prescribing a minimum that was also the maximum to prescribing a minimum with no stated maximum. This part of amendment 7B will avoid any ambiguity in applying the guideline, and we support it. The second change made by amendment 7B is to the commentary to the guideline. We do not find the proposed commentary to be helpful. It is not clear, for example, whether the factors set forth in (A) through (E) in the last sentence apply in any circumstance or only in the two circumstances described in the preceding sentence. We believe that the Commission should wait to see how district courts sentence under the new section 924(c) before attempting to define encouraged-departure grounds.

Proposed amendment 7C deals with the situation where the defendant is accountable for two guns and is convicted of both the underlying offense and the section 924(c) offense. The Commission's general approach is that a weapon enhancement applies only once even if the defendant is accountable for the possession, display, etc. of two guns. A section 924(c) conviction is treated as a replacement for the weapon enhancement in the guideline for the underlying offense and should be treated no differently. We believe that the amendment 7C makes that clear. We support amendment 7C.

Proposed amendment 7D adds commentary to § 2K2.4 that states that a section 924(c) conviction is not an instant offense for purposes of the career offender guideline. A section 924(c) is really a sentence enhancement for possessing, using, etc. a gun. The offense guideline that applies to a section 924(c) offense is unique in that it is the only offense guideline that does not lead to the determination of a place on the sentencing grid. In effect, then, § 2K2.4 is a mandatory penalty enhancement for the underlying crime of violence or drug trafficking offense. We think that the severe penalties of the career offender guideline should not be available unless the government has convicted the defendant of the underlying offense.

Proposed amendment 7E makes a number of technical and conforming amendments necessitated by Public Law 105-386. We support amendment 7E.

The first issue for comment assumes that the statutory definition of brandish is

adopted for use in the guidelines. The question is whether "display" can be deleted from weapon enhancements that apply if a dangerous weapon is brandished. As indicated above, we do not favor using the statutory definition for guideline purposes, but if the statutory definition is adopted, there would be no reason to retain "display."

The second issue for comment is whether § 2K2.4 should have a cross-reference to the underlying offense, to be used if the defendant is not convicted of the underlying offense. We oppose such a provision as undercutting the integrity of the jury system. Section 924(c) calls for additional punishment to be added because of the presence of a firearm. If the jury has acquitted the defendant, the jury, in effect, has determined that there should be no punishment for the underlying offense. The cross-reference, moreover, would created inequity. Assume that two codefendants are charged together with a drug trafficking offense and a section 924(c) offense of brandishing a firearm during that drug trafficking offense. The first defendant is convicted of both, with the section 924(c) offense adding 7 years to her term of imprisonment. The second defendant is acquitted of the drug trafficking offense and convicted of the section 924(c) offense. His section 924(c) offense should add no more to his sentence than his codefendant's conviction of the very same offense added to her sentence. A cross reference would require that result if the underlying drug trafficking crime had a guideline range permitting a sentence in excess of 7 years.

The final issue for comment is whether a section 924(c) offense should be an instant offense for purposes of the career offender guideline. We think it should not. Not only would it be difficult to draft a provision that satisfactorily overcomes many hurdles, we think that such a provision would unnecessarily, and without sufficient justification, increase sentences. An offense for which Congress has mandated an additional 5 consecutive years, for example, could result in the defendant being sentenced to at least 22 consecutive years.

8. Circuit Conflicts[2]

A. Aberrant Behavior

1. Background

Chapter 1, Part A, §4(d) of the Guidelines states that "[t]he Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify

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[2] In this submission we do not address the last two circuit conflicts referenced in the published materials: post-offense rehabilitation and upward departures based on dismissed or uncharged conduct We may provide the Commission with a supplemental submission prior to our March 10th meeting that addresses these issues.

probation at higher offense levels through departures." The Guidelines do not define the phrase "single act of aberrant behavior" or provide any more specific guidance regarding the circumstances in which a downward departure on this ground would be warranted.

After a decade of litigation regarding this language, a rather dramatic circuit split exists regarding its proper interpretation. The split is dramatic not only because the division among circuits is fairly even — roughly seven circuits to four — but also because the gap between the competing positions is fairly wide. The Third, Fourth, Fifth, Seventh, Eighth, Eleventh, and District of Colombia Circuits have interpreted the "aberrant conduct" language very narrowly.[3] These courts have held a downward departure is permitted only where the crime involved a single "spontaneous and seemingly thoughtless act." Using this definition, the courts have looked to the amount of planning, the number of actions involved, and the duration of the criminal conduct.

The First, Second, Ninth, and Tenth Circuits, on the other hand, have declined to apply the "spontaneous and thoughtless act" rule, reasoning that it "is so difficult to satisfy that it rarely, if ever, could result in a downward departure for aberrant behavior."[4] These circuits have instead utilized a broader "totality of the circumstances" test which focuses on a number of potentially mitigating factors such as:

(1) The degree of spontaneity and amount of planning;
(2) Charitable activities and prior good deeds;
(3) Efforts to mitigate the effects of the crime:
(4) The duration of the criminal conduct;
(5) The number of acts involved in the criminal conduct;
(6) The defendant's criminal record;
(7) Psychological disorders or extreme stress suffered by the defendant; and
(8) Letters from family and friends expressing shock at the defendant's behavior in light of the defendant's character and lifestyle.

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[3] See, e.g., United States v. Withrow, 85 F.3d 527 (11th Cir. 1996); United States v. Dyce, 78 F.3d 610 (D.C. Cir. 1996); United States v. Marcello, 13 F.3d 752 (3d Cir. 1994); United States v. Williams, 974 F.2d 25 (5th Cir. 1992); United States v. Garlich, 951 F.2d 161 (8th Cir. 1991); United States v. Glick, 946 F.2d 335 (4th Cir. 1991); United States v Casey, 895 F.2d 318 (7th Cir. 1990).

[4] See, e.g., Zecevic v. United States Parole Commission, 163 F.3d 731 (2nd Cir. 1998); United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996); United States v. Takai, 941 F.2d 738 (9th Cir. 1991); United States v. Peña, 930 F.2d 1486 (10th Cir. 1991).

Rather than restrict the departure to crimes involving "single acts," the Circuits applying a totality of the circumstances test permit departures in cases where multiple acts during a relatively short period of time lead up to the commission of the crime.

2. The PAG's Recommendation

A. *Single vs. Multiple Acts*

The PAG recommends clarification of the existing guideline to specify that a downward departure may appropriate for aberrant conduct which manifests itself through more than a single "act." The requirement of a single act will either effectively read the potential departure out of existence or cause its application to turn on a relatively arbitrary consideration. Instead, the focus should be on a single "crime," even if committed through multiple "acts" within a relatively short period of time leading to the commission of the crime.

The term "act" is not a recognized or defined term within either the criminal code or the guidelines. Virtually any criminal conduct could theoretically be sliced into multiple component "acts" or sub-parts. As noted by the First Circuit, "[e]ven the *Russell*[5] defendant, whose spontaneous actions are widely regarded as a classic example of aberrant behavior, could be understood to have committed more than a single act of aberrant behavior." Grandmaison, 77 F.3d at 563. Accordingly, a "single act" requirement could foreclose any potential departure for aberrant conduct.

Moreover, it should be the nature and context of the defendant's crime which may call for a departure, rather than a potentially academic exercise in defining and then counting the number of "acts" involved. Downward departures for aberrant behavior should turn on a much richer mix of information concerning the defendant's character and the relationship of the criminal conduct to that character than can be captured by an enumeration of the "acts" performed.

