United States
Sentencing Commission

Practitioners' Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 15, 2006

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

Re: Comment on Omnibus Proposals for 2006 Amendment Cycle

Dear Judge Hinojosa:

The Practitioners' Advisory Group ("PAG") submits the following comments to the Commission's January 25, 2006 notice, pursuant to 71 FR 4782-4804, proposing various sentencing guideline amendments for the 2006 amendment cycle. As always, PAG appreciates the opportunity to formally participate in this process.[1]

1. Proposed Amendments to Immigration Guidelines

PAG submits that the Commission's proposed amendments to the immigration guidelines are not appropriate at this time, but rather, should await any Congressional action. In the alternative, we address these proposed amendments and provide you with our comments.

a. Interim Staff Report Fails To Provide a Compelling Basis For Immigration Guideline Amendments at this Time

The Interim Staff Report recommends across-the-board increases in the severity of immigration sentences, based primarily upon its perception that immigration reform is a high Congressional priority. The Interim Report cites an increase in illegal immigration, as well as an alleged increase in violence associated with it, as underlying Congressional interest in additional immigration reform measures. This Report, however, is deficient in several important ways.

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[1] PAG wishes to thank its members Pat Mullin, Mary Price, Tim Hoover, David Debold, Barry Boss, Amy Baron-Evans, Anne Blanchard, Margy Love, Richard Crane, and Steve Jacobson, who made various contributions to this submission, as well as members Lyle Yurko and Tom Dawson, who made significant contributions to PAG's February 23, 2006 comment on the Commission's proposed emergency steroids amendments, referenced herein.

First, the Report repeatedly references H.R. 4437 which, among other things, would make illegal presence in the United States a federal crime by increasing the statutory maximum sentences from six months to one year and a day. The House measure would also increase the severity of penalties for other immigration-related offenses. At this juncture, however, this House Bill has not yet received Senate approval. The Senate Judiciary Committee only began its markup of a separate immigration bill this month, and no Senate vote will occur on any bill until March 27 at the earliest; even if a Senate bill passes, it would still need to be reconciled with H.R. 4437 in conference. The Senate bills under consideration appear to include Senator (and Judiciary Chair) Arlen Specter's proposal that sentencing enhancements be based not on an "aggravated felony," but on the length of the sentence for the prior conviction; moreover, under his bill, prior convictions would need to be charged in the indictment and proved beyond a reasonable doubt. These provisions would differ markedly from the Commission's proposals.

It makes no sense for the Commission to rely upon incomplete, unenacted legislation, passed in the House but awaiting Senate review and amendment, as a basis for ratcheting up immigration sentences. Rather, the Commission should utilize its expertise in crafting amendments to existing immigration guidelines only after Congress speaks again on this issue. The immigration issues in Congress are complex, and the potential tradeoffs palpable. The Commission should not endeavor to read the tea leaves, but instead should await a final word from Congress that might (or might not) then trigger the Commission's involvement.

The Interim Staff Report also fails to proffer meaningful evidence that violence is routinely associated with violation of immigration offenses. There is, in fact, only one reference in the Report to immigration-related violence – a segment of a television program aired January 5, 2006 on CNN. One would have expected the Interim Staff Report to contain far more compelling evidence of immigration-related violence before advancing its position that such violence is an underlying basis for increasing the severity of immigration-related sentences.

Perhaps most significant is the history of increased immigration sentences since the inception of the guidelines. Since 1987, there have been 25 separate amendments to the immigration guidelines. *See* U.S.S.G. § 2L1.1 (Amendments 35, 36, 37, 192, 335, 375, 450, 543, 561); U.S.S.G. § 2L1.2 (Amendments 38, 193, 375, 523, 562, 632, 637, 658); U.S.S.G. § 2L2.1 (Amendments 195, 450, 481, 524, 544, 563); U.S.S.G. § 2L2.2 (Amendments 39, 196, 450, 481, 524, 544, 563, 671). Many of these amendments have increased the severity of sentences meted out for immigration crimes.

For example, re-entry cases under § 2L1.2 were originally set at a base offense level 6. In year 1988, without explanation, the re-entry's base offense level was raised to level 8. In 1989, the following year, yet another amendment was imposed that distinguished between illegal re-entry and illegal re-entry after deportation for a prior felony. A specific offense characteristic was created that imposed a 4-level increase for a

defendant who had previously been deported after a felony conviction for a crime other than an immigration offense.

In 1991, the concept of aggravated felonies was introduced into the immigration guideline scheme, with a 16-level increase for defendants previously deported as aggravated felons. In 1995, yet another amendment was passed which granted further potential for increased sentences for re-entry offenses. Thus, within an 8-year span, there had been 4 separate amendments that each increased the severity of sentences for re-entry cases – often substantially. The guidelines for other immigration offenses, including smuggling and document offenses, also have reflected similar guideline increases.

