the commission of the online crime may on average reflect less moral depravity than the commission of otherwise equivalent offline crime, suggesting that *lesser* punishments may be more appropriate for the online misconduct.

My own view is that these two competing arguments roughly cancel out, such that it generally makes sense to apply the same punishments to analogous misconduct that occurs off-line and on-line. However, if the Commission finds the deterrence argument for online misconduct persuasive, it is unclear why the Commission would want to limit a possible enhancement to Section 1030 offenses. Not only would such a strategy create a new plea bargaining tool for the Department of Justice (prosecutors could accept pleas under the wire fraud statute instead of the computer fraud provision of section 1030, for example), but it would artificially treat Section 1030 offenses differently than other computer crimes for no convincing reason. Perhaps the most coherent strategy would be to take the principle of § 2G2.4(b)(3) and apply it to convictions arising from *any* criminal act facilitated or encouraged by the perceived or actual anonymity of the Internet.

To summarize, current law already appears to track the concerns that motivated Congress to pass Section 225(b) of the Homeland Security Act. The Commission should therefore not respond to Congress's directive with drastic changes to the sentencing provisions that apply to convictions under Section 1030. To the extent that changes are warranted, they should generally work towards eliminating differences between how the guidelines treat 1030 and other offenses, not creating new differences. However, if the Commission believes that faithfully implementing Congress's directive requires it to enact some kind of sentencing enhancement for computer crimes, the Commission should consider a broad enhancement reflecting how the Internet changes the perceived risks and harms of criminal conduct, rather than one artificially tailored to Section 1030 offenses or a subset of such offenses.

Sincerely,

Orin S. Kerr
Associate Professor
George Washington University
Law School
2000 H Street, NW
Washington DC 20052
(202) 994-4775
okerr@law.gwu.edu

Federal Criminal Penalties for Illegal Trafficking of Prescription Drugs

A position statement from the **American Academy of Pain Medicine**

The American Academy of Pain Medicine (AAPM) supports criminal penalties for illegal trafficking of controlled substances. The laws and criminal penalties should apply equally to all individuals. The criminal penalties should be appropriately severe and increased if deemed necessary by the criminal justice system.

AAPM is opposed to criminalization of activities incident to the practice of medicine. The inappropriate use of controlled substances, as this reflects a deviation from the standard of care within the legitimate scope of medical practice, should be resolved within the administrative and civil systems.

Any confusion or blurring of the distinction between legitimate medical practice and diversion or illegal trafficking will have a serious negative affect on the legitimate use of controlled substances for pain control and will likely represent an added barrier to sound medical practice for pain relief.

February 2003.

4700 W. Lake Avenue
Glenview, IL 60025-1485
847/375-4731
Fax 877/734-8750
E-mail aapm@amctec.com
Web site www.painmed.org

CHEROKEE COUNTY

75 Peachtree Street
Murphy, North Carolina 28906

(828) 837-5527 • (828) 837-9684

Commissioners
Barbara Vicknair
Dana Jones
Ernest Jones

County Manager
Randy D. Wiggins
County Attorney
R. Scott Lindsay

February 10, 2003

U. S. Sentencing Commission
Attention: Public Affairs
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 2002-8002

Re: Proposed Amendment to U.S.S.G. §5G1.3

Dear Sirs:

It is my understanding that the Commission is considering giving retroactive application to the proposed amendment to U.S.S.G §5G1.3. I believe that allowing retroactive application of this proposed amendment is fair and appropriate, and I would urge the Commission to make the proposed amendment retroactive for Charles McHan, Sr.

If the proposed amendment to U.S.S.G §5G1.3 is made to apply retroactive, it is my understanding that defendants who have been denied an adjustment to the length of their sentence because of a distinction between discharged and undischarged terms, will have an opportunity to seek relief nunc pro tunc. For example, the Commission specifically disapproved of the Fourth Circuit's decision in U.S. v. McHan, 101 F.3d 1027, 1040 (4th Cir. 1996) which held that downward departure to allow an adjustment for a discharged term was based on an error of law and therefore was an abuse of discretion. Therefore, if the Commission makes the proposed amendment to U.S.S.G §5G1.3 retroactive, Charles McHan, Sr. will have the opportunity to seek relief and hopefully be able to correct an unjust punishment.

I have known Mr. McHan for many years, and I believe that he has been incarcerated long enough. Therefore, I would like to see Mr. McHan have the opportunity to seek relief from the length of his sentence by retroactive application of the proposed amendment. Also, I know other members of our community who would like for Mr. McHan to become once again an active and contributing member of Cherokee County, North Carolina.

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CHEROKEE COUNTY

75 Peachtree Street
Murphy, North Carolina 28906

(828) 837-5527 • (828) 837-9684

Thank you,

Dana H. Jones

NATIONAL IMMIGRATION PROJECT

of the NATIONAL LAWYERS GUILD

February 14, 2003

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Attention: Public Affairs

Dear United States Sentencing Commission:

The National Immigration Project of the National Lawyers Guild (National Immigration Project) submits the attached comments to the proposed amendment to U.S.S.G § 2L1.2. The National Immigration Project works closely with the bench, the criminal defense bar and prosecutors on issues related to immigrants and the criminal justice system. I am the co-author of *Immigration Law and Crimes*, a treatise published by West Group. I have spoken to Judicial Conferences in Utah, Hawaii, and Massachusetts on the relationship between immigration law and the criminal justice system. I have also served on the faculty of many training sessions sponsored by the Federal Defender Training Service for CJA panel attorneys. Our office has also trained prosecutors and police officials on implementing aspects of the Violence Against Women Act.

Thank you for considering our views expressed in the attached document.

Sincerely,

Dan Kesselbrenner

14 Beacon Street, Suite 602, Boston, Massachusetts 02108
617-227-9727 • fax 617-227-5495
www.nationalimmigrationproject.org

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Comment of the National Immigration Project of the National Lawyers Guild to Proposed Amendment to U.S.S.G. § 2L1.2

I. The Sentencing Commission Should Amend Proposed Application Note 1(B)(iii) to Conform to the Statutory Definition of Aggravated Felony

Section 1326(b)(2) of title 8 provides for additional potential punishment for violating 8 U.S.C. § 1326 after having been convicted of an aggravated felony. In 1999, the Supreme Court held that 8 U.S.C. § 1326(b)(2) does not define an element of a separate offense, but rather creates a sentencing enhancement. *Almendarez-Torres v. United States*, 523 U.S. 224 (1999). The term aggravated felony is defined in 8 U.S.C. § 1101(a)(43)(F). The Commentary to U.S.S.G. § 2L1.2 recognizes that the title 8 definition of aggravated felony governs enhancements for 8 U.S.C. § 1326(b)(2).

Section 1101 (a)(43)(F) of title 8 defines aggravated felony to include: "A crime of violence (as defined in section 16 of title 18 United States Code, but not including a purely political offense) for which the term of imprisonment [sic] at least one year." The Circuit Courts have uniformly determined that the word "is" should be in the definition. *See, e.g., United States v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2002); *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000); *United States v. Marin-Navarette*, 244 F.3d 1284 2d Cir. 2000); *United States v. Saenz-Mendoza*, 287 F.3d 1011 (10th Cir 2002); *United States v. Graham*, 169 F.3d 787 (3d Cir. 1999). Congress has acquiesced to the Circuit Courts' interpretation regarding the missing verb. Had Congress meant a verb other than "is" to come between "imprisonment" and "at least one year," it would have amended the statute to make clear that the Circuit Courts of appeal were all in error.

The Application Note to the proposed amendment includes within the definition of crime of violence a burglary of a dwelling offense without regard to the punishment. This means that under the proposed commentary, a defendant who has a conviction for burglary of a dwelling for which she or he receives a sentence of six months could face a sentencing enhancement under 8 U.S.C. § 1326(b)(2). Congress provided that a defendant receives an enhancement under 8 U.S.C. § 1326(b)(2) only if she or he has been convicted of an aggravated felony. Congress defined an aggravated felony crime of violence to require a sentence of "at least one year." If the Commission does not modify Application Note 1(B)(iii), then a defendant could receive an enhancement under 8 U.S.C. § 1326(b)(2) for a conviction that does not satisfy the definition of aggravated felony.

The Sentencing Commission has broad powers to develop sentences. Nevertheless, that power does not include the authority to contravene a statute. *See Stinson v. United States*, 508 U.S. 36 (1993) (recognizing narrow exception to authority of Guideline Commentary).

The Proposed Guideline § 2L1.2(b)(1)(C) provides an 8-level enhancement for a basic aggravated felony, as defined in 8 U.S.C. § 1101(a)(43). For a crime of violence to be an aggravated felony under 8 U.S.C. § 1101(a)(43), the defendant must receive a sentence of

at least one year. Manifestly, the Sentencing Commission has the authority to treat certain aggravated felony offenses as being worse than other aggravated felony offenses. As provided now, a defendant can receive a 16-level enhancement for certain offenses that are not even aggravated felony offenses because the defendant received a sentence of less than one year.

II. An Offense Under Federal, State, or Local Law that Prohibits the Possession of a Firearm is Not an Aggravated Felony

As discussed in Section I above, a defendant should not face an enhancement under 8 U.S.C. § 1326(b)(2) for having been convicted of an aggravated felony for an offense that is not included under the title 8 definition of aggravated felony. Sections 1101(a)(43)(C) and 1101(a)(43)(E) of title 8 define aggravated felony to include:

"(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title); ...

(E) an offense described in—

(i) section 842 (h) or (i) of title18, United States Code, or section 844 (d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18, United States Code (relating to firearms offenses); or

(iii) section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses)."

Neither 8 U.S.C. § 1101(a)(43)(C) nor 8 U.S.C. § 1101(a)(43)(E) includes 26 U.S.C. § 5845(a) or 18 U.S.C. § 841(e). The National Immigration Project respectfully suggests that the Sentencing Commission delete the reference in Application Note 1(B)(vi)(II) to firearm possession offenses.

III. A Conviction Under 18 U.S.C. § 2260 is not a "Child Pornography" Offense for Purposes of the Definition of Aggravated Felony

As discussed in Section I above, a defendant should not face an enhancement under 8 U.S.C. § 1326(b)(2) for having been convicted of an aggravated felony for an offense that is not included under the title 8 definition of aggravated felony. Congress defined child pornography offenses to include an "offense described in 2251, 2251A, or 2252 of title 18 United States Code." 8 U.S.C. § 1101(a)(43)(I). The Sentencing Commission should amend the proposed change to delete the reference to a 16-level enhancement for a conviction under 18 U.S.C. § 2260.