B. *The Totality of the Circumstances*

The PAG also recommends that the Commission clarify the existing guideline to direct the district courts to consider the totality of the circumstances in considering downward departures for aberrant conduct. Due to the nature of the inquiry — whether the criminal conduct by the defendant was unusual and bizarre in contrast with the remainder of the defendant's life — the diversity of potentially relevant facts makes a totality of the circumstances inquiry a virtual necessity. As the Commission recognized in Chapter I, Part A, Section 4(b), "it is difficult to prescribe a single set of guidelines

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[5] United States v. Russell, 870 F.2d 18 (1st Cir. 1989).

that encompasses the vast range of human conduct potentially relevant to a sentencing decision." This is particularly true of potential departures for aberrant behavior.

Adoption of a totality of the circumstances inquiry should also be accompanied by a list of potential factors for consideration by district courts. These factors could include those enumerated above as developed by the various Circuits which have developed and employed the totality of the circumstances approach.

C. *Fixed Limitations on the Availability of the Departure*

The PAG recognizes the need to avoid a totality of the circumstances test which is unduly open-ended, raising the potential for unwarranted disparity through inconsistent application. Accordingly, the guideline could also include a series of absolute limitations to prevent the aberrant behavior departure from becoming a "departure reason that swallows every white-collar first offense case." *Takai*, 941 F.2d at 742.

First, aberrant departures should be limited to defendants in criminal history category I. Although it may be expected that most aberrant behavior departures would be granted to pure first offenders, there may be unusual circumstances in which such a departure would be appropriate even though the defendant had a minor prior offense which is remote from the criminal conduct at issue both in time and nature.

Second, aberrant behavior departures should be granted in truly violent offenses only in the most extraordinary circumstances. By their nature, most acts of violence are sudden and without planning or sophistication. These factors therefore lack the mitigating force with violent offenses that may be present in a non-violent offense.

Third, the criminal conduct must have occurred during a fairly brief period of time. The Commission may wish to specify that conduct occurring over a period of more than a month or two ordinarily would not qualify for a downward departure on this ground. Another potential limiting mechanism may be to permit aberrant conduct departures only in those cases which did not involve "more than minimal planning" as that term has been applied in the fraud context, or "sophisticated means" as used in the tax guidelines.

D. *Conclusion*

In the absence of a potential downward departure for aberrant conduct, the guidelines present no basis for distinguishing between Mother Teresa and Gordon Gecko. Because the "single spontaneous and thoughtless act" test effectively reads the departure ground out of existence, the PAG recommends the current guideline be clarified to adopt a modified and limited totality of the circumstances standard for aberrant behavior departures.

B. Drug Offenses Near Protected Locations

Amendment 8B asks for comment upon whether § 2D1.2 applies "only when the defendant is convicted of an offense referenced to that guideline or, alternatively, whenever the defendant's relevant conduct included drug sales in protected location or involving a protected individual." The answer to that question is clear under the guidelines as presently drafted. Section 1B1.2(a) requires the court to choose the applicable offense guideline by looking at "the offense conduct charged in the count of the indictment or information of which the defendant was convicted." That requirement precludes the use of relevant conduct. The Commission further makes that clear in the relevant conduct guideline itself. Section 1B1.3(a) expressly provides that it applies to determinations under Chapters 2 and 3 of the Guidelines Manual, and section 1B1.3(b) expressly provides that it applies to determinations under Chapters 4 and 5. Nothing in section 1B1.3 applies to the determination of the correct offense guideline.

Revisions to Appendix A

Amendment 8B also asks whether the guidelines should require the sentencing court to use the guideline listed in the Statutory Index. We think not. The Statutory Index is not comprehensive, it does not list all federal offenses, and for some offenses the Statutory Index lists more than one guideline. There will have to be a rule for deciding which guideline to use in both circumstances. We see no reason to restrict judicial discretion. The interest in making this change seems to come from the Justice Department and be motivated by a Third Circuit case that, under § 1B1.2(a), held that the fraud guideline was the correct guideline to use in determining sentence for a money laundering conviction. The Third Circuit correctly applied the guidelines by

looking to the offense conduct charged in the counts of conviction. The Court made that determination on the basis that the conduct charged was outside the heartland of the money laundering guideline – a determination that would also have supported a downward departure to a sentence within the range determined by applying the fraud guideline. The Third Circuit does not point to a problem with the Statutory Index being advisory rather than mandatory. Rather, the Third Circuit case points to a problem with the money laundering guidelines. We suggest that the Commission undertake a comprehensive reexamination of those guidelines and attempt once again to revise them to call for more sensible penalties.

C. Two Level Enhancement for Bankruptcy Fraud Cases

Section 2F1.1 of the Guidelines specifies a base offense level of six for fraud. Neither § 2F1.1 or any other section of the Guidelines provide either a base offense level or an enhancement provision for bankruptcy fraud as such.

The Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits have affirmed two level increases by the District Court for bankruptcy-related fraud that violated "any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the Guidelines." Section 2F1.1(b)(4)(B).[6] The First Circuit reversed a District Court's two-level enhancement under this provision and the Second Circuit in dicta expressed strong disagreement with the pro-enhancement view. Recently, the Third Circuit adopted the First and Second Circuits' analysis in reversing a two-level enhancement.

The pro-enhancement Courts of Appeal recognize bankruptcy fraud as implicating the violation of a judicial or administrative order or process within the meaning of § 2F1.1(b)(4)(B). They note that the applicable guideline, § 2F1.1, is a "dragnet guideline that sweeps within its ambit a great number of offenses involving dishonesty found in the federal criminal code," including 18 U.S.C. § 152, which is used to prosecute bankruptcy fraud such as concealment of assets. E.g., United States v. Michalek, 54 F.3d 325, 332-33 (7th Cir. 1995) (affirming by 2-1 application of enhancement). These Courts of Appeal reject the argument that the enhancement does not apply because the defendant did not violate an identifiable order, injunction, decree or process. Rather, in their view, the gravamen of bankruptcy fraud is that the defendant "abused the bankruptcy process and hindered the orderly administration of the bankruptcy estate by concealing assets " United States v. Lloyd, 947 F.2d 339, 340 (8th Cir. 1991). Accord, e.g., United States v Guthrie, 144 F.3d 1006, 1010-11 (6th Cir. 1998), United States v Welch, 103 F.3d 906, 908 (9th Cir. 1993) (per curiam); United

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[6]References are to the Guidelines effective November 1, 1998 as they appear on the Commission's web-site

States v. Messner, 107 F.3d 1448, 1457 (10th Cir. 1997); United States v. Saacks, 131 F.3d 540, 545 (5th Cir. 1997). In addition, several Courts of Appeal held that the Bankruptcy Rules and Official Forms constitute "orders" of the Bankruptcy Court, which were violated by the false declaration of assets in bankruptcy filings. E.g., United States v. Bellew, 35 F.3d 518, 520-21 (11th Cir. 1994).

Three circuits view this issue differently. In United States v. Shadduck, 112 F.3d 523 (1st Cir. 1997), the First Circuit reversed the imposition of a two-level enhancement on the basis that no prior order, decree or injunction prohibited the defendant from engaging in the type of fraudulent conduct to form the basis for his conviction. The Bankruptcy Rules and Official Forms, which require full disclosure of assets, were unquestionably violated but, since they are in the nature of standing orders applicable to all debtors and not specifically directed to defendant, do not qualify as prior orders, decrees or injunctions within the meaning of § 2F1.1(b)(3)(B). Id. at 529-30.

The First Circuit did not reach the "judicial process" issue, but in United States v. Carrozzella, 105 F.3d 796 (2nd Cir. 1997), the Second Circuit, in dicta, rejected the argument that bankruptcy fraud involved violation of a judicial process. The Second Circuit interpreted "violation of any judicial process" to mean violation of a command or order to a specific party, such as a summons or execution issued in a particular action, not simply rules of general application.[7] Id. at 800. At the end of last year, in a bankruptcy fraud case, the Third Circuit adopted the First and Second Circuits' reasoning. United States v. Thayer, 201 F.3d 214 (3rd Cir. 1999).