PAG does not believe that the purposes of sentencing under 18 U.S.C. § 3553(a) were advanced through these increased immigration guidelines. Between years 1987 and 1993, the federal courts saw somewhere between 1,000 and 2,000 immigration cases annually. Since then, the rate of immigration cases in the federal courts has exploded. In year 2003, 15,066 immigration convictions represented 21.9% of all guideline cases. In year 2004, the percentage of immigration cases rose further to 22.5% of all federal sentences. According to the Interim Staff Report at page 2, Post-Booker 2005 data (January 12, 2005 through November 1, 2005) indicates that 23.1% of all guideline cases sentences were immigration offenses.

Though arguments can be made that increased enforcement and fast-track programs account for a substantial increase in immigration sentences, the reality is that the increased severity of the immigration guidelines has failed to result in deterrence to criminal conduct, nor has it protected the public from further crimes as contemplated by Congress in enacting 18 U.S.C. § 3553(a)'s sentencing purposes.

PAG therefore believes that the Interim Staff Report provides no compelling basis for an increase in the severity of immigration sentences as contemplated in many of the proposed amendments. The Report's reliance upon H.R. 4437 is misplaced; it also fails to provide any significant evidence of increased violence and immigration offenses. The Report further ignores the 25 amendments to the guideline amendments enacted during the past 19 years that have already had the cumulative impact of significantly increasing immigration sentences.

PAG submits that the Commission should await final Congressional action on the immigration laws before unilaterally considering additional changes to these guidelines.

b. Specifically-Proposed Immigration Guideline Amendments

Should the Commission decide nevertheless to proceed with consideration of the proposed immigration amendments, we request that the following comments be considered:

§ 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien)

A. National Security Concerns

The Commission proposes two options for a proposed amendment that would increase sentences for defendants convicted under 8 U.S.C. § 1327. Option 1 would provide a base offense level of 25 where the crime involved an alien who was inadmissible because of "security or related grounds," as defined in 8 U.S.C. § 1182(a)(3). Option 2 would provide a specific offense characteristic with an increase somewhere between 2-6 levels for smuggling, transporting, or harboring an alien who was inadmissible because of security or related grounds, was convicted under 8 U.S.C. § 1327, or some other statute.

We are concerned, among other things, by the very broad sweep of both options. First, we note that § 1182(a)(3) encompasses, among other persons, aliens whom the Attorney General "knows, or has reason to believe" seek to enter the United States to engage in some form of security-related activity. Implementation of these guidelines would grant enormous discretion to the Justice Department in determining which aliens may be subject to significantly increased penalties. For example, Option 2 could result in an 87-108 month guideline level for a defendant suspected of smuggling, transporting, or harboring a suspected security risk.

Also, Option 2's 2-6 level increase may be triggered solely upon relevant conduct and not require that the crime of conviction involve a security risk. Given that fact, PAG believes a heightened standard of proof such as a "beyond a reasonable doubt" standard should be utilized in determining whether an increased level is appropriate. It should be noted that the guidelines contemplate such a higher standard in addressing hate crimes or vulnerable victim enhancements under § 3A1.1. A similar, higher standard of proof should be applied here as well.

B. Number Of Aliens

The Commission's proposal also has two options to amend § 2L1.1(b)(2) concerning the number of aliens involved in an immigration offense. Option 1 maintains the current table under § 2L1.1, which provides a 3-level enhancement for offenses involving 6-24 aliens, a 6-level enhancement for offenses involving 25-99 aliens, and a 9-level enhancement for 100 or more aliens. Option 1's proposal, which further has an additional 3-level increase for offenses involving 200-299 aliens and an additional 6-level increase for offenses involving 300 or more aliens, has no support in the available data. As noted at page 7 of the Interim Report, only 1.4% of all year 2005 post-*Booker* cases involved 100 or more aliens. In egregious cases, a judge can always depart upward from the applicable guideline range. There is therefore no reason then to codify the unusual, additional punishments as is being proposed in this option.

Nor does the Interim Report provide justification for an additional 3-level increase at the lower end of the table as contained in Option 2. There has already been at least a 50% increase in sentencing based on the number of aliens, which was adopted in 1997. No good reason is presented to again increase these sentences. Moreover, as noted at page 8 in the Report, relevant conduct allows a court to include not only the number of aliens smuggled during the offense of conviction but also those smuggled during other smuggling operations related to a common scheme or plan. Any concerns regarding an ongoing course of conduct, then, can be met through application of the § 1B1.3 relevant conduct provisions and does not require the proposed additional 3-level increase at the lower end of the table.

