2012 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES

On January 18, 2012, the United States Sentencing Commission published its proposed amendments for the 2012 sentencing guidelines. The Sentencing Commission has set a deadline of March 18, 2012, for public comment on the proposed guidelines.

On January 24, 2012, Senior United States Probation Officers Joan Pigott, Richard Rogala and Charmarie Green met with United States Probation Officer Thaddeus Dean and came to a consensus on the proposed amendments.

1. Proposed Amendment: Dodd-Frank/Fraud

Synopsis of the Proposed Amendment: The proposed amendment is a multi-part amendment that continues the Commission's multi-year review of fraud offenses to ensure that the guidelines provide appropriate penalties in cases involving securities fraud and similar offenses as well as in cases involving mortgage fraud and financial institution fraud. Part A of the amendment responds to the issue of harm to financial markets and Part B responds to the directive on securities fraud and similar offenses. Part C responds to the directive on mortgage fraud and financial institution fraud and finally, Part D responds to concerns suggesting that the impact of the loss table or the victims table may overstate the culpability of certain offenders in cases sentenced under § 2B1.1 that involve large loss amounts.

Part A- Harm to Financial Markets. Section 2B1.1 contains provisions that address harm to the public and the financial markets in various ways, taking into account the amount of the loss, the number of victims and other factors (specific offense characteristics). The Commission asks whether an enhancement should be added (2, 4 or 6 levels) if the offense involved a serious disruption of a financial market or created a serious risk of such a disruption?

Probation Department's Comments:

This matter has been discussed and it has been determined that it would be too cumbersome a task to determine how the potential and actual harms to the public financial markets would be measured. Furthermore, how would it be determined if the offense involved a "serious disruption" to a financial market? The probation department is unsure of how § 2B1.1 could be amended to more directly account for the potential and actual harms to the public and financial markets. If § 2B1.1 was amended to add an

enhancement for "serious disruption of a financial market" or creating a serious risk of such a disruption, the probation department would recommend that a specific, detailed outline be provided to ensure the proper application of the enhancements.

Part B- Securities Fraud and Similar Offenses. Once again, the proposed amendment applies to those who are convicted of offenses relating to securities fraud or any other similar provision of law. The amendment is to reflect the intent of Congress that the penalties for offenses under these guidelines would appropriately take into account the potential and actual harm to the public and financial markets.

Probation Department's Comment:

Once again, while the probation department agrees that the penalties should reflect the intent of Congress and take into account the potential and actual harm to the public and financial markets, we are unsure as to how "potential harm" would ever be determined. The amendment also discusses insider trading. The Commission has received public comment indicating that some insider trading defendant's engage in serious conduct, but, nonetheless, due to market forces (or other factors), do not realize high gains. In these cases, does § 2B1.4 adequately take into account the seriousness of the conduct and the actual and potential harm to individuals and markets, as the guidelines are used as the measure of harm? Once again, the probation department has determined that it would be difficult to accurately account for "potential harm". If that section were amended, perhaps it could be amended to more narrowly define the methods used in determining loss to ensure that the guideline takes into account the potential and actual harm.

Part C- Mortgage Fraud and Financial Institution Fraud. This section relates to mortgage fraud and financial institution fraud. Should the guidelines be amended to reflect policy statements to people that are convicted of fraud offenses relating to financial institutions to ensure appropriate terms of imprisonment for offenders involved in substantial bank fraud or other types of fraud related to financial institutions?

Probation Department's Comment:

This issue is of particular interest to the probation department in the Eastern District of Michigan. With regard to mortgage fraud, this amendment makes two changes to Application Note 3 regarding the calculation of loss. The first is to address the "credit against loss rule" and states that, "in the case of a fraud involving a mortgage loan in which the collateral has been disposed of at a foreclosure sale, use the amount recovered from the foreclosure sale." Second, the changes specifies that, in the case of a fraud involving a mortgage loan, reasonably foreseeable pecuniary harm includes the