The Commission Should Reject the Application of § 2F1.1(b)(4)(B) to Bankruptcy Fraud Absent Violation of a Prior Order or Decree Directed to Specific Persons

The pro-enhancement position misinterprets the phrase "violation of judicial process;" ignores the Application Note's triple reference to prior proceedings; is inconsistent with the Guidelines structure; and overlooks the availability of other sentence enhancements that address harm to a governmental function.

- To justify the enhancement, the pro-enhancement position rewrites the language of 2F1.l (b)(4)(B) to read "abuse of process" instead of "violation of judicial process." The word "violation" strongly suggests "the existence of a command or warning" followed by disobedience. United States v. Carrozzella, 105 F.3d at 800.

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[7]The Court of Appeals, however, did not actually rule on this issue but instead held that the two-level enhancement should not apply because the conduct of the defendant, a bankruptcy trustee, in filing false probate accounts was "addressed elsewhere" specifically, under Guidelines § 3B1.3 (abuse of a public or private trust).

The narrower reading is also consistent with the preceding words "injunction, order or decree," which refer to specific directives issued to specific persons or parties. The pro-enhancement position should be rejected because it is inconsistent with the actual language of the Guidelines.

o Application Note 6 to § 2F1.1(b)(4)(B) supports the narrower reading of "violation of judicial process." It states that "if it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case." Id. at 336. (emphasis supplied) Thus, the relevant commentary strongly suggests that the term "violation of judicial process" should be interpreted to mean violation of prior orders or decrees directed to specific persons or entities. The pro-enhancement position is inconsistent with the commentary.

o The majority position effectively amends the Guidelines to give bankruptcy fraud a base offense level of eight. In the typical case, a defendant's only violation is the core bankruptcy fraud. A defendant does not violate a "bankruptcy process" in addition to committing bankruptcy fraud. Under the Guidelines' structure, "the core crime corresponds to the base offense level and enhancements correspond to the particular facts of the crime as it was committed by the defendant." United States v. Michalek, supra at 336 (Ferguson, J., dissenting). By counting the core offense twice - once for the base offense and a second time for the enhancement - the pro-enhancement position disregards the very structure of the Guidelines.

o To the extent that a defendant's conduct in committing bankruptcy fraud caused an actual disruption of the bankruptcy process, i.e., inflicted harm on the administration of bankruptcy matters beyond the core bankruptcy fraud, § 5K2.7 allows the Court to increase the sentence "above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected." Thus, § 5K2.7 allows a sentence enhancement in those relatively rare cases where the scale and nature of the bankruptcy fraud damages the governmental function as distinct from simple concealment of assets or liabilities, which, standing alone, is adequately punished by § 2F1.1's base offense level of six. See United States v. Thayer, supra ("Nothing in the guidelines suggests that the drafters intended as a general matter to sentence bankruptcy fraud more strictly than other types of fraud").

The PAG recommends that § 2F1.1 and its commentary be amended as follows in order to clarify the current conflict among the circuits.

Amendment to § 2F1.1

U.S.S.G § 2F1.1(b)(4)(B) is amended to add the words in italics:

> If the offense involved. . . . (B) violation of any *prior* judicial or administrative order, injunction, decree, or process *directed to a specific person or entity* not addressed elsewhere in the Guidelines, increase by two levels. If the resulting offense is less than level 10, increase to level 10.

The commentary to 2F1.1 is amended in Application Note 6 to add the words in italics:

> Subsection (b)(4)(B) provides an adjustment for violation of any *prior* judicial or administrative order, injunction, decree, or process. *The term "process" is defined to mean a command or order to a specific person or entity such as a summons or execution issued in a particular action.* If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. . . .

CONCLUSION

Thank you for taking the time to consider the views of the PAG. We look forward to our meeting with the Commission on March 10, 2000, and hope to be able to answer any questions that you might have at that time. In the interim, or at any point in the future, if you have any questions or would like additional information, please do not hesitate to call either of us.

Sincerely,

James Felman

Barry Boss

cc: All Commissioners
All PAG members
Andy Purdy, Acting General Counsel

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March 9, 2000

via hand delivery
The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
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RE: PAG supplemental submission

Dear Judge Murphy:

Our last submission did not address two of the circuit conflicts set forth in proposed amendment 8. I am writing now to provide you with the PAG's position on these last two issues.

8(D). Rehabilitation as a Basis for Downward Departure

In responding to the Commission's request for comment on post-offense rehabilitation as a departure ground, it must be noted as an initial matter that this is an area that may not require Commission intervention because federal courts are unanimous in their opinion that rehabilitation is an appropriate ground for departure, at least at the initial sentencing, and departures on this ground are being granted judiciously. Thus, every federal appellate court to consider the issue since Koon v. United States, 518 U.S. 81 (1996), has held that a defendant's extraordinary rehabilitation is a factor "not adequately taken into consideration" which may form the basis for a downward departure at his initial sentencing. E.g., United States v. Core, 125 F.3d 74 (2d Cir. 1997) (post-sentencing rehabilitation); United States v. Sally, 116 F.3d 76 (3d Cir. 1997) (post-sentencing rehabilitation); United States v. Brock, 108 F.3d 31 (4th Cir. 1997) (post-offense); United States v. Rudolph, 190 F.3d 720 (6th Cir. 1999) (post-sentence); United States v. Kapitzke, 130 F.3d 820 (8th Cir. 1997) (post-offense); United Statese v Green, 152 F.3d 1202 (9th Cir. 1998) (post-sentence); United States

v. Whitaker, 152 F.3d 1238 (10th Cir. 1998) (post-offense); United States v. Pickering, 178 F.3d 1168 (11th Cir. 1999)[1] (post-offense); United States v. Rhodes, 145 F.3d 1375 (D.C. Cir. 1998) (post-sentencing); see also United States v. Crow, 164 F.3d 229, 239 (5th Cir. 1999) (upholding refusal to depart based on remorse & rehabilitative efforts noting without further explanation that district court's pronouncement was "indicative of [its] awareness of its authority to permit a departure and its decision to decline to do so"); United States v. Jaroszenko, 92 F.3d 486 (7th Cir. 1996) (post-offense extraordinary remorse).

Commission statistics reflect that rehabilitation departures were granted in only 114 cases, a mere 1.5% of the 50,754 cases sentenced in fiscal year 1998. U.S.S.C., 1998 Sourcebook of Federal Sentencing Statistics at 52. Reported cases also reflect that both the district and appellate courts are faithfully adhering to the requirement that rehabilitation be exemplary before such a departure is granted. E.g., United States v. Bryson, 163 F.3d 742 (2d Cir. 1998)(vacating departure where evidence of substantial rehabilitation outside heartland was insufficient); United States v. Crow, 164 F.3d 229 (5th Cir. 1999) (upholding district court's refusal to grant departure); United Staets v. Jaramillo, 4 F. Supp.2d 341 (D. N.J. 1998) (rejecting departure). Accordingly, unless the Commission determines that too few departures are being granted in this area, it would be wise for the Commission to treat this departure as a low priority area in light of the number of other matters facing the Commission on its abbreviated schedule this cycle.