C. Endangerment Of Minors

The proposed amendment also presents two options and an issue for comment relating to the smuggling of alien minors. Option 1 provides a potential 6-level increase for the smuggling of a minor unaccompanied by a parent. Option 2 provides a graduated increase based upon the age of the alien minor, with an additional 4-level increase for minors under the age of 12 and a 2-level increase where an unaccompanied minor has attained age 12 but not yet attained age 16.

We submit that the Interim Report fails to provide compelling reasons for a guideline increase for unaccompanied minors. The provisions of § 3A1.1(b) already provide a guideline increase where vulnerable victims are involved. Smuggled unaccompanied minors, where appropriate, would provide a basis for such increased sentences under § 3A1.1(b). Moreover, Judges may upwardly depart outside the applicable guideline range in egregious cases. Therefore, this amendment is unnecessary.

D. Offenses Involving Death

PAG also finds no justification for the proposed amendment's additional 2-level increase through a new specific offense characteristic under U.S.S.G. § 2L1.1(9), with cumulative enhancements where both bodily injury and death occur as well as a cross-reference to § 2L1.1(c)(1) which cover deaths other than murder. As noted at page 12 of the Interim Report, only slightly over 1% of all § 2L1.1 cases involve an increase for an offense involving death. A better course of action would be to maintain the current 8-level increase for death under § 2L1.1(6)(4) and permit judges to upwardly depart from the applicable guideline range for egregious cases. If the Commission considers adopting this proposal despite our objection, the new guideline at least should be modified to make clear that any separate sentencing enhancements for bodily injury and death can only be applied where two separate victims exist; otherwise, this would be improper double-counting.

E. Abducting Aliens, Or Holding Aliens For Ransom

A new specific offense characteristic is proposed where an alien is kidnapped, abducted, or unlawfully restrained for a period of time. In this proposed amendment, there is a 4-level increase in the base offense level with a minimum level of 23. It must be noted, however, that this course of conduct is presently criminalized under 18 U.S.C. § 1203, which imposes sanctions up to life imprisonment and, where appropriate, death for hostage-taking. The applicable guidelines for such an offense are found under § 2A4.1.

Therefore, the almost 7½% of all instances involving hostage-taking, cited in a 2005 Immigration Coding Project, are already subject to prosecution under 18 U.S.C. § 1203, with severe potential sanctions. The proposed amendment to § 2L1.1 to cover alien hostage-taking would be duplicative of existing law and is therefore unnecessary.

§ 2L2.1 (Trafficking In A Document Related To Naturalization, Citizenship, Or Legal Resident Status, Or A United States Passport; Et Cetera) and § 2L2.2 (Fraudulently Acquiring Documents Related To Naturalization, Citizenship, Or Legal Resident Status For Own Use; Et Cetera)

A. Number of Documents

The proposed amendment to § 2L2.1 provides two options to amend the specific offense characteristic involving the number of documents and passports involved in the offense. Employing the same model as set forth in the proposed amendment to § 2L1.1, these options create additional increased levels at, respectively, the higher or lower end of the table.

The Interim Report provides no basis for the proposed increase in sentences based upon the number of documents, but rather reiterates at page 15 that document guideline sentencing was first initiated in 1992 to include a specific offense, and was the subject of increased sentencing in 1997. The Interim Report fails to recite any data or other sound reason that supports the proposed increase in severity of punishment based upon the number of documents involved. This amendment should not be approved.

B. Fraudulently Obtaining Or Using U.S. Passports Or Foreign Passports

While we do not dispute the symmetry argument raised by the Commission that the 4-level increase in § 2L2.1(b)(3) (defendant knew that passport and visa was to be used to facilitate the commission of a felony offense other than an offense involving violation of immigration laws) should also encompass fraudulent use of a United States passport to facilitate an immigration crime, there is no compelling justification for the proposed two-level increase where a foreign passport is used. We further concur with the Federal and Community Defender's proposal that a downward adjustment for obviously counterfeit documents be added if this proposal is enacted over our objections, since the

bearer's ability to evade detection or cross international borders will not be significantly enhanced by use of such a document.

§ 2L1.2 (Unlawfully Entering Or Remaining In The United States)

The Commission presents five separate options modifying the current illegal re-entry guideline. Four of these options require the continued use of a 16-level enhancement under § 2L1.2(b)(1)(a), implemented in November 2001.

According to the Interim Report, 49.3% of all "unlawfully entry" or "unlawfully remaining in the U.S." cases were subjected to a 20-year statutory maximum penalty, as their removal was subsequent to a conviction for commission of an "aggravated felony". Of those cases, the majority received the 16-level increase provided under the guidelines.