reasonably foreseeable administrative costs to the lending institution. The area in and around the Eastern District of Michigan, in particular, has been hit hard by the collapse of the lending industry. Very often, the homes involved in mortgage fraud, specifically in the Detroit area, are mere shells, uninhabitable and therefore, there is no collateral to off-set the loss. In those cases, the individuals who commit the fraud are responsible for the entire amount, while an individual who commits the same kind of fraud, but in an area that was not as affected by the real-estate meltdown, would be responsible for a lower amount as the home is worth something and can be sold. There is no "credit against loss". Perhaps the Sentencing Commission needs to address this issue, as Detroit cannot be the only area in which this occurs. Also, if an individual "attempts" a fraud, but the loan does not close and another individual completes the process (ie., closes the loan and then reaps the profit), is the person who *attempted* the fraud responsible for more of a loss than the individual who completes the act of the fraud, as there is collateral (the property) to off-set the loss? Our discussions also included questions as to whether an individual who "stripped" a home (ie., removed cabinetry, copper plumbing, flooring, heating and cooling systems, etc.) is also being held accountable for that part (the additional loss amount) of the scheme? Should they, in fact, be held to a higher penalty as the home was robbed of any value, and in turn, affected the surrounding homes (market value) and neighborhood? This premise would then capture the entire scheme, and therefore, the scope of all of the criminal conduct.

Furthermore, for the probation department or the government to determine the administrative costs to the lending institution associated with foreclosing on the mortgaged property, it would seem to be an insurmountable task. The cost and time involved in this process may even outweigh the benefit gained. The amendment includes the caveat, "provided that the lending institution exercised due diligence in the initiation, processing and monitoring of the loan and the disposal of the collateral." Our question is, how could the probation department determine, with certainty, the costs associated with this process? It would be nearly impossible to determine if the lending institution exercised "due diligence" during the process.

<u>Part D</u>- Impact of Loss and Victims Tables in Certain Cases. The Commission has observed that cases sentenced under § 2B1.1 that involve large loss amounts have high rates of below-range sentences. The Commission has received comment and reviewed judicial opinions suggesting that the impact of the loss table or the victims table may overstate the culpability of certain offenders in such cases. In response to these concerns, the Commission is trying to determine whether it should limit the impact of the loss table or the victims table and if so, how?

Probation Department's Comment:

This is another issue that is of particular interest to the Probation Department for the Eastern District of Michigan. The Commission proposes that there should be a new specific offense characteristic in § 2B1.1 to limit the impact of the loss involving large amounts if the defendant had relatively little gain (in relation to) the loss. In this district, we have a very large amount of Medicare Fraud cases. In many cases, drivers (individuals who transport "patients" to and from the clinics for "treatment") as well as some patients are held accountable for the entire amount of the loss. The probation department finds this issue troublesome as the drivers and patients are often held accountable for the same amount of loss as many of the individuals who have set up the clinics, the doctors and the office managers who do the billing to the insurance companies. Often times our district sees cases wherein the individual was merely standing around and was approached by another individual and asked if they had "a red white and blue card?" (referring to their Medicaid card). Should that person then be held accountable for the same amount of loss as the individual who is orchestrating the scheme? The individuals who are at the low-end of the scheme receive very little, if any monetary gain, in stark comparison to the doctors and other individuals involved. This issue has been discussed time and time again amongst probation officers, supervisors and the bench. The probation department would whole heartedly support an amendment that limits the exposure of individuals to high guidelines based upon the entire loss/fraud amount. In particular, it is agreed that the Commission insert a new specific offense characteristic in § 2B1.1, for example, "If the defendant's gain resulting from the offense did not exceed $10,000.00, the adjustment from application of subsection (b)(1) shall not exceed 14 levels."

2. Proposed Amendment: Drugs

Synopsis of the Proposed Amendment: Part A of the amendment sets forth issues for comment regarding offenses involving N-Benzylpiperazine (BZP) and whether the Commission should amend the guidelines applicable to offenses involving BZP, such as by providing a specific reference for BZP in the Drug Quantity Table located in § 2D1.1. The Commission further asks whether it should base the penalties for BZP on the penalties for MDMA (Ecstasy) or on the penalties for amphetamine or on some other basis. Part B sets forth a proposed amendment that would create a "safety valve" provision in the guideline for chemical precursors, under the provisions of § 2D1.1. This would parallel the "safety valve" provision already in place in § 2D1.1.