Case Law: Post-Offense Rehabilitation at Initial Sentencing

In United States v. Brock, 108 F.3d 31 (4th Cir. 1997), the first post-Koon case addressing this issue and a case which is representative of subsequent opinions in the other circuits, Judge Wilkins, former Chair of the Sentencing Commission, explained

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[1] In Pickering, the 11th Circuit introduced a novel concept to the post-offense rehabilitation departure analysis when it held that rehabilitative efforts "reflect more strongly on the offender's ...likelihood of recidivism" and thus may only result in criminal history departures. 178 F.3d at 1175. In practice, this has resulted in district courts within the 11th Circuit rejecting post-offense rehabilitation departures for offenders in criminal history I; regardless of the exemplary nature of their efforts. The guidelines do not encompass such a rigid line of demarcation between the vertical and horizontal axes, however. See U.S.S.G. § 3A1.4 (terrorism offenses require enhancement of both the offense level and criminal history category); § 3D1.1 et seq. (multiple counts of conviction increase offense level); § 4A1.3 (departure above CH-VI require increase along offense level axis); § 4A1.2 (career offenders receive increase along both criminal history & offense level axes); §4B1.4 (same for armed career criminals). The Commission should thus clarify this misunderstanding.

that because the guidelines do not prohibit departures based on this factor, Koon requires a finding that post-offense rehabilitation efforts "potentially may serve as a basis for departure." Brock, 108 F.3d at 35. Brock further explains the requirement that the rehabilitation be exceptional, a requirement that the courts of appeals have universally imposed for this departure ground:

> Because the acceptance of responsibility guideline takes such efforts into account in determining a defendant's eligibility for that adjustment, however, post-offense rehabilitation may provide an appropriate ground for departure only when present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility adjustment is granted.

Id.[2] Other courts have also pointed out that acceptance of responsibility is generally available whenever a defendant pleads guilty, admits the offense and refrains from further criminal conduct and is accounted for with a 2 or 3-level modest and standard deduction. Core, 125 f.3d at 78. Because successful rehabilitation exceeds what is required for acceptance, it is reasonable to conclude that its reference in the commentary to the acceptance guideline does not amount to adequate consideration of this factor in all cases. Id.

Furthermore, rehabilitation is one of the stated purposes of sentencing which district courts are required to consider when imposing sentence under the Sentencing Reform Act. See 18 U.S.C. § 3553(a)((2)(D) ("To provide the defendant with the needed educational or vocational training ...or other correctional treatment in the most effective manner."); 18 U.S.C. §§ 3563(e) & 3583(d) (requiring courts to consider treatment programs as an exception to the mandatory revocation provisions for a violation of probation and supervised release); Comprehensive Crime Control Act of 1984, Sen. R. No. 98-225, at 67 (1983) reprinted in 1984 U.S.C.C.A.N. (98 Stat.) 3182,

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[2] The commentary to the acceptance of responsibility guideline provides that "[i]n determining whether a defendant qualifies [for a downward adjustment] appropriate considerations include, but are not limited to... (g) post offense rehabilitative efforts (e.g., counseling or drug treatment)...." U.S.S.G. §3E1.1, comment. (n.1). Indeed, it would be difficult to conclude that reference to rehabilitation as part of this non-exclusive list amounts to adequate consideration of this factor particularly in light of the breadth of constructive acts that a defendant might undertake to benefit himself, his community or his family and as the reference to rehabilitation was added as part of an amendment that became effective in 1992 without any express discussion of the impact of rehabilitation in the context of this guideline. See Core, 125 F.3d at 77.

3250 (18 U.S.C. § 3553(a)(2) as created by the Comprehensive Crime Control Act "set forth the basic purposes at sentencing -- deterrence, incapacitation, just punishment, and rehabilitation").[3]

In the face of such unanimity among the courts of appeals and in light of related statutory provisions, there is little need for the Sentencing Commission to step in to tinker with the decisional law which authorizes downward departures where a defendant has exhibited exceptional post-offense rehabilitation.

Case Law: Post-Offense Rehabilitation at Resentencing

The only conflict in this area arises from a single panel opinion by the Eighth Circuit which has held that a distinction should be drawn between rehabilitation departures sought at sentencing and those sought at a resentencing, which may occur upon remand from a direct appeal, upon remand based on a successful post-conviction challenge or upon a retroactive change in the law, based upon rehabilitation efforts undertaken by defendant while incarcerated since the original sentencing. See United States v. Sims, 174 F.3d 911 (8th Cir. 1999). First, it must be noted that this is a minority view of one; every other circuit that has considered the availability of a departure at resentencing has found that the timing of the rehabilitation does not alter the departure analysis nor the authority to depart. Compare United States v. Core, 125 F.3d 74 (2d Cir. 1997); United States v. Sally, 116 F.3d 76 (3d Cir. 1997); United States v. Rudolph, 190 F.3d 720 (6th Cir. 1999); United States v. Green, 152 F.3d 1202 (9th Cir. 1998); United States v. Rhodes, 145 F.3d 1375 (D.C. Cir. 1998); see also United states v. Roberts, No. 98-8037, 1999 WL 13073 (10th Cir. Jan. 14, 1999) (unpublished). The reasoning of the majority view is more persuasive than Sims.

First, Sims establishes a distinction between post-offense and post-sentencing rehabilitation by declaring, without citation to any authority, that Koon does not apply at a resentencing. None of the other appellate courts have agreed. Koon's holding was based on the Supreme Court's understanding of the statutory scheme of guideline sentencing established by Congress in 18 U.S.C. § 3553(b). If Sims is correct that Koon does not apply at resentencings it would seem that a fortiori the guidelines themselves would not apply at resentencings. Yet, a number of the cases where departures for post-conviction rehabilitation has been sought involved resentencings resulting from the Supreme Court's decision in Bailey v. United States, 516 U.S. 137 (1995) which defined the term "carrying" a firearm under §924(c) to require "active employment" of a firearm. In those cases, courts have permitted a recalculation of the

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[3] This legislative history is cited in US v. Flowers, 983 F. Supp. 159, 165-66 (E.D. N.Y. 1997), a case in which Judge Weinstein continued sentencing for a year to permit the defendant to make a sufficient showing of post-offense rehabilitation.

guidelines sentences to enhance for possession of a firearm under the drug guideline where the §924(c) conviction was vacated. E.g., Rhodes, 145 F.3d at 1377-78; Core, 125 F.3d at 76. It would be strained reasoning indeed that would grant district courts the power to resentence the drug offenses that were not challenged yet preclude these same courts during such a resentencing from considering information not available at the time of the original sentencing about a defendant's rehabilitative efforts.

Sims also based its holding on its concern that disparity would creep into the system as a result of the resentencings of "a few lucky defendants" who because of a legal error in their original sentences would receive a "windfall" by being permitted to seek reduced sentences based on their rehabilitation while in prison. The most cogent response to this concern is that the guidelines seek to abolish unwarranted disparity. Differences that arise from different factual circumstances -- such as where a defendant who suffered from a legal error is resentenced -- do not implicate any legally significant disparity concerns. For example, courts have repeatedly held that sentencing disparities that arise where a defendant goes to trial rather than pleads guilty do not implicate the guidelines' concern for unwarranted disparity. Also, sentencing disparities that arise where a defendant receives a substantial assistance departure either at the original sentencing or pursuant to Rule 35 are not redressable even where the defendant receiving the departure is admittedly more culpable than the defendant receiving the more severe sentence. Where the facts or circumstances are different, sentencing disparities are not unwarranted. Rhodes, 145 F.3d at 1381, citing, United States v. Labonte, 520 U.S. 751 (1997) (disparity arising from normal exercise of prosecutorial discretion is not unwarranted). That is what courts have consistently ruled and the Commission has never before seen fit to correct that notion.

Additionally, Sims and the dissent in Rhodes express concern that a departure based on a defendant's postsentencing rehabilitative efforts is somehow inconsistent with Congress' abolition of parole and its delegation to the Bureau of Prisons of authority over good-time credits for a defendant's conduct in prison. These arguments were fully and persuasively addressed by the majority opinion in Rhodes:

> Congress ended parole largely to remedy significant problems flowing from the fact that district court sentences for terms of imprisonment were generally open-ended, with the United States Parole Commission actually determining an offender's date of release. As a result, "the offender, the victim, and society" were unaware of the prison release date regardless of the nominal term imposed. S. REP. NO. 98-225, at 46. Split authority between the Parole Commission and the courts also produced sentencing inconsistency because judges were "tempted to sentence a defendant on the basis of when they believe[d] the Parole Commission"

might release the defendant. Id. To solve these problems, the Sentencing Reform Act vested sole sentencing responsibility in district courts, see Mistretta v. United States, 488 U.S. 361, 367 (1989) (the Act "consolidates the power that had been exercised by the sentencing judge and the Parole Commission to decide what punishment an offender should suffer"), and instituted "real-time" sentencing, ensuring that the sentence imposed by the district court will actually be served....