The initial issue the Commission should address is whether implementing a threefold level increase (eight levels to 24 levels) is warranted in these cases. We find that the proposal set forth by the Federal and Community Defenders, which is similar to the structure of the firearms guideline, presents a more appropriate means of enhancement based upon the nature and number of prior felony convictions.

We are further concerned that the proposed use of the statutory definition of "aggravated felony" in Options 1, 2, and 3 would create the distinct possibility that persons with only a misdemeanor conviction could see their sentences drastically increase, after being deemed an aggravated felon under 8 U.S.C. § 1101(a)(43)(G). A defendant may then be subject to a potential 8-12 level enhancement. In our experience, one of the most difficult (if not impossible) tasks we have ever faced in our practice is to try to rationally explain to any person, much less an immigrant with broken English, how a misdemeanant with no felony restrictions can nevertheless be classified as not only a felon, but also an aggravated felon. In 2001, the Commission at least ameliorated some of the effects of overbroad "aggravated felony" classifications by reducing this enhancement for certain individuals who were deemed aggravated felons under the statute, while reserving the 16-level enhancement for the most serious offenses. Nothing has changed in the past five years. The facts and general principles of proportionality do not warrant drastically increasing the sentences of misdemeanants and other individuals convicted of non-violent offenses.

We further oppose Option 1's reliance upon 18 U.S.C. § 924 for the definition of "drug trafficking offense". While the Interim Report at pages 27-28 reflects the Commission's desire to tie all immigration drug trafficking offenses to the statutory definition, including those cases in which an individual pleads guilty to possession of a controlled substance where the amount involved would reflect trafficking rather than simple possession, there is a growing circuit split over application of the statutory term "drug trafficking," which already impacts upon the guideline application of this statute. In fact, the Solicitor General has urged the Supreme Court to resolve the matter in *Lopez*

v. Gonzalez, No. 05-527 (U.S. Jan. 24, 2006), which addresses this issue. We urge the Commission to defer further action on this issue pending Supreme Court consideration.

As to Option 5 (which creates a significantly higher base offense level and then provides for a possible reduction based on the nature of the prior conviction), we believe that a troubling precedent would be set if this option is adopted, as the burden would lie upon a defendant to justify a reduction by establishing facts relative to a prior conviction. This proposal, even if it could pass constitutional muster (which we doubt), would be unwise. Even beyond the fact that these defendants are likely to have limited English language skills and even more limited understanding of the American legal system that may hinder their ability to find and prove facts about prior convictions, there are the practical limits stemming from even competent and diligent defendant's counsel's inability to run NCIC criminal history checks, or to obtain copies of former prosecutors' or agents' case files – limits that federal prosecutors and their agents would not face, at least to the same degree. Prosecutors have always had this burden of proving prior convictions – and they will continue to have the burden where prior convictions are an element of the offense – including under 8 U.S.C. § 1326(b). The government already has systems in place to allow it to conduct research and meet this long-established burden; defendants' counsel (especially appointed counsel) have few or none. In sum, PAG believes it makes no sense to suddenly shift this burden only in this singular context of immigration sentencing enhancements. Rather, the government should continue to shoulder this burden of proving prior convictions justify higher sentences.

In sum, for all the reasons stated herein, we request that the Commission postpone any further action on these proposed immigration amendments until Congress has affirmatively acted on this issue, and clarified the issues the Commission should consider. Congress, if it does soon enact new immigration legislation, should not then be presented with additional (or even contrary) submissions from the Commission that would then need to be considered anew by Congress before the October 31, 2006 deadline.

2. Proposed Amendments to Firearms Guidelines

a. Introduction

PAG offers the following comments on certain of the proposed amendments to the Guidelines covering firearm offenses. For those proposals on which we do not comment, we join in the positions outlined by the Federal Public and Community Defenders in their March 9, 2006 letter to the Commission.

b. Special Offense Characteristics for Trafficking in Firearms

PAG adopts the comments on this set of proposed amendments made by the Defenders. *See* March 9, 2006 Letter from Jon Sands to the Honorable Ricardo H. Hinojosa, as well as the alternative proposed by the defenders. We share the Defenders' concern about the dissonance between the Commission's proposed language defining

trafficking and that contained in 18 U.S.C. § 921(a)(21)(A-F)&(a)(22) and readily appreciate the risk to defendants whom Congress would not consider traffickers but who would be treated as such by the Guidelines' elastic definition.

c. Stolen and Altered or Obliterated Serial Numbers

The proposed amendment to U.S.S.G. § 2K2.1(b)(4) should be rejected. Whether or not the amendment is adopted, § 2K2.1(b)(4) should be amended to require that the enhancement should apply only if the defendant had knowledge either that the firearm was stolen or that it had an altered or obliterated serial number.