Probation Department's Comment:

The probation department has requested clarification from the Commission as to how BZP should be classified for the last two amendment cycles. As stated above, Benzylpiperazine (BZP) is listed as a Schedule I controlled substance in Title 21, Section 1308.11 of the Code of Federal Regulations. There appears to be at least two schools of thought as it relates to BZP. The first is that BZP is most closely related to amphetamines or methlylphenidate, which is the scientific name for Ritalin. The other school of thought is that BZP should be considered most analogous to methylenedioxymethamphetamine (MDMA), which is more commonly referred to as ecstasy, if the BZP is tested and found to contain the hallucinogenic property, 1-3-trifluoromethylphenyl-piperazine, "TFMPP". TFMPP reportedly produces a stimulant and hallucinogenic effect as opposed to just a stimulant effect when BZP is administered alone. There are several expert opinions that, it is only when one mixes BZP with TFMPP does it rise to the level of MDMA. Many defendants who are arrested in the importation, distribution or transportation of BZP in the Eastern District of Michigan are often under the (false) impression that the drug is, in fact, ecstasy.

On March 6, 2010, United States District Judge Julian Abele Cook, Jr. entered an opinion, in *United States v. Arthur Beckley,* wherein the Court determined that, after several hearings from different experts on the subject, the drug, BZP is most closely related to the controlled substance MDMA. It is the probation department's understanding that this issue is currently on appeal before the 6th Circuit awaiting a determination following Arthur Beckley's sentence. It is noted that the 8th Circuit has upheld the district Court's conclusion that BZP is most closely related to MDMA. At this time, the probation department would again request that the drug, BZP be specifically referenced in § 2D1.1, rather than directing the Court to determine the base offense level using the marijuana equivalency of the "most closely related controlled substance". It appears that BZP, on its face, without the added TMFPP is most closely related to methlylphenidate (Ritalin), however, in the case in which the BZP has the TMFPP additive, it appears most closely related to MDMA.

3. Proposed Amendment: Human Rights

Synopsis of Proposed Amendment: Part A of the proposed amendment addresses cases in which the defendant is convicted of an offense that Congress has indicated is a "serious human rights offense," including offenses under 18 U.S.C. § 1091 (Genocide), 2340A

(Torture), 2441 (War Crimes), and 2442 (Recruitment of Use of Child Soldiers). Offenses involving Genocide are currently referenced in § 2H1.1 (Civil Rights). Offenses involving Torture are found at §§ 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A2.1 (Assault With Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), and 2A4.1 (Kidnaping, Abduction, Unlawful Restraint). Offenses involving War Crimes are not currently referenced in Appendix A. Offenses involving Child Soldiers are currently referenced in § 2H4.1 (Peonage, Involuntary Servitude, Slave Trade, and Child Soldiers).

The Commission presents two options for cases in which the defendant was convicted of such offenses:

Option 1: Establishes a new Chapter Two offense guideline at § 2H5.1 (Human Rights). The new guideline would consolidate the varying base offense levels and specific offense characteristics that currently account for the aforementioned offenses. Options for base offense levels would be 18 for offenses involving genocide and 24 for other offenses. Enhancements for serious bodily injury, sexual exploitation, abduction, condition of servitude; number of victims; if death resulted; and if the defendant was a public official or military official or the offense was committed under the color of law or military authority are also being considered. Option 1 also amends Appendix A to reference each of these offenses of conviction to the new guideline and makes conforming changes to other offense guidelines.

Option 2: Establishes a new Chapter Three adjustment at § 3A1.5 (Human Rights) that applies if the defendant [was convicted of]/[committed] a serious human rights offense. The proposed guideline provides an enhancement of between 4 and 12 levels and a minimum offense level of between 24 and 32. The proposed guideline also requires that the defendant be placed in Criminal History Category V or VI.

Probation Department's Comment:

The Commission is seeking comment on whether Option 1 or Option 2 would provide appropriate guideline penalties for cases involving human rights offenses. Should the Commission adopt Option 1 or Option 2, or neither? It is the probation department's option that neither Option 1 or Option 2 appears appropriate in this case. Option 1 consolidates all Human Rights Offenses and offense characteristics. Consolidating each of the Chapter 2 offenses extinguishes the disparity in the base offense levels and offense characteristics already accounted for in the current guidelines.