Allowing district courts to depart from the Guidelines for post-conviction rehabilitation implicates none of the concerns that primarily led Congress to abolish parole. There will be no mystery about the sentences defendants will serve because sentence that take account of post-conviction rehabilitation will be entirely determinate. And because the same district court that imposed the initial, erroneous sentence will impose the second, correct sentence, such sentences pose no risk of judicial second-guessing.

. . .

Nor would consideration of post-conviction rehabilitation "infringe upon" the Bureau's responsibility for awarding good time credit....While considerations that inform the Bureau of Prisons' exercise of discretion in awarding good time credits ... may parallel some factors sentencing courts could weigh for post-conviction rehabilitation departures, awards of good time credit differ from post-conviction departures in several important respects. For one thing, good time credits simply reduce time served for behavior expected of all prisoners, while departures based on rehabilitation alter the very terms of imprisonment; indeed prisoners receiving departures at resentencing will remain eligible for future good time credits. Moreover, it is clear from Department of Justice statistics ...that most prisoners receive good time credits. . . .[H]owever, post-conviction rehabilitation departures will be available only in extraordinary cases. Departures at resentencing for post-conviction rehabilitation thus no more represent awards of good time credit thatn they amount to grants of parole.

Rhodes, 145 F.3d at 1379-80 (internal citations ommitted).

Lastly, the issue in Sims ultimately seems more concerned with the scope of the circuit's remand rule about which there is a split in the circuits than a sentencing issue. Compare Sims, 174 F.3d at 73 (at resentencing a district court "can hear any relevant evidence on that issue that it could have heard at the first hearing") with Rhodes, 145 F.3d at 1377-78 (unless expressly directed otherwise, at resentencing district courts may consider "only such new arguments or new facts as are made newly relevant by the court of appeals' decision -- whether by the reasoning or by the result"; but a defendant is not held to have "waived an issue if he did not have reason to raise it at his original sentencing"). Indeed, it is not clear whether the Sentencing Commission has authority to resolve any disputes among the circuits concerning the scope of a remand rule. In any event, the Commission has not sought comment on that issue. To the extent that the narrow split on rehabilitation departures involves these peripheral issues, the Sentencing Commission should refrain from inserting itself into this conflict at this time.

8E. The Use of Dismissed or Uncharged Conduct as a Basis for an Upward Departure

This issue for comment implicates the plea bargaining process and the ability of the defendant and the government to enter into pleas that permit the person who pleads guilty to waive, knowingly and intelligently, constitutional rights; it implicates the scope of information that may underlie a departure from the guidelines solely as a corollary to that basic concern. For this reason, the rule the Commission should adopt is that conduct underlying charges dismissed and uncharged pursuant to a plea agreement may be used to determine the sentence within the guideline range -- including specific offense characteristics, chapter 3 adjustments and the sentence within the range -- but may not be used as a basis for an upward departure. This rule simply permits the parties during plea negotiations to have some certainty as to the bargain being struck.

Indeed, U.S.S.G. § 6B1.2(a) as currently formulated covers the issue well and requires only minimal clarification, if at all. Section 6B1.2 allows a court to reject a plea bargain that does not "reflect the seriousness of the actual offense behavior" or that will "undermine the statutory purposes of sentencing." U.S.S.G. §6B1.2(a). It further makes clear that conduct underlying dismissed charges or charges not pursued as part of the agreement is to be considered under relevant conduct "in connection with the count(s) of which the defendant is convicted." Id. PAG believes that the only amendment that should be made to § 6B1.2 is to add language that clarifies that conduct underlying such charges **"shall not be used to increase the defendant's sentence above the applicable guideline range by upward departure."**

Significantly, the Commission has adopted just such a policy, using this precise language to explain the scope of a related guideline which also implicates plea

bargains. In § 1B1.8, the Commission has precluded use of certain "self-incriminating information provided pursuant to [a cooperation] agreement" ... in determining the guideline range." In the §1B1.8 commentary, the Commission explains the full scope of the guideline as follows:

> Although the guideline itself affects only the determination of the guideline range, **the policy of the Commission, as a corollary, is the information prohibited from being used to determine the applicable guideline range shall not be used to increase the defendant's sentence above the applicable guideline range by upward departure.** In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, and to what extent, a downward departure is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities); e.g., a court may refuse to depart below the applicable guideline range on the basis of such information.

U.S.S.G. §1B1.8, comment. (n.1) (emphasis added).

The same policy considerations that animate the Commission's decision to prohibit use of information as a basis for an upward departure in §1B1.8 underlie the question here -- fairness and practicality in plea negotiations. Section 1B1.8 goes farther in precluding use of information in that it precludes use of self-incriminating information first made known by the defendant even in determining the applicable guideline range. Section 1B1.8 applies where the parties enter into a cooperation agreement.

In recognition of the differences between self-incriminating information implicated in the § 1B1.8 guidelines (i.e., cooperation agreements], PAG's proposal does not go as far. Consistent with the reasoning of those courts that have precluded use of dismissed and uncharged conduct as a basis for upward departures, PAG proposes that information underlying such counts may be used to calculate the applicable guideline range. See also U.S.S.G. § 1B1.4, comment. (backg'd) ("[I]f the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range"). Information underlying charges dismissed or uncharged pursuant to a plea agreement thus will be reflected in the guideline sentence though it should not be used to depart upwardly from the applicable range.

A rule that precludes upward departures in this limited category of cases permits

the defendant and the government to know the outer limits of the plea agreement struck. Both the government and the defendant would have some predictable notion of the sentence that would ensue as a result of the bargain. Both parties could determine given the law and the facts whether the bargain was a fair resolution. A defendant would be able to calculate the anticipated guideline range, using a worst case scenario where the sentencing court resolves all ambiguities against him and imposes the high end of the applicable range. In contrast, it is difficult to predict whether an upward departure may be imposed and the extent of such a departure. If a district court is concerned with the fairness of a plea agreement in any particular case, it is not without recourse. It may reject a plea agreement.

A rule that permits upward departures creates an unintended problem for the government which may be forced to defend on appeal a sentence that is more severe than it bargained for in good faith. See United States v. Harris, 70 F.3d 1001, 1002 (8th Cir. 1995) ("At oral argument, the government explained that the court's decision to impose the 30-month sentence placed the government in the unusual and uncomfortable position of having to defend a sentence it never intended [the defendant] to receive"). There is no good reason to adopt a rule that would complicate the plea bargaining process, and that may generate mistrust of the government's bona fides with attendant litigation. Indeed, experience shows that district courts as a rule recognize these problems and do not depart upwardly on the basis of uncharged and dismissed conduct. If the Commission were to amend the guidelines to encourage or even point out such a departure, it would disrupt the plea bargaining process in a manner that is avoided currently because of the judicious restraint of district courts in this area. This rule is unfair, impractical and will undermine the plea bargaining process that the Supreme Court long ago recognized as a necessary and integral part of our criminal justice system. See Santobello v. New York, 404 U.S. 257 (1971).

In contrast, a rule that permits use of the conduct underlying charges dismissed or uncharged pursuant to a plea agreement to establish the applicable guideline range but prohibits its use only as a basis for upward departures permits Commission policy to remain consistent in the area of plea agreements. It allows a district court to retain its authority to reject a plea agreement in a given case where it believes the plea "does not adequately reflect the seriousness of the actual offense behavior" or will "undermine the statutory purposes of sentencing." §6B1.2. It provides a more fair process. This is the rule the Commission should adopt.

CONCLUSION

Again, thank you for taking the time to consider the PAG's perspective on these important issues. We look forward to our meeting with the Commission on March 10th.