IV. A Conviction Under 18 U.S.C. § 1589, 18 U.S.C. § 1590, or 18 U.S.C. § 1591 is Not a "Human Trafficking Offense" for Purposes of the Definition of Aggravated Felony

As discussed in Section I above, a defendant should not face an enhancement under 8 U.S.C. § 1326(b)(2) for having been convicted of an aggravated felony for an offense that is not included under the Title 8 definition of aggravated felony. Section 1101(a)(43)(K) covers:

" an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18, United States Code (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in section 1581, 1582, 1583, 1584, 1585, or 1588 of title 18, United States Code (relating to peonage, slavery, and involuntary servitude)"

The National Immigration Project urges the Sentencing Commission to strike the reference to a conviction under 18 U.S.C. §§1589-91 from the amended guideline because those offenses are not included in the statutory definition of aggravated felony

V. The Sentencing Commission Should Delete the Reference to State Smuggling Offenses in the Proposed Guideline

The Supreme Court has repeatedly recognized the federal government's preeminent role in regulating the status of noncitizens. *See,* e.g., *Matthews v. Diaz*, 426 U.S. 67 (1976); *Graham v. Richardson*, 403 U.S. 365, 377-380 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418-420 (1948); *Hines v. Davidowitz*, 312 U.S. 52, 62-68 (1941). This authority derives from the United States Constitution, which gives Congress the power "to establish a uniform Rule of Naturalization," U.S. Const., Art. I, § 8, cl. 4, and "to regulate Commerce with foreign Nations," *id.*, cl. 3. The authority to punish smuggling offenses flows from this exclusively federal power. The National Immigration Project respectfully suggests that the Sentencing Commission delete the reference in Application Note 1(B)(i)(II), which includes within its definition, "an offense under state law."

VI. The Sentencing Commission Cannot Add a Category of Crime that Does Not Appear in the Aggravated Felony Definition

The statutory definition of aggravated felony does not mention "terrorism offenses" as a distinct category of crime. In all likelihood, any "terrorism offense" listed in the proposed Guideline would be included already in the "crime of violence" definition. Although it is easy to understand the impetus behind including "terrorism offenses" in the wake of the tragedy on September 11, 2001, the manifest justification behind its inclusion does not authorize the Sentencing Commission to create an enhancement for an

aggravated felony offense, which Congress has not chosen to include in 8 U.S.C. § 1101(a)(43). The practical significance of respecting clear Congressional intent in this regard is nonexistent, since it is difficult to conceive of a "terrorism offense" that is not now within the scope of the crime of violence definition.

420 7th St., NW
Apt. 510
Washington, DC 20004

January 24, 2003

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

Dear Judge Diana E. Murphy:

Thank you for allowing me to comment on two of the amendments to the Sentencing Guidelines that you and the rest of the Commission are currently considering.

Use of Body Armor in a Crime of Violence or Drug Trafficking Crime:

First, the adjustment increase should be limited only to defendants who use body armor during commission of the crime. Obviously, when Congress directed increased punishment for anyone committing a violent crime "in which the defendant used body armor," it imagined a defendant clad in body armor while shooting at police officers. By using a broader definition, the Sentencing Commission may encompass more use of body armor than Congress imagined. In this instance, the Commission should be conservative in issuing its mandate. Accordingly, the amendment to the Sentencing Guidelines should only encompass crimes in which the defendant wore body armor during commission of the crime.

More importantly, Congress has mandated an increase of at least two levels to the adjustment. The Commission should not expand beyond the mandated two level increase for any reason. The higher the increase, the longer the defendant will be in jail, which deprives the defendant of his freedom for a greater amount of time, while consuming additional taxpayer money. And for what use? The difference between two, four, or six levels will have no deterrent effect on crime: criminals will not base their use of body armor on the potential penalty if they get caught. Clearly, if they are in such a war-mentality to be wearing body armor, the defendants do not believe they will ever find themselves in court. Nor will such a penalty reform a criminal in such a manner to additionally condition him not to use body armor when committing crime in the future. This increase will simple be a tool for more legal wrangling for prosecutors and defense lawyers, and an avenue for allowing vengeance into our courtrooms. Please, do not increase the sentencing for body armor use any more than is absolutely mandated by Congress.

The 21st Century Department of Justice Appropriations Authorization Act: Sentencing Level Increases

This is a general comment to your numerous questions spurn from this Act concerning whether you should increase the punishment associated with certain level adjustments. As stated above concerning increases for body armor, I do not believe that increasing penalties will help deter crime: criminals do not consider the minutia of adjustments before they commit crimes, as they

usually do not know of the adjustments and do not believe or care if they get caught. Additionally, given the types of crimes considered in the Act, it seems unlikely that additional years in prison will help reform such criminals. Furthermore, increased incarceration time means increase cost to taxpayers; we should keep imprisonment costs down by limiting sentencing as much as possible. Indeed, the increased adjustments will serve only one purpose: to allow victims of the crime, through the court, to exact additional revenge on the criminals. Revenge is the worst of human characteristics and should not be embodied in the laws of our great nation! The courts should not be given tools with which to channel the vengeance of victims or the community on criminal perpetrators, no matter how heinous their crimes. By keeping the adjustments and sentences in general as low as possible, we ensure that the courts of this country dispense justice, not vengeance.

Thank you for allowing me to comment on these issues.

Faithfully yours,

Lee F. Berger

SEAN P. DEVEREUX, P.A.
ATTORNEY AT LAW
The Jackson Building
22 South Pack Square, Suite 1100
Asheville, North Carolina 28801

TEL: (828) 285-9455
FAX: (828) 285-9457

BOARD CERTIFIED SPECIALIST IN CRIMINAL LAW

E-MAIL ADDRESS: sdevereux@devereuxlaw.com

January 28, 2003

U.S. Sentencing Commission
Attention: Public Affairs
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002

RE: Proposed amendment to §5G1.3

Dear Sirs,

I strongly urge the Commission to give retroactive application to the proposed amendment to U.S.S.G. §5G1.3. Defendants who were denied an adjustment of the length of their sentence due to the prior unsound distinction between discharged and undischarged terms of imprisonment should be given an opportunity to obtain appropriate relief *nunc pro tunc.*

I represent Charles McHan, Sr. who was the appellant in *United States v. McHan*, 101 F.3d 1027, 1040 (4th Cir. 1996)(holding that downward departure to allow an adjustment for a discharged term was based on an error of law and therefore was an abuse of discretion), cert. denied, 520 U.S. 1281 (1997). The Commission specifically disapproved the *McHan* decision in Amendment 645, effective No. 1, 2002. The prior amendment did McHan no good because it was not made retroactive. I hope the Commission will take this opportunity to make it possible for defendants such as McHan, who has suffered a grave injustice, to obtain relief.

Sincerely yours,

Sean P. Devereux

/tmh

[105]

REED WICKER PLLC

1120 Waterfront Plaza
325 West Main Street
Louisville, Kentucky 40202
(502) 572-2500 (phone)
(502) 572-2503 (fax)

Steven S. Reed
(502) 572-2501
steve@reedwicker.com

Kent Wicker
(502) 572-2502
kent@reedwicker.com

January 27, 2003

Honorable Diana E. Murphy
Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

In re: U.S. Sentencing Guidelines Amendments/Sarbanes-Oxley Act of 2002

Dear Judge Murphy:

This letter is in response to an invitation from the United States Sentencing Commission for public response to proposed revisions to the United States Sentencing Guidelines relevant to the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or the "Act"). Much has been written on corporate criminal liability leading up to and since Sarbanes-Oxley and even more has been said. The purpose of this letter is not to join in the chorus of critics on either aisle of the debate. Rather, we draw upon our years of white collar crime prosecution and corporate criminal defense experience and offer insight regarding application of the Guidelines to organizations which have corporate compliance plans.

Our law firm focuses much of its practice on corporate investigations defense. Previously, Mr. Wicker and I served as the First Assistant U.S. Attorney and United States Attorney for the Western District of Kentucky, respectively, and we have more than 13 years of combined white collar crime prosecution experience as Assistant United States Attorneys. We have written on the subject of corporate criminal liability under Sarbanes-Oxley and Mr. Wicker teaches courses on Corporate Criminal Liability and Trial Practice at the Brandeis School of Law at the University of Louisville.

The preamble to Sarbanes-Oxley gives its purpose as "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities law, and for other purposes." The Act expands the prosecutor's arsenal by increasing criminal fraud penalties that companies and their employees face if convicted.

The Act directs the Sentencing Commission to consider changing the Guidelines to "ensure that the sentencing guidelines and policy statements reflect the serious nature of securities, pension, and accounting fraud and the need for aggressive and appropriate law enforcement action to prevent such offenses." In short, the revised Guidelines must increase the penalty when corporate fraud is committed and must provide incentives to deter fraud from occurring. In non-legal terms, this may be appropriately referred to as the "stick" and the "carrot."

To enhance the penalty, or "stick," the Sentencing Commission has issued proposed emergency guidelines which increase the guideline penalties for fraud offenses which (1) are committed by an officer or director of a public company, (2) endanger the financial soundness of a public company, (3) effect large numbers of victims, (4) create a loss to victims of over $100 million, or (5) involve more sophisticated obstruction of justice. We hope these measures are effective in punishing and deterring white collar crime.

The goals of the Act would be met, we believe, if the Sentencing Commission also enhances the "carrot." The Guidelines should be revised to enhance the reward to companies which have effective compliance plans. Although no corporate actions can guarantee against employee misconduct, effective compliance plans can help corporations prevent and detect employee misconduct before the misconduct implicates the justice system.

Creating and implementing compliance plans are time consuming and expensive. Thus, companies may be reluctant to undetake them, despite the broad benefit to the company and the public. The Sentencing Commission should take note and enhance the incentive for companies to have compliance plans. We have two suggestions. First, we encourage the Sentencing Commission to adopt a five-level reduction in the "culpability score," under U.S.S.G. § 8C2.5(f). A five-level reduction would equate to a fifty percent reduction in the fine range. Currently, the Court may grant a three-level reduction in the corporation's culpability score, which would decrease the fine range up to thirty percent. While a thirty percent reduction is indeed better than nothing, in all likelihood, the reduction would not cover the costs of creating and maintaining an effective compliance plan in the majority of cases. Thus, from a financial perspective, there is now insufficient incentive for companies to adopt compliance plans. Increasing the reduction under § 8C2.5(f) gives companies a financial incentive to prevent and deter crime.