Section § 2H1.1 currently provides a range of lower base offense levels (for offenses with lower statutory maximum terms of imprisonment). These include offenses such as, "directly and publicly incite another" to violate offenses such as genocide and allows cross-reference to the applicable guideline and base offense level when the offense is

more serious, such as the actual act of genocide. The guidelines under §§ 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A2.1(Assault With Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), and 2A4.1 (Kidnaping, Abduction, Unlawful Restraint) again provide for varying range of base offense levels and specific offense characteristics in accordance with the count of conviction and conduct of the offense. Such guidelines provide for additional offense characteristics including the use of a firearm, payment or offer of money, violations of court protection orders, etc. This is also true with offense involving child soldiers, slave trade, involuntary servitude, and peonage, which are found under Section § 2H4.1. The base offense level provides varying levels in accordance with the count of convictions and relevant specific offense characteristics, that may or may not be relevant in other human rights violations. Consolidating each of these violations/guidelines into a single Chapter 2 guideline would guarantee increased sentences based on increased base offense levels, not take into account all of the relevant offense characteristics that the current guidelines do, and result in similar guideline range for distinctly different types of conduct.

The probation department also does not believe that Option 2 is appropriate in this case. Simply requiring significant increases of 4 to 12 levels for an enhancement, minimum offense levels of between 24 and 32, and increasing all criminal history categories to V or VI would guarantee that all or most of these offense would receive increased guidelines ranges, increases sentences, and certainly face statutory maximum terms of imprisonment in most cases, even when there are low numbers of victims involved and/or minimal personal damage.

Instead, the probation department proposes Option 3, that is, to create a new Chapter Two guideline for offenses involving War Crimes, which is currently not referenced in Appendix A. Like the sections identified above, the new guideline would include ranges of conduct including torture, cruel and inhumane treatment, performing biological experiments, murder (possible cross-reference to § 2A1.1), mutilation and maiming, differing levels of bodily injury, rape, sexual abuse, taking hostages specific to war crimes, number of victims involved, if the defendant was a public or military official (suggested in Option 1), and the offense was committed under color of law or color of military authority (suggested in Option 1).

Part B of the proposed amendment addresses cases in which the defendant has been convicted of immigration or naturalization fraud by the defendant who had committed a serious human rights offense. The proposed amendment adds a new specific offense characteristic to §§ 2L2.1 and 2L2.2. The new specific offense characteristic provides an enhancement of between 10 and 18 levels if the offense reflected an effort to avoid detection or responsibility for a serious human rights offense.

Probation Department's Comment:

An enhancement would be appropriate in cases involving immigration and naturalization fraud by the defendant who had committed a serious human rights offense. However, an enhancement of at least 10 levels would guarantee that many offenders would be subject to the statutory maximum term of imprisonment or approached similar sentences when a sentence that is sufficient, but not greater than necessary could be imposed through a departure or sentencing variance.

Part C of the proposed amendment sets forth issues for comment on Human Rights offenses.

The Commission presents several issues for comment, the Issues for Comment are as follows:

1. General comment on human rights offenses and human rights offenders and how these offenses and offenders compare with other offenses and offenders. For example, what activities are involved in human rights violations? What are the characteristics of the offenders involved in these activities? What harms are posed by these activities.

Probation Department's Comment:

Human rights are considered the fundamental rights which a person is inherently entitled. They apply everywhere to everyone. Activities involved in human rights violations include, but are not limited to, mental/physical abuse, injury, punishment, and/or restraint and deny access to basic necessities and/or services, among others. Characteristics include; benefit to the offender at the expense of many including the individual(s), families, and others. Other offenders that were not included for purposes of the proposed amendments to the sentencing guidelines include child predators/sex offenders.

2. Do the guidelines provide appropriate guideline penalties for cases involving human rights offenses? If not, what amendments are appropriate to ensure that the guidelines provide appropriate guideline penalties for such cases? What penalty structure or structures should the guideline provide for human rights offenses, and what penalty levels should the Commission provide? In considering whether the penalty levels and penalty structures for human rights offenses are appropriately proportioned to other offenses, what are the other offenses to which the human rights offenses should be compared?