The existing 2-level enhancement for possessing a firearm that is either stolen or has an obliterated serial number is already a strict liability provision, and results in double-counting. The effect is to increase punishment even though, in almost all firearms offenses, the fact that the firearm is stolen or has an obliterated serial number has nothing to do with the offense of conviction, and likely did not make the firearms possession more dangerous or conceal any other crime. That is the obvious effect of current Application Note 8, which provides that the aggravating enhancement applies even where the defendant does not know and has no reason to believe that the firearm was stolen, or that the serial number was altered or obliterated. Absent such knowledge, PAG believes that a felon who possesses a weapon that he does not know is stolen commits no more serious an offense than a felon who possesses a weapon that has not been stolen. Thus, § 2K2.1(b)(4) already works an enhancement without any clear purpose or connection to increased culpability.

With an already shaky basis for the enhancement as it presently exists, the proposed amendment would raise the number of levels for having an altered or obliterated serial number to 4, from 2. There is no plausible justification for raising the enhancement and putting it on par with the large, 4-level specific offense characteristics that actually have some value in appropriately measuring the increased seriousness of the offense, such as § 2K2.1(b)(5). And the only justification offered – that "[t]he 3-level increase reflects the difficulty in tracing firearms with altered or obliterated serial numbers" – is insufficient to support the four-level increase, for several reasons.

First, this "difficulty" in tracing altered firearms appears to be the reason for the current two-level enhancement. It does not justify any particular number of levels for an enhancement beyond a 2-level enhancement, and certainly does not justify a 4-level enhancement, the type typically reserved for particularly aggravating specific offense characteristics.

Second, this "difficulty" does not have any relationship with the federal crime of being a felon-in-possession, or federal gun possession crimes generally, since knowing the serial number does not in any way make proving the offense more difficult or allow an offender to escape detection. A person or felon standing on a street corner with a gun in his waistband is guilty of the offense of possessing a firearm with an obliterated serial

number or being a felon in possession, period.

Third, it is subject to debate whether this "difficulty" even exists. In our experience, the "tracing" of firearms recovered by law enforcement is not a normal or even usual part of federal firearms prosecutions, either by federal authorities or state and local police that make street arrests that are later adopted for federal prosecution. The most that will happen is that the firearm's serial number is entered into an agency database to discover where and when it was manufactured, sold and the like. But rarely is there ever any additional investigation to determine whether the firearm was illegally sold or transferred at a previous point. It simply does not occur. At the same, time, federal law enforcement has a series of tools at its disposal to discover the actual serial number or path the weapon traveled to reach the defendant's hand, clothes or car. These include a cooperation reduction, laboratory work to "recover" the serial number, and old-fashioned investigation techniques (such as the use of informants, witness interviews).

While the Commission should reject the proposed amendment, whatever it does it should add a knowledge requirement to the specific offense characteristic. A knowledge requirement, even under the softer "knew or had reason to believe" standard, will ensure that the purported increased harm from having a firearm with either of these characteristics is applied only where that harm actually bears on the federal offense by the possessor's knowledge of the characteristic at issue.

d. "In connection with" in Burglary and Drug Offenses

The Commission should adopt Option Three, because it is the only option that is consistent with the standard in the clear majority of circuits. This majority-endorsed standard does not permit application of the enhancement (and does not allow an 18 U.S.C. § 924(c) charge to be sustained) where the possession of the firearm is merely coincidental to another felony – even where the other felony is a drug offense. Also, Option Three is the option that accurately reflects the holdings of a clear majority of circuits that a § 2K2.1(b)(5) enhancement cannot be applied in the case of a contemporaneous burglary where firearms are stolen but not otherwise used.

As the Commission's synopsis to the Amendment recognizes, an unquestioned majority of circuits have adopted the standard for applying the enhancement from *Smith v. United States*, 508 U.S. 223 (1993), and interpret the "in connection with" language in U.S.S.G. § 2K2.1(b)(5) consistently with the "in relation to" language in 18 U.S.C. § 924(c). *See, e.g., United States v. Spurgeon*, 117 F.3d 641 (2d Cir. 1997) (per curiam); *United States v. Wyatt*, 102 F.3d 241, 247 (7th Cir. 1996); *United States v. Nale*, 101 F.3d 1000, 1003-04 (4th Cir. 1996); *United States v. Thompson*, 32 F.3d 1 (1st Cir. 1994); *United States v. Routon*, 25 F.3d 815 (9th Cir. 1994); *United States v. Gomez-Arrellano*, 5 F.3d 464 (10th Cir. 1993). This is a rigorous standard that provides:

> So long as the government proves by a preponderance of the evidence that the firearm served some purpose with respect to the felonious conduct, section 2K2.1(b)(5)'s 'in connection with' requirement is satisfied; conversely, where the firearm's presence is merely coincidental to that conduct, the requirement is not met.