Second, the Guidelines should provide for a downward departure at sentencing when the costs of implementing the compliance plan greatly exceed the company's gain from the wrongful conduct. Of course, any decision to grant a downward departure would remain with the judge after careful consideration of the company's good faith effort to have an effective compliance plan. A similar downward departure provision

already exists in § 8C4.9 in circumstances when the organization agrees to pay remedial costs which greatly exceed the organization's gain from the offense.

In sum, Congress has responded appropriately to the public's outcry over corporate scandals by increasing the statutory penalty for corporate fraud. If the Sentencing Commission follows Congress and gives prosecutors a bigger stick to fight corporate fraud, it should give corporations a juicier carrot to be responsible. That carrot is a sentence reduction when effective compliance plans have been implemented and a downward departure under proscribed circumstances.

We greatly appreciate your consideration. Please contact us if you have any questions.

Sincerely,

Steven S. Reed

Kent Wicker

Steven S. Reed
Kent Wicker
REED WICKER PLLC

United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, N.E.
Washington D.C.
20002-8002
Attn: Office of Publishing and Public Affairs January 2, 2003

Dear Office of Publishing and Affairs:

I had previously sent a letter suggesting an improvement to the guidelines in the category of 'threatening communications' due to the vagueness and confusion caused by the large number of guidelines referenced under U.S.C. 876 in Appendix A of the guidelines manual.

I would ask that a retroactive amendment be made to the guidelines manual to be submitted in May of 2003 which changes the following sections of Appendix A.

Here is how it currently reads:

18 U.S.C. 875(a)	2A4.2, 2B3.2
18 U.S.C. 875(b)	2B3.2
18 U.S.C. 875(c)	2A6.1
18 U.S.C. 875(d)	2B3.2, 2B3.3
18 U.S.C. 876	2A4.2, 2A6.1, 2B3.2, 2B3.3
18 U.S.C. 877	2A4.2, 2A6.1, 2B3.2, 2B3.3

It appears from the way this part of Appendix A was written that it was intended for 18 U.S.C. 876 and 18 U.S.C. 877 to use guidelines in the same types of situations as 18 U.S.C. 875 has been sectioned off.

This is not what occurs in real practice. Because the guidelines have been listed 'together' under 18 U.S.C. 876 and 18 U.S.C. 877 prosecutors are simply using their 'discretion' as to which guideline to use.

In its current form, say a person is charged with 'Threatening to damage the reputation of another' under 18 U.S.C. 876 paragraph #4. Because all 4 guidelines are listed under 18 U.S.C. 876, a prosecutor can effectively use the highest - 2A4.2 (Demanding a ransom) for a 23 point base even though the title may be 'categorically incorrect' for this situation. This statute 876 paragraph #4 carries a maximum of 2 years in prison. 23 points is far above this range and a maximum sentence of 24 months ends up being placed against this individual.

I do not believe that this is how the commission originally wanted Statute 876 and 877 to be calculated and used.

[109]

(1)

I propose that the following amendments be made to this guideline and Appendix A in order to correct this situation:

#1.

That appendix A be amended as follows with changes shown in **BOLD.**

18 U.S.C. 875 (a)	2A4.2, 2B3.2
18 U.S.C. 875 (b)	2B3.2
18 U.S.C. 875 (c)	2A6.1
18 U.S.C. 875 (d)	2B3.2, 2B3.3
18 U.S.C. 876 (P. #1)	**2A4.2, 2B3.2**
18 U.S.C. 876 (P. #2)	**2B3.2**
18 U.S.C. 876 (P. #3)	**2A6.1**
18 U.S.C. 876 (P. #4)	**2B3.2, 2B3.3**
18 U.S.C. 877 (P. #1)	**2A4.2, 2B3.2**
18 U.S.C. 877 (P. #2)	**2B3.2**
18 U.S.C. 877 (P. #3)	**2A6.1**
18 U.S.C. 877 (P. #4)	**2B3.2, 2B3.3**

The Indictment should define which paragraph the defendant is being charged under.

#2.

That the statement in guideline **2A4.2 Demanding or Receiving Ransom Money** in Application Note #1. "This section additionally includes extortionate demands through the use of the United States Postal Service, behavior proscribed by 18 U.S.C. 867-877."

be further clarified.

- Does it include ALL types of extortionate demands made by postal mail? (Is every extortionate demand a possible 23 point base?)

- Does it include only certain types of extortionate demands?

#3.

That the title of 2A4.2 be rephrased 'Demanding or Receiving ransom money **IN A KIDNAPPING OFFENSE'**

(The background statement 'The actual demand for ransom under these circumstances is reflected in 2A4.1' is another statement which maybe could use some clarification.)

Such changes as listed above should counteract the use of 'Prosecutorial Discretion' is choosing a guideline in threat cases.

If these changes were made retroactive they would affect a very small group of the total Federal prison population.

Other modifications to this set of guidelines that I suggest:

#1. There are several "mathematical" point adjustments to 2B3.1 and 2B3.2 which would make more sense than the current version.

One difference that I noticed was that 2B3.2 has a "planning" enhancement of 3 points whereas 2B3.1 does not. This is really not reflected in the base level difference. If you commit a robbery, you have obviously "planned" it whereas that is not true of extortion necessarily.

As it reads now, if one committed a "non violent robbery with planning" they would have this many points:

Base 20 + no enhancement for planning. = **20 points**

If one commits "extortion" with planning they receive:

Base 18 + 3 = **21 points**

Technically, there is little difference in these two situations. Why should extortion be one point higher? If anything it should be equal or lower than robbery.
Two ways exist to remedy this:

A. Change "planning" under 2B3.2 (b)(3)(B) to **2 levels enhance.**
B. OR change the base level for Robbery to **21.**

#2. The application notes under "2B3.2" could be more clearly defined:

- Note #7 (Numerous victims) - define this further and its enhancement value.

- Note #8 (Threat to a family member) - define this further and maybe assign it a **1 point** enhancement if the person "robbed, extorted or threatened" is a minor.

Also, additional commentary to Application note #2 of 2B3.2 could be added explicitly explaining that this guideline also applies to 'Threatening to kidnap', which I believe is not clear. The title of the 2B3.2 guideline could also be changed to '**Extortion by Force or Threat of Injury, Serious Damage or Kidnapping.**'

#3, I also suggest the following changes to **5K2.13: Diminished Capacity.**

I do not believe that the statement in 5K2.13 'the facts and circumstances of the defendant's offense indicates a need to protect the public because the offense involved a **serious threat** of violence' covers all cases. There are certain disorders such as Thyroid disease, Diabetes, etcetera which affect the blood chemistry and therefore also the mind **temporarily.** These two disorders among others are known to cause delusional or the occasional 'drunken' behavior in some cases (see the text 'Thyroid Solution' by Dr. Ridha Arem - 1999) which may render a defendant 'temporarily threatening'. Even if

a person makes a "statement of violence" who has a disorder that does NOT mean that such a person would ever act on it. "Intoxication" is a VOLUNTARY reduction in mental capacity. INVOLUNTARY" reductions in mental capacity by way of disease have NOT been addressed in this downward departure or in the "culpability" standards of U.S.C. 875, 876 and 877.

As an example, this year in my hometown we had a diabetic man who passed out while driving due to a low blood sugar level (they tested him right after). He swerved off the highway, hit several automobiles and then went off the road. Does this person really have a level of 'culpability' of recklessness or higer? Should such individuals be punished as criminals when they may p½resent a TEMPORARY threat of violence?

I believe that maybe a downward departure should be allowed in cases of VERBAL or RECKLESS or NEGLIGENTLY committed acts f violence under **5K2.13 (2)** instead of the current statement which allows no downward departures for the commission of any form of violent crime. In the cases of such downward departures the pre sentence report should both show that the defendant:

A. Took responsiblity for his actions
B. Has "a disorder" which can affect the mind or emotions for short durations.
C. That the person committed no physically violent act or verbally violent act with any malicious intent.
D. That the person is not a drug user and that drugs were not involved with the threat or violent act.
E. That the person agrees to further psychological counseling while in prison or on supervised release.

In my educated opinion, I believe that the above changes will solve the obvious flaws with this set of guidelines and ad to uniformity and clarity in sentencing.

Thank you for you r time in reading my suggestions.

David Southwood
#06534-028
Unit 9
FMCFP
PO Box 4000
Springfield, MO
65801-4000

Dear U.S. Sentencing Commission,

It would be a serious mistake to upgrade the penalties existing under 1030. I will summarize the general case against harsher penalties, and have attached a paper which more fully elaborates on my opposition to the proposed changes.

1. There is no evidence for a deterrent effect. This was the conclusion of the 1996 U.S. Sentencing Report, as it noted, "The limited empirical data available to the Commission and other factors preclude a definitive assessment of the deterrent effect of existing guidelines for computer fraud and computer vandalism." Little to no evidence has surfaced within the last seven years to support a conclusion that deterrence works in this context. Similarly, Indira Carr and Katherine Williams have found that high computer crime penalties in Singapore, Malaysia, and the UK have had little to no impact on the level of criminal activity. The decision calculus of the type of personalities that are attracted to computer crime offenses is simply not influenced by high penalty levels. Furthermore, even if there is a deterrent effect the current penalty levels are sufficiently severe to serve this purpose.

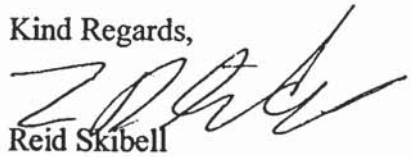
2. The Patriot Act changes mean that many low-level offenders are subject to the felony provisions of 1030. While minor trespassers should be subject to some punishment, upgrading the penalties under 1030 will do an injustice. The Patriot Act resulted in:
   - Expansion of 1030 (a)(2) – Asportation was originally reserved for military and financial documents, but now viewing any document which has an inherent value of more than $5,000 is a felony offense.
   - Removal of the Computer Use Exception – Simply using computer time is now sufficient to classify as fraud under the CFAA
   - Aggregation of Damage – Financial harm can now be aggregated across many different computers to meet the monetary threshold for a felony.
   - Codification of the Definition of "Damage" from *US v. Middleton* – the *Middleton* court went beyond previous interpretations of 1030 to include the cost of damage assessments and forensic computer analysis, as well as intangible lost revenue from an interruption in service. The result is that any minor trespass can be held to have caused more than $5,000 in damage.