Probation Department's Comment:

The probation department feels that, yes, the guidelines as currently written provide appropriate penalties for cases involving human rights. The current guidelines and their structures include specific offense characteristics relative to particular harms involved. The Commission may wish to consider sex offenses to human rights violations to determine proportionality, but consider that many courts have ruled the guidelines for such offenses as possession of child pornography to be too high. The Commission seeks comment on what guidance should be given to courts in determining whether a particular offense is, or is not, a human rights offense for purposes of Parts A and B of the proposed amendment. Should the Commission add other offenses or categories of offenses and, if so, what offenses or categories of offenses?

Consistent with the probation department's comments in Part A, the Commission should add another guideline for offenses involving war crimes. Consolidation of other human rights violations is not necessary and the addition of a Chapter 3 adjustment would only serve to significantly increase the applicable guidelines in these cases approaching, or in some cases, exceeding statutory maximum sentences. The probation department believes that offenses involving the sexual exploitation of a minor child is a human rights violation.

3. The Commission seeks comment on aggravating and mitigating circumstances in cases involving human rights offenses. In particular, Direct Prosecution of Human Rights Offenses, Immigration and Naturalization Fraud Involving Human Rights Offenses and Amnesty.

Probation Department's Comment:

Aggravating and mitigating circumstances involving human rights violations that should be considered include conduct already considered in Chapter 5, including mental and emotional conditions, psychological injury, extreme conduct, coercion or duress, and criminal purpose. However, one aggravating factor the Commission may consider is the defendant's relationship or link to any terrorist organization in the planning, commission, or concealment of the human rights violation(s).

4. Proposed Amendment: Sentence Imposed in § 2L1.2:

Synopsis of the Proposed Amendment: The proposed amendment responds to a circuit conflict over the application of the term "sentence imposed" in § 2L1.2 (Unlawfully Entering or Remaining in the United States) when the defendant's original "sentence imposed" was lengthened after the defendant was deported. The proposed amendment resolves the conflict by amending the definition of "sentence imposed" in Application Note 1(B)(vii). The Commission presents two options for discussion. The first option follows the approach of several districts including the Fifth, Seventh, and Eleventh and specifies (1) that a post-revocation sentence increase is included, "but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States." The second option follows the approach of the Second Circuit and specifies (2) that a post-revocation sentence increase is included "without regard to whether the revocation occurred before or after the defendant previously was deported or unlawfully remained in the United States."

Probation Department's Comment:

The United States Probation Department for the Eastern District of Michigan suggests that the first option is the appropriate choice in this case. In many cases, probation or parole revocations are based upon, or due in large part to the fact that the defendant was removed or deported from the United States. Courts have the authority to impose the maximum sentence permitted by law for the probation or parole violation with an order that the sentence will run concurrent to the deportation and may not understand the impact such a sentence would have on the defendant if he re-enters the United States and is charged with another illegal re-entry offense. These individuals would be subjected to a higher base offense level than a person, in a similar circumstance, with similar criminal history, but received, in essence, a sentence of "time served" or was discharged from their previous probation or parole case as a result of the removal or deportation. Further, the defendant may not even be aware that such a sentence would significantly increase the Base Offense Level, the guideline range and possibly, the ultimate sentence imposed if the defendant was not put on notice prior to their removal or deportation. In addition, the overall impact of Option Two would increase the sentence in many of these cases. This appears contrary to the decision to eliminate supervised release for these offenders, as evidenced by the 2011 amendment to The Guidelines Manual. Also, as a result of *Padilla v. Kentucky*, criminal defense attorneys must advise their non-citizen clients about the immigration consequences of a guilty plea. Therefore, the first option appears appropriate in this case and utilizes only the original sentence imposed or revocation prior to the removal or deportation.

5. Proposed Amendment: Categorical Approach

Synopsis of Proposed Amendment: The proposed amendment presents options for specifying the types of documents that may be considered in determining whether a particular prior conviction fits within a particular category of crimes for purposes of specific guideline provisions (for example, determining whether a defendant's prior conviction for non-residential burglary under a particular state statute qualifies as an "aggravated felony", under the provisions of § 2L1.2(b)(1)(C).