Sprugeon, 117 F.3d at 644 (quoting *Wyatt*, 102 F.3d at 247).

The majority of the circuits that have decided the issue also will decline to apply the enhancement when firearms are possessed as the result of a burglary, but are not otherwise used. *United States v. Blount*, 337 F.3d 404, 407-410 (4th Cir. 2003); *United States v. Fenton*, 309 F.3d 825, 826 (3d Cir. 2002); *United States v. Szakacs*, 212 F.3d 344 (7th Cir. 2000); *United States v. McDonald*, 165 F.3d 1032 (6th Cir. 1999); *United States v. Sanders*, 162 F.3d 396 (6th Cir. 1998); *see also United States v. Lloyd*, 361 F.3d 197, 201-204 (3d Cir. 2004).[2]

Adopting Option One or Option Two would not clarify current U.S.S.G. § 2K2.1(b)(5), but instead would effectively override almost every circuit that has ruled on the applicable standard, and the application of that standard to the burglary context. Options One and Two would overrule the correct standard and replace it with a loose, automatic standard that would apply the enhancement even if the possession of the firearm was coincidental – in all cases under Option One, and in all drug cases under Option Two. Put another way, the appropriate standard under the case law would be eviscerated by Option One and Option Two, not as a matter of resolving any circuit split, but simply by watering down the Guideline to make the enhancement a strict liability provision, regardless of whether the offense conduct justified any increased punishment. These options therefore should be rejected – especially for the stiff 4-level enhancement that this specific offense characteristic provides.

Finally, the apparent purpose of the original Guideline enhancement was to enhance a sentence where there was an increased danger or other criminal conduct that was facilitated by gun possession. As the majority of courts have recognized, there is no "other criminal conduct" when a burglary occurs and guns, not used, often unloaded and not even held in hand, are taken away. Moreover, the offense is not made more

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[2] In the Third, Fourth, Sixth and Seventh Circuits, the Guideline as presently written is not applied in the case of a burglary when firearms are taken because the firearms are not possessed in connection with another felony offense (the Fourth Circuit), or the burglary is not "another felony offense" for purposes of U.S.S.G. § 2K2.1(b)(5) (the Third, Sixth and Seventh Circuits). And in the minority of circuits that would allow the enhancement to be applied, at least one of those circuits (the Fifth) allows the enhancement based on its minority-view standard of "in connection with" that is different than almost every other circuit. *United States v. Blount*, 337 F.3d 404, 407-410 (4th Cir. 2003); *United States v. Kenney*, 283 F.3d 934 (8th Cir. 2002); *United States v. Armstead*, 114 F.3d 504 (5th Cir. 1997); *see also United States v. Hedger*, 354 F.3d 792 (8th Cir. 2004); *United States v. English*, 329 F.3d 615 (8th Cir. 2003).

dangerous when guns are possessed in this fashion. Option Three accounts for this; it allows the enhancement to be applied when there is actual additional criminal conduct beyond the burglary, and an upward departure is always available when there is no other felony offense or use of the firearm, but the sentencing judge believes an enhanced sentence is required. As the Fourth Circuit, in interpreting current § 2K2.1(b)(5), has explained, the purpose of the enhancement is to provide increased punishment where the offense was made "more dangerous by the presence of the firearm . . . ." *Blount*, 337 F.3d at 406. With that said, the *Blount* court ruled that the enhancement could not be applied in the garden variety burglary context. That common sense, majority interpretation, shared by then-Judge Alito (authored the *Lloyd* opinion), Chief Judge Wilkins (authored the *Blount* opinion) and Judge Easterbrook (joined in the *Szakacs* opinion), and grounded in the appropriate standard for applying the "in connection with" language, should not be disturbed.

In maintaining the clear majority standard, and following the lead of a majority of circuits have ruled on this precise issue, the subdivision (C) language should be amended to reflect that a burglary as discussed in Option Three is not "another felony offense." This will maintain the current circuit majority interpretation of "another felony offense" in the current Guideline.

e. Lesser Harms and Felon in Possession

Without explanation, the Commission proposes to bar departures based on lesser harms under U.S.S.G. § 5K2.11 to anyone convicted under 18 U.S.C. § 922(g), which prohibits felons from possessing firearms. PAG opposes this blanket prohibition because the scope is unprecedented, the change is unwarranted (stemming neither from a circuit split nor from any obvious need to resolve a situation that the courts are not already equipped to handle), and the offense-specific prohibition is so random and inexplicable that it suggests the action may be motivated by concerns other than those that should inform guideline amendments.