3. Computer Crime is an Institutional Problem - Most computer crime is perpetrated by unsophisticated users who download scripts from the Internet. The only way that they are able to penetrate systems is that software producers knowingly ship software that has not been properly tested and is full of bugs, and network administrators are negligent in installing security patches. The culpability of these types of computer criminals is rather limited, and they should not be subject to harsh punitive sanctions simply as a scapegoat for those who do not take security seriously.

4. Computer Crime is not economically "cheaper" – Some have argued for harsher computer crime sanctions because computers make it far easier for a criminal to perpetrate a large scale crime. If anything, the opposite is true. Using a computer to commit a crime other than vandalism generally takes the sunk costs of many years of training. In those cases which it does not, this is only because of the negligence of others as explained in my third point.

For these reasons, and to avoid the injustice that will result from tougher criminal sanctions under 1030, I strongly urge the Sentencing Commission to refrain from upgrading the penalty structure under the Guidelines.

Kind Regards,



Reid Skibell

Columbia Law School
401 W. 118th st., B1
New York, NY 10027
reids@pobox.com

JANUARY 30, 2003

U.S. SENTENCING COMMISSION
ONE COLUMBUS CIRCLE N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002

PUBLIC COMMENT:
CONCURRENT SENTENCES

COULD THE SENTENCING COMMISSION TAKE IN CONSIDERATION, AND HELP THE FELONS THAT MOST NEED A CONCURRENT SENTENCE. THE FELONS THAT GET PUNISHED DOUBLE FOR THE SAME STATE CHARGE! THE FELONS THAT GET THERE FEDERAL CHARGE ENHANCED UNDER 4B1.2 BECAUSE OF THERE STATE CHARGE, THEN RUN CONSECUTIVE TO THE SAME STATE CHARGE! THIS 4B1.2 SHOULD BE ONE OF THE MECHANISMS THAT TRIGGER A CONCURRENT SENTENCE. THE 4B1.2 IS COUNTED IN THE BASE OFFENSE LEVEL IN CHAPTER 4. THEY ARE THE MOST NEEDING THE CONCURRENT SENTENCE AND WOULD STOP THE DOUBLE COUNTING ON THEM FOR THE SAME STATE CHARGE. IT IS INCORPORATED IN THE BASE OFFENSE UNDER 4B1.2. SO THEREFORE IT SHOULD BE ADDED IN BESIDE RELEVANT CONDUCT 1B1.3 UNDER 5G1.3(B).

I ALSO READ RUGGIANO V. REISH 307 F3D 121. I AGREE WITH THAT COURTS SHOULD HAVE AUTHORITY UNDER 5G1.3(C) IN CASES THAT UNDER 4B1.2. KEEP THE DEFENDANT FROM BEING PUNISHED DOUBLE.

THANK YOU,

Stacy Burnett

[115]

RE: Public Comment (Pub L.107-296)

To whom it may concern:

I wish to comment on Section 225 of the Homeland Security Act of 2002.
With regards to cyber security, I would like to see Federal cyber laws that address the following issues:

DDoS and DoS – The malicious denial of Internet services by anyone should be treated as a terrorist act. This includes treating underage "script kiddies" who are responsible for a DDoS or DoS as criminals. The following link illustrates this thinking: http://grc.com/dos/grcdos.htm .

Young children who deny Internet services to any company by attacking a private network cannot and should not do so without impunity. Sanctions against these children should be harsh. I would recommend 2 years in a Juvenile Detention Center and being banned from the Internet until age 18 for the "script kiddie" mentioned in the above Internet link.

The adults who are responsible for aiding and abetting these young children should face the stiffest possible sanctions. Ten years in prison would be a good start.

Virus and Trojan creators – Anyone who creates a virus or Trojan and then plants it on the Internet should be considered to be a criminal. Depending on intellectual property damage, that person should spend a minimum of 5 years in jail and be forbidden to use a computer for at least 5 years. Kevin Mitnick got off too easy in my opinion.

Cyber B/E – Breaking into a private network should be treated the same way as breaking into a private home.

Theft of data – Stealing the intellectual property of a private firm or individual is the same as breaking into a person's home and stealing their goods.

Protecting Root Servers – Without the "root servers" there would not be an Internet. Crashing these servers through vandalism or some malicious act, should be treated the same as destroying a power grid to a major metropolitan area.

Therefore, root servers should be protected at all costs; with the highest level of security possible. This includes locating these servers in guarded buildings with internal and external alarm systems in place. A detailed background check should be done on all personnel in these secure locations.

Failure to adequately protect these servers – as determined by an outside auditor - should be treated as a felony.

Thanks for allowing me to comment:

Sincerely:

Dan Drass
Network Administrator

[117]

Dann Anthony Maurno
563 Sagamore Ave #12
Portsmouth NH 03801
603.436.3347
dmaurno@lillysoftware.com

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Affairs

Re: Proposed Amendments to Sentencing Guidelines, Policy Statements and Commentary - BAC2210-40/2211-01 (Dec 2002) (on "Cyberhacking")

Dear Sir/Madam:

I understand that this commission is seeking comments on sentencing for hacking and other cyber crimes, and respectfully submit the following.

It seems that, hacking being a non-violent crime, sentences are light, and sympathy low. But I can testify that it can be a psychologically devastating crime.

An individual against whom I obtained a restraining order used the internet to –

1. write to the sales and "request for information" addresses at my workplace
2. find phone/address/e-mail of my family and friends, and pester them with a barrage of messages
3. send threatening notes to me in the names of other people
4. send hostile notes to friends of her own, using my name, to rally support.
5. send blanket e-mails to friends and acquaintances with character assassinations.

It was humiliating, to be on a business trip, only to receive a call from my company regarding the messages; to have to explain to my mother why she was receiving hostile e-mails entitled "Your Son's Behavior", and have to refute the lies therein; to have to explain to my former fiancée why she was receiving mail at her workplace from a perfect stranger wanting to "meet you to talk about how to love Dann," etc. I live in a small town (she moved here to be near me), and this poison is out there. I refuse to leave, but have no idea, day to day, who thinks what about me, because of this character assassination. The 'net was her weapon.

The individual pleaded "no contest" to five counts of violating a restraining order (bargained down from 10), plus two year's probation, a one-year extension of the restraining order (for a total of two years), and nine months court-enforced counseling. That was a stiffer sentence than the prosecutor had expected. But the judge refused to limit her access to the internet as unenforceable, and she continued to harass me through third parties.

Please, please recognize the intent of cybercrimes like these: to harm an individual as much as possible, and through clever and difficult-to-trace methods. The criminals use it with abandon, because they are shielded from the results. These crimes are too easy, and far more devastating than a click of a button would make them seem.

Thanks kindly for listening, and please do consider my letter.

Kind regards,

Dann Anthony Maurno

From: "Pat Castle 933" <p.castle@attbi.com>
To: <pubaffairs@ussc.gov>
Date: 1/14/03 12:58AM
Subject: Comments - on section 1030 of title 18, United States Code

The issue I'm commenting on:

BAC2210-40/2211-01

6. Cybersecurity

Issue for Comment: Section 225 of the Homeland Security Act of 2002 (the Cyber Security Enhancement Act of 2002), Pub. L. 107-296, directs the Commission to review and amend, if appropriate, the sentencing guidelines and policy statements applicable to persons convicted of an offense under section 1030 of title 18, United States Code, to ensure that the sentencing guidelines and policy statements reflect the serious nature of such offenses, the growing incidence of such offenses, and the need for an effective deterrent and appropriate punishment to prevent such offenses.

My comments:

It seems to me that crime (or vandalism) should not pay.

This suggests to me that the total penalties applied to the criminals should meet or exceed the total losses of the victims.

As an example: 1000 people each have to take an hour of their time to repair the damage done by one cyber attack. That's a loss of 1000 waking hours.

If only one in ten cyber attacks results in a conviction, then the penalty should be at least 10x the damages. In this example.... 10,000 waking hours. (Without this multiplier, the "odds are" that cyber attackers will have a gain of 9x, "losing" only 1/10 the time that was lost by the victims)

Since something like this is deliberate, the penalty should probably be tripled. I.e. 30,000 waking hours.

Of course, some of these attacks may cause physical or financial harm to victims, in which case penalties would have to take that into consideration.

Patrick M Castle

p.castle@attbi.com

816 S Heather Street

P.O. Box 166

Cornelius, OR 97113

[119]

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699

MEMORANDUM

TO: Chair Murphy
Commissioners

FROM: Karen Hickey

RE: Public Comment

DATE: February 24, 2002

Attached are late-arriving letters of public comment from the Practitioners' Advisory Group and from The Honorable George P. Kazen. These letters are hole-punched for insertion into the February 18, 2003 Public Comment notebook.

PRACTITIONERS' ADVISORY GROUP
CO-CHAIRS BARRY BOSS & JIM FELMAN
C/O ASBILL MOFFITT & BOSS, CHARTERED
1615 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, DC 20009
(202) 234-9000 - BARRY BOSS
(813) 229-1118 - JIM FELMAN
(202) 332-6480 - FACSIMILE

February 24, 2003

Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Amendments Published for Comment on November 22, 2002

Dear Judge Murphy:

We are writing to provide the Commission with the Practitioners' Advisory Group's comments on the amendments published for comment on November 22, 2002.

1. **Terrorism Enhancement in Money Laundering Guideline**

The P.A.G. supports Option One of this proposed amendment. Having been heavily involved in the drafting of the revised money laundering guideline, we do not believe there was any consideration given in the course of that possibility of a cumulative "double counting" adjustment for terrorism beyond that set forth in the money laundering guideline. Given the more recent Chapter 3 adjustment, deletion of this adjustment within the 2S1.1 guideline is appropriate.

2. **Reference of 18 U.S.C. § 1960 to Money Laundering Guideline**

The P.A.G. does not support either of the two options with respect to this proposed amendment because they will potentially dissolve the significant statutory differences between Sections 1956 and 1957, on the one hand, and § 1960 on the other. It is important to note that considerable thought and effort went into the drafting of the new guidelines for Sections 1956 and 1957. Section 1956 carries

a statutory maximum penalty of 20 years, while § 1957 carries a statutory maximum of ten years. In contrast, § 1960 covers a statutory maximum of only five years. It has been well documented that § 1957 is an extraordinary broad statute which encompasses a variety of conduct. The most significant limitation on the application of § 1957 is the requirement that the monetary transaction in question have a value of greater than $10,000. This dollar value threshold was of critical importance in the enactment of the legislation and to prevent its application in an overbroad fashion. Section 1960 does not contain this limitation. In other words, it applies to any transaction involving the proceeds of a criminal offense regardless of amount, circumstance, or intent. By applying the guideline applicable to § 1957 offenses to § 1960 offenses, the effect will be to eliminate the $10,000 threshold which has been so important eliminating the overbreath of § 1957.