Sincerely,

James Felman

Barry Boss

cc: All Commissioners
All PAG members
Andy Purdy, Acting General Counsel

UNITED STATES POSTAL INSPECTION SERVICE

OFFICE OF THE COUNSEL

March 10, 2000

United States Sentencing Commission
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SUBJECT: 2000 Proposed Guideline Amendments

Attention: Michael Courlander
Public Information Officer

Dear Mr. Courlander:

The United States Postal Inspection Service respectfully submits its comments to the proposed guideline amendments for identity theft and fraud published by the Commission on January 18, 2000. During the last year, we have met and discussed with the Commission's Economics Crimes Policy Team (the "Team") the problems associated with the investigation of identity theft offenses.

As background, the Postal Inspection Service was one of the primary law enforcement agencies involved in the legislative initiative to combat identity theft, due to the impact of these offenses on the Postal Service and the mail. We feel those issues the legislation instructs the Commission to consider in its deliberations address the significant issues in identity offenses and their resulting harm to victims.

We have also reviewed the Team report in conjunction with the proposed guidelines. Although mail theft and mail fraud (18 U.S.C. §§ 1708, 1341) are not cited in the report as prevalent violations associated with identity theft, they are, in fact, two of the primary means by which identity information is unlawfully obtained. For example, of the 12 case summaries included in the report, nine of them involve either theft of mail or mail fraud, in order to

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obtain the victim's personal information. Since mail theft and mail fraud adversely effect the U.S. mails and the postal system as an essential government function, we believe a person's mailing address should be included in the guideline language as found in the definition of "means of identification" as stated in 18 U.S.C. § 1028(d)(3)(C).

In our discussions with the Team, it was our understanding there was concern about the expanded reach of 18 U.S.C. § 1028, with the inclusion of the "means of identification" element. As we read the Team's report and the proposed options, we believe the limited application of the "means of identification" and the addition of "identifying information" and "unauthorized identification means" are confusing in light of the statutory language. Furthermore, we believe the legislative intent was to make the statute apply to all crimes where the identity element was essential to the commission of the crime. We do not believe Option 1 captures the scope of illegal conduct as contemplated in the legislative intent, and for that reason, oppose this option as proposed.

We support Option 2 as the better alternative because it tracks the statutory elements and covers the key elements of identity offenses, specifically, harm to victims. Based on our experience with identity theft and fraud offenses, including their impact on victims, financial institutions and the Postal Service, we support the proposed minimum offense level of 12. We agree with the proposed enhancement language regarding "more than minimal" harm to the victim as clarified in the application notes, but feel the "production or transfer" enhancement based on the number of identity items should start at three or more such items, as opposed to the proposed six items.

As we have stated in previous submissions to the Commission, we are in favor of a specific guideline to address the offense element of multiple victims in both the theft and fraud guidelines (Comment Issue 1). If a specific offense characteristic is added for identity offenses, we believe it should be a graduated offense level increase based on the number of victims. Alternatively, we believe a separate offense characteristic should be added to address the number of unauthorized identification means involved in the offense. Additionally, we agree the offense level increase should apply if the identity offense involves five or more victims or means of identification.

We support a change in the alternate loss valuation for credit card offenses (Comment Issue 5). In past years, we have asked the Commission to establish the alternate loss based on the credit line of the card as being the

better measurement of intended loss, as opposed to the current $100 per card. We believe this is a more accurate measurement of loss, but support the $1,000 valuation as the minimal loss for credit cards that have been stolen but not used.

Sincerely,

H. J. Bauman
Inspector in Charge/Counsel
Office of the Counsel

SOCIAL SECURITY

Office of the Inspector General

MAR 10 2000

ATTN: Public Information-Public Comment
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500 South
Washington, D.C. 20002-8002

Dear Sir/Madam:

Thank you for the opportunity to comment on the proposed amendment to the sentencing guidelines for United States Courts on Identity Theft. The Office of the Inspector General, Social Security Administration (SSA) is acutely aware of the identity theft problem. Our Office of Audit analyzed the Social Security number (SSN) misuse allegations made to Fraud Hotline and found that 81.5 percent related directly to identity theft. As the report stated:

> Identity Theft affects many areas of our society. Private citizens have had their credit histories destroyed by individuals who steal and use their SSN to obtain credit. These individuals run up large credit debts and then move on without paying on the debt. This type of behavior not only destroys the citizen's credit history, it adversely affects the national economy as creditors raise interest rates to cover the losses arising from this fraudulent activity." Management Advisory Report, Analysis of Social Security Number Misuse Allegations Made To The Social Security Administration's Fraud Hotline, A-15-99-92019, at page 8 (August 1999).

As this report reflects, the misuse of an individual's SSN can be a key component of identity theft. We have found that the SSN is used as a "breeder document", i.e., to obtain benefits, other documents, loans, etc. As a result, our Special Agents spend a major part of their time investigating cases involving some aspect of identity theft.

Our concern is that the Guidelines ultimately adopted by the Commission adequately address the egregious conduct we investigate involving SSN misuse. Examples of this egregious conduct are:

(1) An individual provides identifying information of another person to improperly obtain a SSN from the SSA.

(2) An individual provides another person's SSN when applying for government benefits, including Social Security benefits.

(3) An individual provides another person's SSN to obtain employment, a credit card, driver's license, loan, etc.

(4) An individual uses two SSN, one theirs and one another person's, to work and obtain Social Security benefits at the same time.

If the language of the proposed Guidelines is strained to include this egregious conduct, we would ask the Commission to see that the conduct described above is captured in the Guidelines that are ultimately adopted by the Commission.

With respect to the issues you have asked to be addressed, we have the following comments.

1. The proposed amendment in Option 1 provides a two-level enhancement in the fraud guideline for the possession of [5] or more unauthorized identification means. The enhancement, as proposed, applies regardless of whether the offense involves the possession of unauthorized identification means of one individual victim or more than one individual victim as long as at least [5] unauthorized identification means were possessed. Should the Commission consider providing an additional part to the proposed enhancement that would increase sentences based on the number of individual victims involved in the offense? If so, on what number of individual victims should the enhancement be based? The Commission also invites comment on whether it should provide an additional increase, cumulative to the 2-level increase already proposed in Option 1, for cases involving specified numbers of individual victims or unauthorized identification means. For example, such an enhancement could provide an additional [4-level] enhancement if the offense involved more than [10-25] unauthorized identification means and/or more than [5-25] individual victims. Alternatively, should the Commission provide an upward departure for cases involving a large number of unauthorized identification means and/or a large number of individual victims?

   Response – We believe that the Commission should consider providing an additional part to the proposed enhancement that would increase sentences based on the number of individual victims involved in the offense. We would suggest that there should be an additional 4-level enhancement if there are more than 10 individual victims and/or more than 15 unauthorized identification means. These numbers would indicate an organized effort to commit identity theft on the part of the defendant(s).

2. The proposed amendment in Option 1 limits the enhancement for identity theft to the fraud guideline. Given the breadth of offense conduct covered by 18 U.S.C. Sec. 1028, should the Commission also provide a similar sentencing increase (including, if appropriate, an enhancement that ties offense level increases to specified numbers of identification means) for identity theft conduct in [any or] all other economic crime guidelines (e.g., Sec. 2B1.1 (Theft), Sec. 2S1.1 (Laundering of Monetary Instruments), Sec. 2T1.4 (Tax Fraud))?

   Response – We recognize that there is a great diversity in the types of cases that are prosecuted. Identity theft may be involved to varying degrees. Therefore, we agree that the Commission should provide a similar sentencing increase for identity theft conduct in any or all other economic crime guidelines. Identity theft is an integral

part of many other types of crimes. In many of these cases, there may be an ancillary charge of identity theft in the indictment that is dismissed in a plea agreement. Allowing for similar sentencing increase could help ensure that the defendant receives a sentence commensurate with the crime.