First, the scope of this prohibition is unprecedented. The Commission has from time to time defined classes of departures as prohibited or discouraged, sometimes because they were placed off-limits by the Sentencing Reform Act itself.[3] These restrictions apply to all cases where a departure might otherwise be entertained. However unwise such blanket prohibitions may be, they apply, with "majestic equality," to thieves, drug dealers and fraudsters alike.[4] PAG is aware of no situation, however, in

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[3] See e.g., U.S.S.G. §§ 5H1.4, Drug or Alcohol Dependence; 5H1.10, Race, Sex, National Origin, Creed, Religion and Socio-Economic Status; 5H1.12, Lack of Guidance as Youth and Similar Circumstances.

[4] "The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Anatole France, *The Red Lily*, Chap. 7, available at: http://education.yahoo.com/reference/quotations/quote/33040 (last visited March 12, 2006).

which the Commission has forbidden a departure for one class of offenses but retained it for all others.[5] And we can discern no reason to do so here.

The Commission's restraint in this respect is consistent with its general approach to departure policy. Congress provided for departures from the guidelines where the court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); *see also* §5K2.0. According to the Commission, it adopted its departure policy for two reasons:

> First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. . . . Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice.[6]

These observations obtain in felon-in-possession cases just as in other cases for which the Commission would not forbid lesser harms departures. The vigorous departure case law confirms the Commission's first observation that the guidelines cannot be expected to account for the range of human conduct and condition.[7] The scarcity of lesser harms departures also bear out the Commissions prediction. Despite what must be the rather tantalizing prospect that a court can account for lesser harms at sentencing that could not be credited at conviction, the departure is extremely rarely invoked. Between 2000 and 2003 lesser harms departures comprised fewer than 1 percent of all departures.[8] While it is impossible to determine from available data, PAG is confident from our experience that felon-in-possession cases comprise a very small subclass of these already-infrequent "Lesser Harms" departures.

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[5] Of course, Congress in the Protect Act limited the application of certain departures in certain offenses involving crimes against children, *see United States v. Van Leer*, 270 F. Supp. 2d 1318, 1321-22 & n.20 (D. Utah 2003), citing PROTECT Act, Pub. L. No. 108-21 § 401, 117 Stat. 650, 667 (discussing the "Feeney Amendment" limitations on downward departures), much as it has enacted mandatory minimum sentences that limit departures for certain offenses. The Commission, however, has never declared departures off-limits for any particular offense category, and has long criticized Congress' enactment of mandatory minimums as inconsistent with a rational Guidelines system.

[6] United States Sentencing Commission, *Departures*, at 15 (April, 2003).

[7] *Id.* at 11-113, discussing treatment of cases that illustrate various grounds for departure.

[8] According to the Sentencing Commission's Sourcebooks for the identified years: in 2003 lesser harms departures accounted for only 46 or 0.8% of the 5950 other-than-government initiated departures granted; in 2002, 34 or 0.3% of the 10,995 departures, in 2001 23 or 0.2% of the 11,044 departures; and in 2000, they were 24 or 0.2% of the 10,288 departures. Lesser harms departures never exceeded 1%, even after the Commission began isolating judicial from government-sponsored departures in 2003.

The Commission's history of restraint in establishing "forbidden" departures is therefore appropriate, and borne out by this history of judicial restraint. The recently-proposed offense-specific prohibition, by contrast, is surprising and ill-considered in light of Congress' and the Commission's concern to ensure that the breadth of the human condition not be lost forever at sentencing by overly rigid guidelines. The Commission cannot and should not take the unprecedented step of declaring that, with felon-in-possession cases only, the penalties it is establishing "encompass[] the vast range of human conduct potentially relevant to a sentencing decision."

Second, there is simply no need to forbid "lesser harms" departures in felon-in-possession cases. The Commission carefully monitors developments in guideline sentencing and occasionally proposes amendments to clarify existing guidelines, respond to congressional directives, or resolve circuit conflicts. For example, the Commission seeks to resolve two circuit conflicts in the firearms section of the current set of proposals. *See* Proposed Amendment to the Sentencing Guidelines, at 27-28 (January 25, 2006). In contrast, the lesser harms departure needs no clarification, as it is relatively uncomplicated. Congress has not directed the Commission to eliminate this departure in § 922(g) cases, and there is no significant Circuit split developing in this area. In fact, the majority of the Courts of Appeals that have encountered lesser harms departures in § 922(g) cases have either ruled they are available or ruled in such a way that it can be inferred the court accepts the propriety of the departure's use in at least some 922(g) contexts.[9]