The use of § 2S1.1 in § 1960(b)(1)(C) offenses will also collapse the distinction between § 1956 and § 1960. Section 1956 requires proof that the defendant conducted the transaction "with the intent to promote the carrying on of specified unlawful activity." Section 1960, in contrast, requires only a knowledge on the part of the defendant that the funds are intended to be used *by someone else* to promote or support unlawful activity. This is a significant difference in mental state which will be erased by the use of § 2S1.1 for § 1960(b)(1)(C) offenses. In short, the P.A.G. believes that in light of the significant effort expended in the drafting of § 2S1.1 and its application to Sections 1956 and 1957, that guideline should not be applied to § 1960 offenses. Section 1960 has a significantly lower statutory maximum, and significantly less restrictive elements.

3. **Enhancement in Accessory After the Fact Guideline for Harboring Terrorists.**

The P.A.G. does not oppose the elimination of the offense level "cap" of level 20 where the conduct involves harboring a person who the defendant knows or has reasonable grounds to believe has committed any offense listed in 18 U.S.C. § 2339 or § 2339(a), or has committed any offense involving or intending to promote a federal crime of terrorism as defined in 18 U.S.C. § 2332(b)(g)(5). The P.A.G. is concerned, however, that the proposed language in the amendment to § 2X3.1(a)(3)(C) appears to be broad enough to apply to those who harbor persons who have committed such offenses without either knowledge or reason to believe that the nature of the offense committed by the fugitive was one of terrorism. Although crimes of terrorism are obviously very serious, there appears to be no reason to apply the higher base offense level where the defendant has neither knowledge or reason to believe that the fugitive being harbored has committed such an offense.

4. **The Amendments Regarding Biological Agents and Toxins**

The P.A.G. has no comment on the proposed amendments regarding biological agents and toxins, and believes the proposed amendments regarding the safe drinking water provisions are appropriate, with the limited proviso that a base offense level of 22 rather than 25 should be utilized. The proposed seven-level increase from 18 to 25 will more than double the current sentencing levels. While the P.A.G. recognizes that the existing guidelines for these offenses may need modification, such a drastic change to existing sentencing policy should rarely, if ever, occur at one time. The P.A.G. believes that a four-level upward adjustment to the guideline reflects a more measured approach which could then receive further study and analysis in application. The P.A.G. also believes that the current distinction between actual tampering and mere threatened tampering should remain. Actual tampering with a water supply or a consumer product in any instance reflects a very different mental state than a threat to do so. Accordingly, the current distinction between the two should be recognized through the use of separate guidelines.

The P.A.G. supports the proposed upward departure regarding animal enterprise terrorism.

5. **Amendments Required by the Terrorists Bombing Convention Implementation Act of 2002**

The P.A.G. believes it would be overbroad to amend § 2K1.4(a)(1) to expand the use of the higher base offense level for offenses involving the attempted destruction of "a place of public use." The current distinction in the guideline between offense level 24 and 20 reflects the significantly greater culpability of those who attempt to destroy dwellings, airports, aircraft, mass transportation facilities, and mass transportation vehicles. The proposed amendment would apply this higher base offense level to attempts to destroy or cause property damage to any "place of public use" as defined in 18 U.S.C. § 2332f(e)(6). This definition includes any "location" that is "accessible" to "members of the public, whether continuously, periodically, or occasionally." This would appear to encompass any location that is not private. The P.A.G. believes this to be detrimental to the proportionality previously achieved in the guideline through the differentiation of those with higher culpable states who seek to destroy implements of mass transportation compared to those who seek to destroy remote locations on public land which are technically open to members of the public although used only occasionally. The P.A.G. would recommend the deletion of "place of public use" from the base offense level 24 portion of the guideline.

6. **Immigration**

The P.A.G. supports Option Two of the amendment to § 2L1.2(b)(1) inasmuch as that option recognizes the distinction between prior offenses which resulted in a term of imprisonment and those which did not. In light of the volume of state offenses which do not result in periods of incarceration, the P.A.G. believes this distinction is important and should be preserved in the guidelines.

7. **Proposed Amendments to § 5G1.3**

With regard to the series of proposals regarding § 5G1.3, the P.A.G. recommends that the Commission select for passage those amendments which provide the sentencing judge with maximum discretion. Such discretion is necessary in this area because of the often complex and case-specific issues that arise where a defendant is facing (or has faced) imprisonment on a related charge in another jurisdiction. The sentencing judge is in the best position to determine whether, or to what extent, the defendant should receive credit for the prior sentence. With this over-arching principle in mind, the P.A.G. recommends the following.

At the outset, the P.A.G. recommends amending § 5G1.3 to cover cases in which the defendant is facing an undischarged terms of imprisonment or has already completed his or her term of imprisonment. There is no principled basis to credit or not to credit a defendant for a prior sentence based on the fortuity of whether the defendant has completed the prior sentence at the time of sentencing. With regard to amending § 5G1.3(b), the P.A.G. supports Option Two because it provides maximum discretion to the sentencing judge in determining whether, or to what extent, to credit the prior sentence.

With regard to application note 6, the P.A.G. supports Option One (B), which again, provides maximum discretion to the sentencing judge to determine whether or not the sentence for the instant offense should run consecutively or concurrently or partially concurrently with the prior offense on which supervision is being revoked. We submit that Option One (A), which would require that the sentence for the instant offense shall be imposed to run consecutively, essentially adopts a mandatory minimum sentencing scheme which is at odds with the purpose of the guidelines and with this Commission's long-held position on mandatory minimum sentencing. The requirement of consecutive time also risks at least some double counting because a defendant who has committed other offenses typically has a higher criminal history score. In addition, that defendant will receive a two point upward adjustment, pursuant to § 4A1.1(d), for having committed the new offense while under supervision.

Finally, with regard to the issue for comment, the P.A.G. urges the Commission to resolve the current circuit split and to clarify that a sentencing judge has the authority to grant credit for an

undischarged state sentence even where the federal sentence is imposed concurrently. Bureaucratic quirks in the criminal justice system, particularly involving the interplay between the state and federal prison systems, have served to defeat the recommendations, and even the rulings, of federal sentencing judges regarding concurrent sentences. Unless a federal judge is authorized to grant "credit" for time served in state prison, the imposition of a concurrent sentence in many instances will not achieve the desired result.

The timing of the interplay between a defendant who starts in federal custody and one who does not can lead to incredible disparity in sentences among defendants otherwise similarly situated. This is because the Bureau of Prisons generally gives a defendant no credit for time spent in state custody, whereas state systems typically give full credit for time spent in federal custody.

Accordingly, if Defendant A starts in the federal system, he or she typically faces no problem. The federal system gives Defendant A full credit for any time spent in pretrial detention and any judges who sentence Defendant A retain their full historical power to declare that subsequent sentences may be imposed either concurrently or consecutively to any prior sentence.

If Defendant B begins in state custody, however, he or she may get bureaucratically hammered. A new federal case may cause Defendant B to get sent via a writ into the federal system, where Defendant B might be in pretrial detention in the same cell as Defendant A; yet the Bureau of Prisons will give Defendant B no credit for this time based on the fiction that Defendant B actually remains in "state" custody and is only "borrowed" by the federal facility on a federal writ. This situation is not changed even if the federal sentencing judge orders the imposition of a concurrent or partially concurrent sentence. The Bureau of Prisons will decline to credit the judge's order, ruling that the federal sentence cannot even "begin" until the defendant finishes his state sentence and "enters" federal custody. By providing the sentencing judge with the authority to grant "credit" for time served in state prison, the Commission can help overcome this extremely frustrating, illogical and inequitable situation.

As always, we appreciate the opportunity to assist the Commission in understanding the perspective of practitioners with respect to the difficult and important matters before the Commission.

Sincerely,

James E. Felman
Barry Boss

cc: All Commissioners
Charles Tetzlaff, Esq.
Tim McGrath, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

GEORGE P. KAZEN
CHIEF U.S. DISTRICT JUDGE

P.O. BOX 1060
LAREDO, TEXAS 78042
(956) 726-2237
Fax (956) 726-2349

January 21, 2003

Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D. C. 20002-8002

Dear Judge Murphy:

I write in response to a proposed amendment, issued December 20, 2002, to Section 2L1.2 of the Guidelines. Proposed Application Note 2(A) would now exclude from the definition of "aggravated felony" any controlled substance offense "without an intent to distribute that controlled substance."

In my opinion, this proposal would aggravate an already unfortunate disparity created by the previous amendment to that guideline concerning the definition of a "drug trafficking offense."

The Commission apparently wishes to make a distinction between a controlled substance crime of "simple possession," as distinguished from a crime of possession with intent to distribute or manufacture, or the actual distribution or manufacturing of controlled substances. I would have no quarrel with such a distinction if it truly separated cases involving small amounts of narcotics for personal use. Unfortunately, however, that is not the case, at least in Texas.

My research of Texas law indicates that, with respect to marihuana, there are only two offenses. These are found in the Health and Safety Code at §§481.120 and 121. One offense is delivery of marihuana and the other is possession of marihuana. Copies of these statutes are attached for your convenience. As you can see, the possession statute describes offenses ranging from a Class B Misdemeanor up to one punishable by life in prison, depending upon the amount of the marihuana.

The other narcotics with which we typically deal, including cocaine and heroin, are treated in different sections of the same Texas code, also attached. For those substances, there is an offense of manufacturing, delivering or possession with intent to deliver. Section 481.112. There is also, however, the offense of "simple" possession at §481.115. Once again, the latter provision describes offenses ranging from a state jail felony up to life in prison. Thus, under §481.115(f), an offense involving at least 400 grams of the controlled substance is punishable by a minimum sentence of 10 years and a maximum sentence of 99 years or life. Because of the very high sentences allowed under §481.115, my experience is that Texas prosecutors almost never bother to charge under §481.112. Instead, they inevitably use §481.115, since it is much simpler to prove. Similarly, as to marihuana, they invariably use only §481.121.