3. Given the breadth of offense conduct covered by 18 U.S.C. Sec. 1028, as an alternative to amending Chapter Two, should the Commission amend Chapter Three of the Guidelines Manual, relating to general adjustments, to provide a new adjustment that would apply in every case that involves the unauthorized use of an identification means? If so, how should that adjustment be structured (e.g., should there be a table or tiered adjustment based on the number of unauthorized identification means involved in the offense)? Should the adjustment also include the unauthorized use of any identification document or the use of any false identification document?

   Response – A general adjustment to Chapter Three of the Guidelines Manual may the best way to proceed. We would defer to those with more experience on this issue. However, we believe that if a general adjustment to Chapter Three is provided for, there should be a table or tiered adjustment based on the number of unauthorized identification means involved in the offense. We believe that the individual circumstances of each case should be determinative of the sentence received and that an across-the-board general adjustment could unfairly punish a defendant who had used a minimal number of unauthorized identification means versus a defendant who had used many unauthorized identification means. As stated in the Identity Theft Report issued December 15, 1999 by the Economic Crimes Policy Team, United States Sentencing Commission, we too are concerned about "the risk of treating all manifestations of offense conduct along with identity theft continuum the same, from the most basic form of identity theft such as credit card theft to the most egregious forms involving identity assumption."

4. As an alternative to a Chapter Three adjustment, should the Commission amend Chapter Five, Part K, of the Guidelines Manual, relating to departures, to encourage a departure above the authorized guideline sentence in any case involving the unauthorized use of an identification means if the guideline range does not adequately reflect the seriousness of the offense conduct?

   Response – We are concerned about encouraging departures in sentencing guidelines "if the guideline range does not adequately reflect the seriousness of the offense conduct." Our concern is based on the basis of the decision as to when the guideline range does not adequately reflect the seriousness of the offense conduct. If this were adopted, we would suggest that the reasons for the departure must be clearly stated and that the amendment to Chapter 5 clearly state what is and is not acceptable as a basis for a departure.

5. The Treasury Department has recommended that the Commission amend its current minimum loss amount rule for stolen credit card offenses in Sec. 2B1.1 (a minimum loss amount of $100 per credit card) to include all access devices, and that the minimum loss amount be increased to $1,000 per access device. Given that the Identity Theft and Assumption Deterrence Act of 1998 included access devices in the definition of "means of identification," the Commission invites comment on whether it should consider amending that rule to include all access devices (such as debit cards, bank account numbers, electronic serial numbers, and mobile identification numbers) and to place that amended rule in Sec. 2F1.1. Such a rule would have the effect of subjecting an offense that involves an unauthorized identification means that is a credit card number to the same minimum loss amount as an offense that involves the stolen credit card itself. If the Commission should consider such an amendment, should the Commission additionally amend the rule to increase the minimum loss amount per access device, for example [$500][$750][$1000] per access device? (Such an amendment may need to be coordinated with efforts to revise the theft guideline in connection with offenses involving access devices and cellular phone cloning.)

   Response – Based on our reading of the documents provided, we are unsure of the effect of this proposal. We would point out that requiring a minimum loss per access device may adversely affect identity theft prosecutions. We have cases in which the defendant was found in possession of several individuals' means of identification where there had been no loss.

6. Commission data indicate that a high portion of offenders involved in identity theft conduct have previously been convicted of similar offense conduct at either the state or federal level. Although Chapter Four addresses criminal history, the Commission has provided enhancements in certain Chapter Two guidelines for prior similar conduct (e.g., Secs. 2L2.1(b)(4) and 2L2.2(b)(2), which provide two- and four-level increases if "the defendant committed any part of the instant offense after sustaining one or more convictions for felony immigration and naturalization offenses"). Should the Commission provide an enhancement in the relevant Chapter Two guideline (Sec. 2F1.1, if the Commission adopts a limited approach to identity theft) or guidelines (the economic crime guidelines, if the Commission adopts a more expansive approach to identity theft) if the defendant had previously been convicted of conduct similar to identity theft? If so, what is the appropriate number of levels for the enhancement? Should such an enhancement require a minimum offense level?

   Response – We agree that the Commission should provide for an enhancement for the criminal history of the defendant for prior offenses involving identity theft conduct under either approach adopted. We would suggest that the appropriate number of levels for enhancement should be tiered. For example, if the defendant has three or less prior convictions, the enhancement should be two levels. Four-seven prior convictions, the enhancement should be four levels. However, we have concerns that the prior convictions not be too remote to the current charge. Therefore, we would

suggest that the prior convictions have occurred within 10 years of the current charge to be considered.

We would agree that the enhancement should require a minimum offensive level.

We will be happy to discuss these concerns in more detail and provide the Commission with additional information that they may need.

Sincerely,

Kathy A. Buller
Counsel to the Inspector General

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

UNDER SECRETARY

March 10, 2000

The Honorable Diane E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500 South
Washington, D.C. 20002-8002

Dear Judge Murphy:

I write to provide Treasury's comments on two amendment proposals that the U.S. Sentencing Commission recently published in the Federal Register for public comment. The first amendment proposal concerns identity theft and responds to a legislative directive in the Identity Theft and Assumption Deterrence Act of 1998, Pub. L. 105-318. The second proposal also responds to a legislative directive, in the Wireless Telephone Protection Act, Pub. L. 105-172, and directs the Commission to provide an "appropriate" penalty for offenses involving the cloning of wireless telephones.

We believe that stronger penalties are warranted for identity theft and the cloning of wireless telephones. The incidence of both crimes is on the rise. The security of private communications and commercial transactions over the Internet is undermined by criminals who exploit this new technology to steal identities, social security numbers, credit card numbers, and other individual means of identification. In addition, criminals increasingly use cloned cell phones to conceal their identities and avoid detection when conducting drug deals, illegal weapons sales, and other serious crimes. Provided below are our more detailed comments addressing each of the amendment proposals separately.

Identity Theft

Our consideration of the guideline amendment options on Identity Theft are guided by two overriding concerns. First, because the length of sentences under the applicable fraud guideline, USSG §2F1.1, is largely dependent upon the monetary loss amount, the guideline does not adequately account for the significant non-monetary harms suffered by victims of identity theft, including loss of reputation, inconvenience, and destroyed credit standing. Second, §2F1.1 fails to provide greater penalties for identity thieves who produce, transfer, or unlawfully possess multiple means of identification. For instance, an individual who illegally obtains 20 social security numbers matched to named individuals, and then uses them to create false driver's licenses, generally should be punished more severely than someone who illegally possesses a single social security number.

We think that Option 2 in the Sentencing Commission's proposed amendments addresses these concerns in a simple and direct manner. It provides a two-level increase, and a

minimum offense level of either 10 or 12, if "the offense involves harm to an individual's reputation or credit standing, inconvenience related to the correction of records or restoration of an individual's reputation or credit standing, or similar difficulties." Of the two alternatives for minimum offense level, we favor a floor of 12 because it makes more likely that individuals convicted of identity theft will be sentenced to incarceration.

Additionally, we believe the Application Notes should make clear that even where the stolen means of identification is used to defraud an institution or government agency, a court should consider the non-monetary harm caused to the individual to whom the means of identification rightfully belonged. For example, a court should impose a two-level increase in "tax refund scams" where an identity thief files a false tax return using the name and social security of another, in order to obtain a quick tax refund. Although the real owner of the social security number may not suffer any quantifiable financial loss, he suffers significant harm nonetheless. When he files his own legitimate tax return two months later, he will encounter, at the very least, significant inconvenience and personal embarrassment in trying to sort the matter out with the appropriate tax authority.