Probation Department's Comment:

The proposed amendment presents two options for specifying the types of documents that may be considered for purposes of the guidelines in determining whether a particular prior conviction fits within a particular category of crimes. Option 1 would only apply to determinations under the guidelines for Illegal Re-Entry (§ 2L1.2) and Option 2 would apply throughout the Guidelines Manual and in any case in which the nature of the prior conviction is a disputed factor. There are two Supreme Court case decisions, *Taylor v. United States* and *Shepard v. United States,* which set forth a "categorical approach" for determining whether a particular prior conviction fits within a particular category of crimes. It is the probation department's opinion that Option 2 is the appropriate approach to this amendment. Option 2 would apply the "Categorical Approach" throughout the Guidelines Manual and not just focus on Illegal Re-Entry cases. Focusing on only Re-Entry cases as in Option 1, appears to carve out a specific guideline provision for a specific set of defendant's, when, in fact, the Guidelines Manual should be uniform. Furthermore, Option 2 also seems to be the most in line with the Supreme Court decisions cited above.

Furthermore, the Commission presents several options, with regard to the various documents to be considered in determining whether a prior conviction falls within a Category of Offense and in determining whether a prior conviction qualifies as a "crime of violence" or "aggravated felony", beyond the fact of conviction and the statutory definition of the prior offense. The Commission states, under Option C (which incorporates Option A), that the Court may only look to the following documents: "the terms of the charging document, the terms of the plea agreement or transcript of the plea colloquy between the judge and the defendant, any explicit factual finding by the trial judge and other comparable judicial record of this information" and "any other parts of the record from the prior conviction, provided that the information in such other parts of the record has sufficient indicia of reliability to support its probable accuracy."

6. Proposed Amendment: Driving While Intoxicated

Synopsis of Proposed Amendment: This proposed amendment responds to an application issue regarding when a defendant's prior sentence for driving while intoxicated or driving under the influence (and similar offenses by whatever name they are known) is counted toward the defendant's criminal history score. There appears to be a difference among the Circuits on how these offenses are scored.

This amendment was formulated to address the circuit split on Application Note 5 to § 4A1.2 which provides Sentences for Driving While Intoxicated or Under the Influence-Convictions for Driving While Intoxicated or Under the Influence (and similar offenses by whatever name they are known) are counted. Such offenses are not minor traffic violations within the meaning of § 4A1.2(c). Section 4A1.2(c) states that minor traffic offenses are not counted in criminal history calculations.

The 7th and 8th Circuits have ruled that Driving While Intoxicated offenses are always counted, but the 2nd Circuit held Application Note 5 to be ambiguous, and allows for an exception for these offenses under § 4A1.2(c)(2), where they may or may not be counted in criminal history calculations.

The proposed amendment amends Application Note 5 to clarify that such a sentence is always counted, without regard to how the offense is classified and without regard to whether any exception under § 4A1.2(c)(1) or (2) applies.

Probation Department's Comment:

This amendment is in line with previous rulings in the United States District Court for the Eastern District of Michigan, which has consistently found that such offenses are to be scored in criminal history. These offenses are more serious in nature than other traffic offenses. Thus, the proposed amendment is supported.

7. Proposed Amendment: Burglary of a Non-Dwelling

Synopsis of Proposed Amendment: This proposed amendment responds to differences among the circuits on when, if at all, burglary of a non-dwelling qualifies as a crime of violence under § 4B1.2 (Definition of terms used in § 4B1.1) such as Armed Career Criminal, or Career Offender. Three options are proposed. Option 1 states that all burglaries are crimes of violence. Option 2 specifies that burglary of a non-dwelling is not a crime of violence unless it has as an element the use, attempted use, or threatened use of physical force against the person of another. The commission also inquires as to whether they should consider a third option, ie: to specify that whether burglary of a non-dwelling is a crime of violence depends on the individual circumstances of the case.

The 4th, 10th and 11th Circuits have held that burglary of a non-dwelling is never a crime of violence, while the 1st, 5th, 6th, 7th and 9th Circuits have looked into the circumstances of each case.

The commission also inquires if they should address the definition of crime of violence under § 2L1.2 (Unlawfully Entering or Remaining in the United States), which presents a similar issue.

Probation Department's Comment:

Regarding the proposed options addressing the inclusion of burglary of a non-dwelling in the definition of crime of violence under § 4B1.2, it is recommended that the commission consider the third option. Option three directs the court to consider the individual circumstances of each case. The recommendation is that each case be considered using the categorical approach as recommended in previously in this document, when discussing the proposed amendment. Burglary of a non-dwelling may include the presence of victims during the offense, which increases the potential for violence. The potential of the presence of victims and the potential of violence are part of the reasons that burglary of a dwelling is considered a crime of violence.