The result is that after November 1, 2002, when I am sentencing two defendants for illegal reentry under the current §2L1.2, a defendant with a prior federal conviction of possession with intent to distribute 50 pounds of marihuana could receive an upward adjustment of 16 levels under (b)(1)(A), while a defendant with a conviction only of "possession" of 1,000 pounds of marihuana or 100 pounds of cocaine in a Texas state court would receive an adjustment of 8 levels. The proposed new amendment, as I understand it, would now lower the latter defendant's adjustment to 4 levels. This is not an academic issue. I have dealt with similar disparities already, and it is most unfortunate.

I have not tried to determine whether other states have a statutory scheme similar to that of Texas. I do know that I have encountered cases where defendants were convicted in other states and the charging documents only refer to "possession," despite an offense report which clearly described a case of possession with intent to distribute and/or actual distribution. In any event, Texas probably accounts for a very large number of illegal entry prosecutions, and significant numbers of the affected defendants have been convicted of drug offenses in Texas courts, so that the problem I describe is not an insignificant one.

Thank you for your consideration of this matter, and your efforts in this very difficult area of criminal sentencing.

Sincerely yours,

George P. Kazen

GPK/gs

TX PENAL §§ 12.31. Capital Felony

(a) An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by imprisonment in the institutional division for life or by death. An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the institutional division for life.
(b) In a capital felony trial in which the state seeks the death penalty, prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. In a capital felony trial in which the state does not seek the death penalty, prospective jurors shall be informed that the state is not seeking the death penalty and that a sentence of life imprisonment is mandatory on conviction of the capital felony.

TX PENAL §§ 12.32. First Degree Felony Punishment

(a) An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the institutional division for life or for any term of not more than 99 years or less than 5 years.
(b) In addition to imprisonment, an individual adjudged guilty of a felony of the first degree may be punished by a fine not to exceed $10,000.

TX PENAL §§ 12.33. Second Degree Felony Punishment

(a) An individual adjudged guilty of a felony of the second degree shall be punished by imprisonment in the institutional division for any term of not more than 20 years or less than 2 years.
(b) In addition to imprisonment, an individual adjudged guilty of a felony of the second degree may be punished by a fine not to exceed $10,000.

TX PENAL §§ 12.34. Third Degree Felony Punishment

(a) An individual adjudged guilty of a felony of the third degree shall be punished by imprisonment in the institutional division for any term of not more than 10 years or less than 2 years.
(b) In addition to imprisonment, an individual adjudged guilty of a felony of the third degree may be punished by a fine not to exceed $10,000.

TX PENAL §§ 12.35. State Jail Felony Punishment

(a) Except as provided by Subsection (c), an individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days.
(b) In addition to confinement, an individual adjudged guilty of a state jail felony may be punished by a fine not to exceed $10,000.
(c) An individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial of the offense that:

(1) a deadly weapon as defined by Section 1.07 was used or exhibited during the commission of the offense or during immediate flight following the commission of the offense, and that the individual used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited; or
(2) the individual has previously been finally convicted of any felony:
(A) listed in Section 3g(a)(1), Article 42.12, Code of Criminal Procedure; or
(B) for which the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, Code of Criminal Procedure.

TX HEALTH & S §§ 481.112. Offense: Manufacture or Delivery of Substance in Penalty Group 1

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1.
(b) An offense under Subsection (a) is a state jail felony if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, less than one gram.
(c) An offense under Subsection (a) is a felony of the second degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, one gram or more but less than four grams.
(d) An offense under Subsection (a) is a felony of the first degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, four grams or more but less than 200 grams.
(e) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 200 grams or more but less than 400 grams.
(f) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 15 years, and a fine not to exceed $250,000, if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

TX HEALTH & S §§ 481.115. Offense: Possession of Substance in Penalty Group 1

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 1, unless the person obtained the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.
(b) An offense under Subsection (a) is a state jail felony if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, less than one gram.
(c) An offense under Subsection (a) is a felony of the third degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, one gram or more but less than four grams.
(d) An offense under Subsection (a) is a felony of the second degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, four grams or more but less than 200 grams.
(e) An offense under Subsection (a) is a felony of the first degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 200 grams or more but less than 400 grams.
(f) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

TX HEALTH & S §§ 481.120. Offense: Delivery of Marihuana

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally delivers marihuana.
(b) An offense under Subsection (a) is:
(1) a Class B misdemeanor if the amount of marihuana delivered is one-fourth ounce or less and the person committing the offense does not receive remuneration for the marihuana;
(2) a Class A misdemeanor if the amount of marihuana delivered is one-fourth ounce or less and the person committing the offense receives remuneration for the marihuana;
(3) a state jail felony if the amount of marihuana delivered is five pounds or less but more than one-fourth ounce;
(4) a felony of the second degree if the amount of marihuana delivered is 50 pounds or less but more than five pounds;
(5) a felony of the first degree if the amount of marihuana delivered is 2,000 pounds or less but more than 50 pounds; and
(6) punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of marihuana delivered is more than 2,000 pounds.

TX HEALTH & S §§ 481.121. Offense: Possession of Marihuana

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.
(b) An offense under Subsection (a) is:
(1) a Class B misdemeanor if the amount of marihuana possessed is two ounces or less;
(2) a Class A misdemeanor if the amount of marihuana possessed is four ounces or less but more than two ounces;
(3) a state jail felony if the amount of marihuana possessed is five pounds or less but more than four ounces;
(4) a felony of the third degree if the amount of marihuana possessed is 50 pounds or less but more than 5 pounds;
(5) a felony of the second degree if the amount of marihuana possessed is 2,000 pounds or less but more than 50 pounds; and
(6) punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 5 years, and a fine not to exceed $50,000, if the amount of marihuana possessed is more than 2,000 pounds.

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
300 East Washington Street, Suite 222
Greenville, South Carolina 29601

Honorable Donetta W. Ambrose
Honorable William M. Catoe, Jr.
Honorable William F. Downes
Honorable Richard A. Enslen
Honorable David F. Hamilton
Honorable Sim Lake
Honorable James B. Loken
Honorable John S. Martin
Honorable A. David Mazzone
Honorable William T. Moore, Jr.
Honorable Wm. Fremming Nielsen
Honorable Emmet G. Sullivan

Honorable William W. Wilkins, Chair

TELEPHONE
(864) 233-7081

FACSIMILE
(864) 242-0489

February 10, 2003

Honorable Diana Murphy
Chair, United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-8002

Dear Diana:

The Judicial Conference Committee on Criminal Law respectfully submits the following comments to the proposed guideline amendments published in the January 17, 2003 *Federal Register*.

The Commission has sought comment on whether the loss tables for fraud, theft, and property destruction offenses should be separate. The Committee has studied these issues and provides the following observations for the Commission's consideration.

In May 2001, the Commission proposed the Economic Crime Package, which became effective November 1, 2001. The Economic Crime Package was the result of a 6-year study of economic crime sentences by the Commission and other interested groups, including probation officers, defense counsel, the Department of Justice, and the Criminal Law Committee, and was adopted after extensive Commission hearings and a major symposium. The Economic Crime Package built upon and improved a draft proposal that, with our Committee members' participation, was successfully field tested in 1998 and found to be superior to the previous guidelines in organization, workability, and resolution of circuit conflicts. The Economic Crime Package was the first comprehensive rewrite of guidelines dealing with a major category of crime.

The Economic Crime Package consolidated the theft, property, and fraud guidelines, revised the loss table for the consolidated guidelines and a similar tax offense table, and provided a revised definition of loss for the consolidated guideline. The loss table revision resulted in

substantial increases in penalties for moderate and high loss offenders while slightly reducing offense levels for low loss offenders.

The Committee strongly believes that it would be ill-advised to now precipitously reverse course by pulling apart the consolidated guideline into separate theft, fraud, and property guidelines, or to revise and separate the definition of loss. The considerations that favored the adoption of the Economic Crime Package are still valid. One key consideration, as we understood it, was to avoid disparate sentencing outcomes for conceptually similar offenses that sometimes were occurring depending on whether sentencing occurred under the theft or the fraud guideline. For example, a bank officer's fraudulent personal loan scheme should be punished the same, whether the offense was charged as a bank fraud under 18 U.S.C. § 1341 or as an embezzlement under 18 U.S.C. § 656. Similarly, a consolidated guideline would appear to better ensure consistent sentencing treatment of the various hybrid theft/fraud and new technology offenses, such as identity theft and cellular telephone cloning.

Since these guideline amendments are only applicable to offenses committed after November 1, 2001, there is little available data on the effect that these changes have had on sentencing and virtually no appellate case law. Moreover, prosecutors, defense counsel, probation officers, and judges are only now becoming familiar with these new guidelines. Revision of these guidelines by the Commission would result in enormous confusion and a waste of governmental and private resources as counsel, probation officers, and judges have to learn new guidelines after only recently beginning to digest the November 2001 amendments.

The Committee strongly believes that the Commission should wait until sufficient empirical data and case law guidance are available concerning the Economic Crime Package before considering any major revisions. At a minimum, the Commission should publish specific proposals on how the loss tables would be separated and provide specific examples on how the proposed guidelines would operate.

The members of the Committee appreciate the opportunity to comment on the proposal to separate the loss tables and will be pleased to provide any other information requested by the Commission.

With warm personal regards, I am

Sincerely,

Billy

William W. Wilkins

PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission

Cathy A. Battistelli
Chair, 1st Circuit

U.S. Probation Office
Warren Rudman Courthouse
55 Pleasant St.
Concord, NH 03301

Phone # 603-225-1428
Fax # 603-225-1482

March 24, 2003

The Honorable Diana E. Murphy, Chair
United States Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Murphy:

The Probation Officers Advisory Group (POAG) met in Washington, D.C. on March 6 and 7, 2003 to discuss and formulate recommendations to the United States Sentencing Commission regarding the proposed amendments for the amendment cycle ending May 1, 2003. We are submitting comments relating to the following proposed amendments.

Proposed Amendment – Corporate Fraud

POAG considered the issues that remain outstanding and were published for comment on January 17, 2003. To date, we have insufficient experience with the impact on the total offense level of the various specific offense characteristics which were added between November 1, 2001, and January 25, 2003. There is also a concern that charge bargaining will increasingly occur as a result of some of these changes. POAG discussed the sweeping changes to §2B1.1, effective November 1, 2001 and January 25, 2003. Given the recent amendments to §2B1.1, which have raised issues of ***ex post facto*** for offenses committed prior to enactment, POAG believes the field has not had sufficient opportunity to consistently apply this guideline. The group remains concerned about the impact to low level theft type cases which are now captured in this consolidated guideline. That being said, however, the group does not support this guideline being deconsolidated. The amendments effective November 1, 2001 and January 25, 2003 may provide adequate sanctions to the type of offender targeted under *Sarbanes-Oxley*. Notwithstanding these concerns, POAG's positions with respect to the proposed amendments are outlined below.