Option 2 also provides a two-level increase if "the offense involved the production or transfer of 6 or more identification documents, false identification documents, or means of identification . . . ." We think this provision can be improved in two ways: First, by including "unlawful possession" of 6 or more identification documents as a condition triggering the two-level increase; and second, by providing an additional increase, cumulative to the two-level increase, for cases involving specified numbers of identification documents or means of identification. For example, this latter enhancement could provide an additional one-level increase for offenses involving more that 10 means of identification or identification documents; two levels for more than 25; three levels for more than 50; and four levels for more than 100. We believe that providing explicit increases for multiple means of identification is preferable to the other alternative raised by the Commission, i.e., encouraging courts to depart upward in such cases. Upward departures are rare, even when encouraged by the Guidelines, and they may not lead to equal treatment of like conduct among districts.

Addressing the identity theft amendment proposal in Option 1, we support its intent but are concerned with its application. We fully support a two-level increase for offenses involving "the use of any identifying information of an individual victim to obtain or make any unauthorized identification means of that individual victim." This provision is aimed at punishing conduct in which a victim's identifying information is used to create new documents in the individual's name, such as credit cards, but the victim remains unaware of the violation until well after his reputation or credit rating is destroyed. The victim is more helpless to protect himself than the average victim of credit card fraud, who generally can protect himself from personal financial loss by closely scrutinizing his monthly bill and notifying his financial institution of unauthorized purchases. This type of fraud deserves greater punishment.

However, while supporting its intent, we are concerned that Option 1, as drafted, may be overly confusing in application. For instance, the new term "unauthorized identification means" is defined as "any identifying information that has been obtained or made from any other identifying information without the authorization of the individual victim whose identifying information appears on, or as a part of, that unauthorized identification means." This definition is confusing, and we are concerned that courts may have difficulty distinguishing the meaning of this new Guideline term ("unauthorized identification means") from the statutory term "means of identification."

That said, we would support an attempt to work this provision into Option 2 if it could be simplified and clarified. Specifically, it could serve as an alternative basis for applying Option 2's existing two-level increase for harm to an individual's reputation or credit standing. In other words, we suggest that Option 2's two-level increase apply if the offense involved either: (1) harm to an individual's reputation or credit standing, or inconvenience related to the correction of records or restoration of reputation; or (2) the use of an individual's identifying information to create new identification documents or means of identification without the victim's knowledge or permission. We are willing to assist the Commission in determining whether this combination of Option 1 and 2 is workable.

Telephone Cloning

We have two principal concerns with the current guideline applicable to telephone cloning offenses (USSG §2F1.1). First, the guideline's sentence enhancements are overly weighted toward proof of actual financial loss, and therefore do not adequately account for the fact that financial loss is often very difficult to determine in cases involving the use or possession of cloned telephones and cloning equipment. Second, the guideline does not provide sentence enhancements for the use or possession of cloning equipment and other device making equipment.

This latter concern seems to have been shared by the Commission in earlier versions of the Guidelines. Prior to November 1, 1993, Application Note 11 to §2F1.1 encouraged courts to enhance the sentences for "the use or possession of device making equipment . . . in a manner similar to the treatment of analogous counterfeiting offenses under Part B of this Chapter." Counterfeiting offenses involving the possession of counterfeiting devices or manufacturing equipment receive a six-level sentence enhancement, to an adjusted offense level of 15. USSG §2B5.1(b)(2). As of November 1, 1993, however, Application Note 11 was amended to delete any reference to device making equipment. Little or no explanation was given for this significant deletion.[1] We think an important

[1]The only written explanation for the amendment was the Commission's accompanying statement that it was "clarifying Application Note 11 and conforming the phraseology in this application [illegible]

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principle was lost.

Of the two options, we feel that Option 2 more fully restores this principle and better addresses our concerns generally. Option 2 provides a two-level enhancement for offenses involving any "device-making equipment," and broadens the statutory definition of device-making equipment (found in 18 U.S.C. §1029(e)(6)) to include the cloning hardware and software described in 18 U.S.C. §1029(a)(9). We favor the two-level increase over the "presumptive loss amount" alternative because it will guarantee a set increase in offense level across the full range of loss amounts.

Neither Option 1 nor Option 2, however, address our concern that the sentences provided in §2F1.1 are too heavily contingent upon proof of actual financial loss, particularly in regard to offenses involving the use and possession of cloned phones. We therefore urge the Commission to adopt a specific offense characteristic that would assign an alternative minimum loss amount not just for stolen or fraudulent credit cards, see §2B1.1 (minimum loss amount of $100 per credit card), but for cloned phones and certain other access devices (e.g., mobile phone identification numbers) as well.

The current $100 minimum loss amount for credit cards in §2B1.1 is, in our view, simply inadequate. Based on the investigative records and experience of the U.S. Secret Service, the average loss caused by fraudulent credit cards and cloned cellular telephones in most cases exceeds $1,000. We therefore recommend that the Commission provide a minimum loss amount of at least $1,000 per access device. Thus, in fraud cases where the actual loss is difficult to ascertain or is less than $1,000 per credit card or cloned phone, courts would instead assign a minimum loss amount of $1,000 per access device when determining sentence enhancements under the monetary loss table in §2F1.1.

In addition, we encourage the Commission to provide for increased penalties when a cloned wireless telephone is used in connection with other criminal activity. In our view, use of a cloned phone represents a degree of sophistication and additional planning (i.e., to conceal identity) that warrants greater punishment. Thus, we support a two-level enhancement for this type of conduct in §2F1.1.

* * * *

In conclusion, we strongly support changes to the fraud guideline that provide stronger sentences for offenses involving identity theft and the cloning of wireless telephones. Treasury's law enforcement bureaus, in particular the United States Secret Service and IRS Criminal Investigations, give high priority to these crimes and devote substantial

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used elsewhere in the guidelines." USSG App. C, Amendment 482.

resources to their investigation and prosecution. Their efforts will be aided by changes to the Sentencing Guidelines that ensure appropriate penalties for these crimes. We hope that our comments on the individual amendment proposals will aid the Commission in its future deliberations.

Sincerely,

James E. Johnson
Under Secretary for Enforcement

cc: Eric Holder
Deputy Attorney General

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TOTAL P.06

CHARLES E. SCHUMER
NEW YORK

COMMITTEES:
BANKING
JUDICIARY
RULES

United States Senate

WASHINGTON, DC 20510

March 15, 2000

Judge Diana Murphy
Chair
United States Sentencing Commission
Thurgood Marshal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20002

Dear Judge Murphy:

I am writing concerning what may be a discrepancy under the U.S. Sentencing Guidelines relating to the appropriate sentencing ranges for a charge of sex with a minor under 18 U.S.C. § 2423(b), as opposed to a charge of possession or transmission of sexually explicit images of minors under 18 U.S.C. § 2252(a).

As I understand it, a defendant who travels across state lines to engage in sex with a minor, aged 12 to 16, faces a 12-18 month sentence pursuant to U.S.S.G. 2A3.2, provided no force is involved. If the same defendant has an image of a minor, aged 12 to16, on his or her computer, he or she faces a 15-21 month sentence under U.S.S.G. 2G2.4. Further, if the defendant transmits, via computer, sexually explicit images of a minor, aged 12 to16, he or she faces a sentence of 21-27 months under U.S.S.G. 2G2.2.

My office has been notified of cases in the Northern District of New York where defendants who plead guilty to crimes under these provisions received seemingly discordant sentences. For example, a twenty-nine-year-old man who traveled from Indiana to New York to engage in sexual acts with a 15-year-old girl was sentenced to 18 months imprisonment. One year earlier, a twenty-four-year-old man who transported 46 computed images involving child pornography to an undercover agent, including some images of prepubescent minors, was sentenced to 41 months.

I recognize that these crimes are not identical, and that each raises somewhat different concerns. Nevertheless, I would be grateful if you could provide me with the Commission's views on the apparent discrepancy between the sentences for these crimes.

Sincerely,

Charles Schumer

Charles E. Schumer
United States Senator