The probation department also recommends a similar amendment to the definition of crime of violence under § 2L1.2, for the same reasons, and for consistency. As stated previously, the Guidelines Manual should be uniform throughout.

8. Proposed Amendment: Multiple Counts (5G1.2)

Synopsis of Proposed Amendment: This proposed amendment responds to an application issue under § 5G1.2, regarding the applicable guideline range in a case in which a defendant is sentenced on multiple counts; one of which has a mandatory minimum greater than the minimum of the otherwise applicable guideline range. In such cases, circuits differ over whether the guideline range is affected only for the count which carries the mandatory minimum, or for all counts in the case.

Probation Department's Comment:

The probation department does not support this amendment. The 5th Circuit has held that the mandatory minimum carries over to all convicted counts, as applied in *United States v. Salter*, while the 9th Circuit and similarly, the District of Columbia Circuit have held that only the count requiring the mandatory minimum is effected, and the original guideline range stands for all other counts. The proposed amendment by the Sentencing Commission follows the approach taken by the 5th Circuit Court. Furthermore, it amends § 5G1.2 to clarify that the court is to determine the total punishment (ie: combined length of the sentences to be imposed) and impose that total punishment on each count, except to the extent otherwise required by law. The proposed amendment amends the commentary section and clarifies that when any count involves a mandatory minimum sentence that restricts a defendant's guideline range, the guideline range is restricted as to all counts. Finally, the proposed amendment revises the commentary section to clarify that in a case where the defendant's guideline range was affected by a mandatory minimum, at resentencing, if the mandatory minimum no longer applies, the defendant's guideline range shall be determined without regard to the mandatory minimum.

The starting point of any sentencing hearing is a properly calculated guideline range. At the time of sentencing for cases with multiple counts, the guidelines must be calculated prior to the inclusion of the mandatory minimum. It is the probation department's thought that imposing a sentence within the guideline range for all counts not subject to a mandatory minimum term, would not impact the term served by the defendant, due to the imposition of the mandatory minimum on one or more of the counts. In cases in which the count with the mandatory minimum is overturned, the defendant would not have to be returned for resentencing, as a guideline sentence was imposed on the remaining counts. This would result in the savings of time and money for the courts, without a negative impact on the defendant.

9. Proposed Amendment: Rehabilitation

This proposed amendment responds to *Pepper v. United States* *131 S.Ct. 1229 (2011)* which held that a defendant's post-sentencing rehabilitation efforts may be considered when the defendant is resentenced after appeal, and may support a downward variance. Currently, § 5K2.19 states that post-sentencing rehabilitative efforts, even if exceptional, are not a basis for a downward departure at resentencing.

The Commission presents two options for consideration. Option 1 would repeal § 5K2.19. Option two would amend §5K2.19 to provide that rehabilitative efforts, whether pre- or post-sentencing, may be relevant in determining whether a departure is warranted, if the effort, individually or in combination with other circumstances, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Option 2 also sets forth a two part test with factors for the court to consider consistent with *Pepper v. United States* and *Gall v. United States* *(552 U.S.38, 57-58 (2007).*

Probation Department's Comment:

The Probation Department would favor Option 1, to repeal § 5K2.19. This would be consistent with the fact that post-sentencing rehabilitative efforts are considered for resentencing under the amended sentencing guidelines for crack cocaine. In addition, it gives the court more discretion. Option 1 also limits the court to considerations of a downward departure or variance, whereas Option 2 would provide the court with an opportunity for a downward or upward departure or variance. Rehabilitative efforts may reduce recidivism, and thus affect the purposes of sentencing including the protection of society and deterrence of further criminal conduct.

10. Proposed Amendment: Miscellaneous

Synopsis of Proposed Amendment: This is a proposed multi-part amendment that responds to miscellaneous issues arising from recently enacted legislation.

Part A responds to the Cell Phone Contraband Act of 2010 which amended 18 USC § 1791, making it a Class A misdemeanor to provide a mobile phone or similar device to an inmate, or for an inmate to possess a mobile phone or similar device. Other Class A misdemeanors in the same statute involve inmate possession of currency, alcohol and certain controlled substances. Option 1 proposes a base offense level of 13 under § 2P1.2, which is the base offense level assigned to possession of a weapon, ammunition, LSD,

PCP, methamphetamines or a narcotic drug. Option 2 places possession of a mobile phone at a base offense level of 6 under § 2P1.2, along with alcohol, currency, or a controlled substance (other than LSD, PCP, methamphetamines or a narcotic drug).