With the increased statutory penalties from ten to twenty years for fraud offenders, POAG recognizes the need to provide alternative base offense levels to reflect these penalties. If alternative base offense levels are implemented, POAG prefers applying the higher base offense level of 7 in cases involving offenses for which the maximum term of imprisonment prescribed by law is at least twenty years. This option would assign the higher base offense level to many cases involving fraud; the lower base offense level of 6 would almost always apply in theft cases. This might, to some extent address the concern that theft and fraud cases warrant different punishment.

There are three options under consideration for amending the loss table in §2B1.1. POAG notes that none of the options raise sanctions for offenders whose frauds involve $70,000 or less. If the table is altered, POAG noted ease of application exists for all three loss tables.

With respect to §2B1.1(b)(13), POAG supports expansion of this guideline as proposed. POAG members noted limited experience with cases where this enhancement would apply but surmise that this specific offense characteristic will specifically provide for the inclusion of non registered brokers and dealers and thus will close a potential loophole.

Likewise, POAG supports the creation of an application note under §2J1.1 (Contempt) regarding application of §2B1.1 as the most analogous guideline in cases involving a violation of a judicial order enjoining fraudulent behavior. Again, POAG members voiced limited experience concerning these types of cases.

POAG supports an increase to the base offense in §2J1.3 (Perjury) to conform to the increased base offense level in §2J1.2 (Obstruction of Justice), which became effective January 25, 2003. These types of offenses are similar and should have the same base offense level. POAG recommends that, under application note 4 at §2J1.2, which lists potential considerations for upward departure, examples of "extreme violence" would be helpful. This would assist officers in identifying the types of aggravated obstruction cases falling outside the heartland.

Proposed Amendment - Campaign Finance

POAG has had no experience with the new emergency Campaign Finance Fraud guideline and offers no suggestions for change. The group previously agreed with the establishment of a separate guideline, a base offense level of 8 and use of the loss table in §2B1.1 to address the value of the illegal transactions. POAG notes that the new guideline will eliminate possible disparity as previously, the instruction was to apply the most analogous guideline.

Proposed Amendment - Use of Body Armor in a Crime of Violence or Drug Trafficking Crime

POAG understands and appreciates the need to provide an enhancement/enhanced punishment for crimes of violence and/or drug trafficking offenses in which the defendant used body armor. Offenses involving both a weapon and body armor have an increased potential for violence and should not be treated in the same manner as the person who is simply wearing body armor, yet, has no means to commit an act of violence. Both situations indicate an awareness of a heightened potential for violence and therefore, it is our position that enhancements are appropriate for both scenarios. Under a new guideline, §3B1.5,

consideration should be given for an increased enhancement for the more egregious case of an offender possessing a dangerous weapon and wearing body armor.

In application note 1, it would be helpful to highlight that the definition under 18 U.S.C. § 16 for a crime of violence is different and broader than the definition found in Chapter 4.

Application note 2 currently indicates this enhancement is defendant based. We understand that the Congressional directive was worded in a defendant specific manner. It is our position that this enhancement should include relevant conduct of others. For example, four individuals planned and committed a bank robbery. Two wear body armor, two do not. Under current relevant conduct standards, all four would receive a weapon enhancement. It is our recommendation that this same principal should apply to offenses involving body armor if the defendants plan a crime together and decide that some participants will wear body armor and others will not.

Finally, in regard to application note 4, POAG found the language "actively used the body armor in a manner to protect the defendant's person" confusing. Perhaps some examples to illustrate this principal would assist officers in making this determination.

Proposed Amendments - Oxycodone and Red Phosphorous

POAG believes the proposed amendment to §2D1.1 would remedy proportionality issues resulting from inequitable counting of oxycodone. Based on the increasing levels of abuse and the addictive nature of oxycodone, POAG supports the amendment to resolve oxycodone calculation difficulties and increase its marijuana equivalency from 500 to 6,700 grams.

POAG supports the amendment which adds red phosphorous to the Chemical Quantity Table in §2D1.11. The conversion method suggested by staff appears to be sound and, like the precursor ephedrine, is based on the amount of methamphetamine which could be manufactured from the precursor.

Proposed Amendment - Cybercrime

POAG discussed the proposed promulgation of amendments pursuant to the Cyber Security Enhancement Act of 2002. The Group believes that an increase of four levels, rather than two, more accurately accounts for the increased risk of serious bodily injury or death which may occur as a result of conduct described in 18 U.S.C. § 1030(a)(5)(A)(i). The expanded language proposal in the loss definition for protected computer cases in application note 2 mirrors the loss language in the statute. This definition addresses consequential damages without using said terminology and POAG is concerned about the difficulty in ascertaining these loss amounts and the sentencing delays that may result. Although the U.S. Attorney's Offices are to produce this information, it is often not provided.

POAG discussed the proposed specific offense characteristic at §2B1.1(b)(14)(A), which provides for alternative offense level increases of two levels, or four levels. POAG believes these offense level increases accurately reflect the Congressional directive that the Guidelines account for (1) whether the offense involved a computer used by the government in furtherance of national defense, national security, or the

administration of justice, and (2) whether the violation was intended or had the effect of significantly interfering with or disrupting a critical infrastructure.

POAG requests that the Commission examine the terminology used in the proposed upward departure at §2B1.1, comment. (n.16(B)), to the extent that an upward departure under this provision seems to require a higher degree of "disruption" than that required under §5K2.7. The proposed application note provides that "[a]n upward departure would be warranted in a case in which subsection (b)(14)(A)(ii) applies and the disruption of public or governmental functions or services *is so substantial as to have a debilitating impact* on national security, national economic security, national public health or safety, or any combination of those matters. See, e.g., §5K2.7 (Disruption of Governmental Function)." In contrast, §5K2.7 requires only that the " . . . conduct resulted in a *significant* disruption of a governmental function." (Emphasis added). POAG foresees a possible application problem given the apparent differences between the two provisions in the degree of governmental disruption required for an upward departure. To the extent that the Commission is concerned with maintaining consistency between guideline sections, POAG suggests the Commission consider amending the language in one or both provisions, eliminating the reference to §5K2.7, and adding examples to clarify use.

POAG foresees no application problems with the amendments proposed at §§2B1.1, comment. (n.2(A)(v)(III)), 2B2.3, or 2B3.2.

Proposed Amendment - Terrorism

In discussing the proposed change in the Money Laundering Guideline, POAG agreed the term "terrorism" should be deleted from §2S1.1(b)(1). This will prevent double-counting with the terrorism adjustment found in §3A1.4. POAG thought the proposed amendment to §2X3.1, Enhancement in Accessory After the Fact Guideline for Harboring Terrorists, was difficult to understand. We anticipate there may be some confusion in applying this guideline and recommend this guideline be revised for easier application. POAG discussed the proposed amendment to §2M6.1, Biological Agents and Toxins, and suggests a definition be added under the application notes to define or explain the phrase "intent to injure the United States" which is found in §2M6.1(a)(1). We recognize that this wording is statutory construction and an element of the offense, however, we believe the language will pose application difficulty for the field. POAG also discussed the proposed amendment pertaining to the Safe Drinking Water Provision which provides for the consolidation of guidelines found in §2N1 and §2Q1. While POAG could not foresee any application problems by consolidating the guidelines, we simply do not have enough application experience with these particular guidelines to make a recommendation.

Proposed Amendment - Immigration

The proposed amendment to §2L1.2 contains two options for a slight change to the specific offense characteristics regarding prior drug trafficking offenses, and also adds or amends several definitions. With regard to the options at §2L1.2(b)(1)(B), POAG recommends Option Two. We believe that this option will result in sufficient punishment, and with the definition added for "sentence of imprisonment," application of the guideline should be facilitated. The group also prefers the second option in the revised proposal of sixty days at §2L1.2(b)(1)(B). However, we believe a conflict may exist. The definition provided for "sentence of imprisonment" in the case of a totally suspended sentence would seem to be at odds with the definition in the statute at 8 U.S.C. § 1101(A)(48)(b). Additionally, we would recommend if Option Two

is adopted, that it not be retroactive as retroactivity would have an adverse effect on the caseloads in courts in the border districts.

POAG supports the definitions provided for "child pornography offense," "crime of violence," "drug trafficking offense," "firearms offense," "human trafficking offense," and "terrorism offense." We also support the revised definition of "alien smuggling offense," which eliminated the term "for profit." However, another conflict may exist between these definitions and the list of "aggravated felonies" provided at 8 U.S.C. § 1101(a)(43).

Regarding §2L1.2, (comment. n.3), POAG recommends Option 2 with the terminology "under such section" being replaced with 21 U.S.C. § 844. The group recognized sentencing disparity issues exist regarding the treatment of drug possession cases. A conviction for simple possession in one jurisdiction may be charged as distribution elsewhere, thus resulting in disparity. In addition, officers may encounter difficulties in obtaining documents outlining the criminal conduct.

Proposed Amendment - §5G1.3

POAG favors Option 1A of the proposed amendment since it is clearly stated in the case of a prior revocation, the sentence is to run consecutive to any prior undischarged term of imprisonment. It was the opinion of POAG that this option consistently uses the term "shall" in addressing cases falling under §5G1.3(a). POAG remains supportive of the Commission's past approach to revocation sentencing as a sanction for the breach of trust of supervision, and not punishment of new offense behavior.

POAG believes the use of the case examples in this guideline would be extremely helpful to the field. This guideline has traditionally caused great confusion to probation officers and examples demonstrating how this guideline is to be applied will assist the field in ease of application.

POAG feels the requirement in §5G1.3(b)(A) addressing credit received by the Bureau of Prisons may create problems for courts, since it is our experience that information obtained from the Bureau of Prisons is problematic to determine. Many times officers are unable to retrieve this information from the Bureau of Prisons in a timely fashion, or the Bureau is unable to assist the officer without receipt of the presentence report.

Regarding application note 3(D), POAG believes the language should clearly state that the sentence imposed is by way of a downward departure, and that the use of the word "adjustment" should be avoided. The term "adjustment" is inconsistent with its use in other areas of the guidelines.

As an aside, it might be helpful if the U.S. District Judges' Bench Book contained language for imposing sentences under §5G1.3(b) and (c) as these areas have proven problematic throughout the circuits. It is recommended that the amended language contain notice to the Bureau of Prisons as to when and how the "sentence alteration" has been rendered by courts.