Probation Department's Comment:

It is the probation department's belief that the possession of a mobile phone within a correctional institution is viewed as a serious threat. It may be used from within the institution to facilitate an escape, to coordinate gang activities, to arrange for drugs to be brought into the facility, or to arrange for violence toward another inmate's family, as a means or retaliation, or extortion. Therefore, it is believed that it should be considered as serious as a weapon or serious controlled substance as presented in Option 2. It is noted, however, that a Class A misdemeanor has a maximum penalty of one year. A base offense of 13 could result in a guideline range that exceeds 12 months. With or without acceptance of responsibility, other than those in criminal history categories I and II, there would be no benefit for a plea as the sentence would be capped at 12 months. A base offense level of 6, with a two level reduction for acceptance would result in a guideline range of 0 to 6 months for those in Criminal History Category I, II, or III; with up to 12 months for a criminal history category IV, thus Option 1 is recommended.

Part B responds to the Prevent All Cigarette Trafficking Act (PACT Act) of 2009, which raised the criminal penalty from a misdemeanor to a three year felony for a knowing violation of the laws governing the sale, shipment and taxation of cigarettes and smokeless tobacco. The proposed amendment amends Appendix A (Statutory Index) to reference the offense to § 2T2.1 (Non-payment of Taxes), with the possibility of an additional reference to § 2T2.2 (Regulatory Offense). The PACTS Act also created a new class A misdemeanor which prohibits the knowing shipment of cigarettes and smokeless tobacco through the United States mail. The proposed amendment amends Appendix A (Statutory Index) to reference § 2T2.1 or § 2T2.2.

Probation Department's Comment:

The probation department believes that the new felony offense should be referenced in § 2T2.1, in which the base offense is based on the tax loss. This is consistent with other financial crimes, such as other offenses categorized under § 2B1.1, and § 2T2.1, in which the offense level is driven by the amount of loss or fraud.

Part C responds to the Indian Arts and Crafts Amendments Act of 2010, which reduced the penalties under 18 USC 1159 (Misrepresentation of Indian Produced Goods and Services). The maximum term of imprisonment had been five years for a first offense, and 15 years for a repeat offender. The Indian Arts and Crafts Amendments Act of 2010 reduced the maximum penalty to one year, for a first offender when the value of the goods is less than $1,000.00. The original penalty structure remains in effect, with this one exception. Part C also addresses an existing offense, 18 USC 1158 (Counterfeiting Indian Arts and Crafts Board Trademark), adding the offense to Appendix A (Statutory Index) and Part D responds to Public Law 111-350 which enacted certain laws relating

to Title 41: Public Contracts. Two criminal offenses, 41 USC § 53 and 423 were given new Title 41 section number. The substantive offenses and their related penalties did not change. Clerical changes were made to Appendix A (Statutory Index).

Part E responds to the Animal Crush Video Prohibition Act of 2010, which substantially revised the criminal offense at 18 U.S.C. § 48 (Animal crush videos). The statute bans the creation and distribution of obscene animal torture videos that show the intentional crushing, burning, drowning, suffocating, and impaling of one or more non-human mammals, birds, reptiles or amphibians. These videos typically involve scantily-clad women or girls often using stiletto heeled shoes to inflict the torment of the above noted animals to satisfy a sexual deviancy for viewers. The maximum statutory penalty for a section 48 offense is seven years imprisonment.

Probation Department's Comment:

The proposed amendment references offenses found under 18 U.S.C. § 48 to § 2G3.1. That guideline provides for a base offense level of 10 and enhancements for distribution (ranging from 2 levels to 5 or more levels), certain conduct with intent to deceive a minor into viewing material that is harmful to minors (2 levels), use of a computer (2 levels), and material that portrays sadistic or masochistic conduct or other depictions of violence (2 levels). It is the probation department's position that the provisions found in § 2G1.3 adequately account for offenses found under the provisions of 18 U.S.C. § 48, and reflects the very serious nature of this offense.