Closing

We trust you will find our comments and suggestions beneficial during your discussion of the proposed amendments and appreciate the opportunity to provide our perspective on guideline sentencing issues. As always, should you have any questions or need clarification, please do not hesitate to contact us.

Respectfully,

Cathy A. Battistelli /BE

Cathy A. Battistelli
Chair

PRACTITIONERS' ADVISORY GROUP
CO-CHAIRS BARRY BOSS & JIM FELMAN
C/O ASBILL MOFFITT & BOSS, CHARTERED
1615 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, DC 20009
(202) 234-9000 - BARRY BOSS
(813) 229-1118 - JIM FELMAN
(202) 332-6480 - FACSIMILE

February 24, 2003

Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Amendments Published for Comment on November 22, 2002

Dear Judge Murphy:

We are writing to provide the Commission with the Practitioners' Advisory Group's comments on the amendments published for comment on November 22, 2002.

1. **Terrorism Enhancement in Money Laundering Guideline**

The P.A.G. supports Option One of this proposed amendment. Having been heavily involved in the drafting of the revised money laundering guideline, we do not believe there was any consideration given in the course of that possibility of a cumulative "double counting" adjustment for terrorism beyond that set forth in the money laundering guideline. Given the more recent Chapter 3 adjustment, deletion of this adjustment within the 2S1.1 guideline is appropriate.

2. **Reference of 18 U.S.C. § 1960 to Money Laundering Guideline**

The P.A.G. does not support either of the two options with respect to this proposed amendment because they will potentially dissolve the significant statutory differences between Sections 1956 and 1957, on the one hand, and § 1960 on the other. It is important to note that considerable thought and effort went into the drafting of the new guidelines for Sections 1956 and 1957. Section 1956 carries

a statutory maximum penalty of 20 years, while § 1957 carries a statutory maximum of ten years. In contrast, § 1960 covers a statutory maximum of only five years. It has been well documented that § 1957 is an extraordinary broad statute which encompasses a variety of conduct. The most significant limitation on the application of § 1957 is the requirement that the monetary transaction in question have a value of greater than $10,000. This dollar value threshold was of critical importance in the enactment of the legislation and to prevent its application in an overbroad fashion. Section 1960 does not contain this limitation. In other words, it applies to any transaction involving the proceeds of a criminal offense regardless of amount, circumstance, or intent. By applying the guideline applicable to § 1957 offenses to § 1960 offenses, the effect will be to eliminate the $10,000 threshold which has been so important eliminating the overbreath of § 1957.

The use of § 2S1.1 in § 1960(b)(1)(C) offenses will also collapse the distinction between § 1956 and § 1960. Section 1956 requires proof that the defendant conducted the transaction "with the intent to promote the carrying on of specified unlawful activity." Section 1960, in contrast, requires only a knowledge on the part of the defendant that the funds are intended to be used *by someone else* to promote or support unlawful activity. This is a significant difference in mental state which will be erased by the use of § 2S1.1 for § 1960(b)(1)(C) offenses. In short, the P.A.G. believes that in light of the significant effort expended in the drafting of § 2S1.1 and its application to Sections 1956 and 1957, that guideline should not be applied to § 1960 offenses. Section 1960 has a significantly lower statutory maximum, and significantly less restrictive elements.

3. **Enhancement in Accessory After the Fact Guideline for Harboring Terrorists.**

The P.A.G. does not oppose the elimination of the offense level "cap" of level 20 where the conduct involves harboring a person who the defendant knows or has reasonable grounds to believe has committed any offense listed in 18 U.S.C. § 2339 or § 2339(a), or has committed any offense involving or intending to promote a federal crime of terrorism as defined in 18 U.S.C. § 2332(b)(g)(5). The P.A.G. is concerned, however, that the proposed language in the amendment to § 2X3.1(a)(3)(C) appears to be broad enough to apply to those who harbor persons who have committed such offenses without either knowledge or reason to believe that the nature of the offense committed by the fugitive was one of terrorism. Although crimes of terrorism are obviously very serious, there appears to be no reason to apply the higher base offense level where the defendant has neither knowledge or reason to believe that the fugitive being harbored has committed such an offense.

4. **The Amendments Regarding Biological Agents and Toxins**

The P.A.G. has no comment on the proposed amendments regarding biological agents and toxins, and believes the proposed amendments regarding the safe drinking water provisions are appropriate, with the limited proviso that a base offense level of 22 rather than 25 should be utilized. The proposed seven-level increase from 18 to 25 will more than double the current sentencing levels. While the P.A.G. recognizes that the existing guidelines for these offenses may need modification, such a drastic change to existing sentencing policy should rarely, if ever, occur at one time. The P.A.G. believes that a four-level upward adjustment to the guideline reflects a more measured approach which could then receive further study and analysis in application. The P.A.G. also believes that the current distinction between actual tampering and mere threatened tampering should remain. Actual tampering with a water supply or a consumer product in any instance reflects a very different mental state than a threat to do so. Accordingly, the current distinction between the two should be recognized through the use of separate guidelines.

The P.A.G. supports the proposed upward departure regarding animal enterprise terrorism.

5. **Amendments Required by the Terrorists Bombing Convention Implementation Act of 2002**

The P.A.G. believes it would be overbroad to amend § 2K1.4(a)(1) to expand the use of the higher base offense level for offenses involving the attempted destruction of "a place of public use." The current distinction in the guideline between offense level 24 and 20 reflects the significantly greater culpability of those who attempt to destroy dwellings, airports, aircraft, mass transportation facilities, and mass transportation vehicles. The proposed amendment would apply this higher base offense level to attempts to destroy or cause property damage to any "place of public use" as defined in 18 U.S.C. § 2332f(e)(6). This definition includes any "location" that is "accessible" to "members of the public, whether continuously, periodically, or occasionally." This would appear to encompass any location that is not private. The P.A.G. believes this to be detrimental to the proportionality previously achieved in the guideline through the differentiation of those with higher culpable states who seek to destroy implements of mass transportation compared to those who seek to destroy remote locations on public land which are technically open to members of the public although used only occasionally. The P.A.G. would recommend the deletion of "place of public use" from the base offense level 24 portion of the guideline.

6. **Immigration**

The P.A.G. supports Option Two of the amendment to § 2L1.2(b)(1) inasmuch as that option recognizes the distinction between prior offenses which resulted in a term of imprisonment and those which did not. In light of the volume of state offenses which do not result in periods of incarceration, the P.A.G. believes this distinction is important and should be preserved in the guidelines.

7. **Proposed Amendments to § 5G1.3**

With regard to the series of proposals regarding § 5G1.3, the P.A.G. recommends that the Commission select for passage those amendments which provide the sentencing judge with maximum discretion. Such discretion is necessary in this area because of the often complex and case-specific issues that arise where a defendant is facing (or has faced) imprisonment on a related charge in another jurisdiction. The sentencing judge is in the best position to determine whether, or to what extent, the defendant should receive credit for the prior sentence. With this over-arching principle in mind, the P.A.G. recommends the following.

At the outset, the P.A.G. recommends amending § 5G1.3 to cover cases in which the defendant is facing an undischarged terms of imprisonment or has already completed his or her term of imprisonment. There is no principled basis to credit or not to credit a defendant for a prior sentence based on the fortuity of whether the defendant has completed the prior sentence at the time of sentencing. With regard to amending § 5G1.3(b), the P.A.G. supports Option Two because it provides maximum discretion to the sentencing judge in determining whether, or to what extent, to credit the prior sentence.

With regard to application note 6, the P.A.G. supports Option One (B), which again, provides maximum discretion to the sentencing judge to determine whether or not the sentence for the instant offense should run consecutively or concurrently or partially concurrently with the prior offense on which supervision is being revoked. We submit that Option One (A), which would require that the sentence for the instant offense shall be imposed to run consecutively, essentially adopts a mandatory minimum sentencing scheme which is at odds with the purpose of the guidelines and with this Commission's long-held position on mandatory minimum sentencing. The requirement of consecutive time also risks at least some double counting because a defendant who has committed other offenses typically has a higher criminal history score. In addition, that defendant will receive a two point upward adjustment, pursuant to § 4A1.1(d), for having committed the new offense while under supervision.

Finally, with regard to the issue for comment, the P.A.G. urges the Commission to resolve the current circuit split and to clarify that a sentencing judge has the authority to grant credit for an

undischarged state sentence even where the federal sentence is imposed concurrently. Bureaucratic quirks in the criminal justice system, particularly involving the interplay between the state and federal prison systems, have served to defeat the recommendations, and even the rulings, of federal sentencing judges regarding concurrent sentences. Unless a federal judge is authorized to grant "credit" for time served in state prison, the imposition of a concurrent sentence in many instances will not achieve the desired result.

The timing of the interplay between a defendant who starts in federal custody and one who does not can lead to incredible disparity in sentences among defendants otherwise similarly situated. This is because the Bureau of Prisons generally gives a defendant no credit for time spent in state custody, whereas state systems typically give full credit for time spent in federal custody.

Accordingly, if Defendant A starts in the federal system, he or she typically faces no problem. The federal system gives Defendant A full credit for any time spent in pretrial detention and any judges who sentence Defendant A retain their full historical power to declare that subsequent sentences may be imposed either concurrently or consecutively to any prior sentence.

If Defendant B begins in state custody, however, he or she may get bureaucratically hammered. A new federal case may cause Defendant B to get sent via a writ into the federal system, where Defendant B might be in pretrial detention in the same cell as Defendant A; yet the Bureau of Prisons will give Defendant B no credit for this time based on the fiction that Defendant B actually remains in "state" custody and is only "borrowed" by the federal facility on a federal writ. This situation is not changed even if the federal sentencing judge orders the imposition of a concurrent or partially concurrent sentence. The Bureau of Prisons will decline to credit the judge's order, ruling that the federal sentence cannot even "begin" until the defendant finishes his state sentence and "enters" federal custody. By providing the sentencing judge with the authority to grant "credit" for time served in state prison, the Commission can help overcome this extremely frustrating, illogical and inequitable situation.

As always, we appreciate the opportunity to assist the Commission in understanding the perspective of practitioners with respect to the difficult and important matters before the Commission.

Sincerely,

James E. Felman
Barry Boss

cc: All Commissioners
Charles Tetzlaff, Esq.
Tim McGrath, Esq.
Karen Hickey, Esq.