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[9] A number of courts have explicitly recognized the authority to depart for lesser harms in § 922(g) cases, while others have implied in their rulings that the departure authority was available to judges. *See, e.g., United States v. Bunnell*, 280 F.3d 46, 50 (1st Cir. 2001) (rejecting appeal based on failure to grant § 5K2.11 departure in § 922(g) case by holding that lower court did not misunderstand its authority to depart on this ground); *United States v. Clark*, 128 F.3d 122, 123 (2d Cir. 1997) (remanding case because of doubt that sentencing judge appreciated his available authority to depart for lesser harms in § 922(g) case); *United States v. Cutright*, 2000 WL 166345, at *3-4 (4th Cir., Nov. 6, 2000)(collecting cases and rejecting district court lesser harms departure in § 922(g) because not adequately supported); *United States v. Washington*, 1998 WL 13533, at *1 (4th Cir., Jun. 15, 1998)(holding that the sentencing court was aware of, but properly declined to exercise, its authority to depart based on lesser harms in § 922(g) case); *United States v. Williams*, 432 F.3d 621, 623-24 (6th Cir. 2005) (holding that departure from § 922(g) sentence for, *inter alia*, lesser harms, reasonable based on court's consideration of appropriate factors); *United States v. Peterson*, 37 Fed. Appx. 789, 792 (7th Cir. 2002) (rejecting appellant's contention that district court's failure to depart for lesser harms was because court thought it was powerless to do so in gun case); *United States v. Dubuse*, 289 F.3d 1072, 1075-76 (8th Cir. 2002) (finding that district court understood it had authority to depart for lesser harms in § 922(g) case); *United States v. Wentz*, 46 Fed. Appx. 461, 461 (9th Cir. 2002) (finding that district court was aware of authority to depart for lesser harms but nonetheless declined to do so); *United States v. Styles*, 139 Fed. Appx. 249, 253 (11th Cir. 2005) (clarifying that court had authority to depart downward under § 5K2.11 and remanding so that court could consider downward departure in § 922(g) case); *but see United States v. Riley*, 376 F.3d 1160 (D.C. Cir. 2004) (rejecting downward departure under § 5K2.11, even though defendant had no unlawful purpose because statute does not distinguish between unlawful possession and purpose).

Indeed, there are important reasons to retain the departure. The Sentencing Guidelines routinely permit departures when statutes have been violated, and allow lesser harms departures when the violation does not "threaten the harm or evil sought to be prevented by the statute." *United States v. Lewis*, 249 F.3d 793, 796 (8th Cir. 2001). "[T]he guidelines authorize reasonable departure for an act that is technically unlawful, yet not committed for an unlawful purpose." *Id.* at 797 (discussing departure in context of § 922(a)(6) false statements case). While not widespread, a number of courts have at least considered and occasionally found grounds to depart because the weapons' possession, while criminal conduct, merited a lower sentence. Other conceivable examples abound. For example, suppose a defendant who had attained a prior conviction, perhaps even on felony tax charges, at age 20 or 25, is later is found in his home at age 75, passively possessing in his closet a firearm that his grandchildren bought him for self-protection after his neighborhood became less safe. This would be a felon-in-possession, but does the Commission really want to make a "lesser harms" departure off-limits in this situation and all others? Retaining the possibility of a departure makes good sense, particularly in light of its limited current use in only the most deserving cases. The Courts of Appeals have proven adept at evaluating these few cases and should be permitted to continue its management of this area.

Finally, PAG must note that the Commission has chosen to present this proposal without any type of explanation, suggesting that it might be prompted by complaints about recent use of this infrequently-used departure. Whatever the reason behind the proposed amendment, the defense bar and the courts deserve some explanation from the Commission about why it feels the change may be necessary, and also deserve an opportunity to respond to that specific rationale. Particularly striking in this regard is that the Commission would forbid the departure even in a class of cases where the defendant has come into possession of a weapon and is acting in haste to dispose of it. For example, in *United States v. Hancock*, 95 F. Supp. 280 (E.D. Pa. 2000), the Court granted a § 5K2.11 departure when it found that the defendant had found a gun by chance and fired two times into the ground to empty the gun of ammunition and then quickly threw the gun away. The defendant possessed the gun for only a short time and then only to determine if it was loaded and to remove its harm. This seems the right result in such a case where the possession of the weapon by the former felon is only for the purpose of disarming it. Tellingly, the Government did not appeal the *Hancock* departure. We can think of no reason to deny such considerations of a departure to other defendants whom the court determines did what they could as quickly as possible to dispose of a weapon.

For these reasons, we strongly urge that the Commission not amend the guidelines to forbid the use of the Lesser Harms departure at U.S.S.G. § 5K2.11 for otherwise deserving defendants convicted of being felons in possession under 18 U.S.C. § 922(g). If the Commission continues to feel this amendment is warranted, the public should be given a meaningful opportunity to evaluate the specific reasons behind the proposed change, and consideration of this change should be deferred to the next amendment cycle.

3-5. Proposals to Make Permanent Emergency Amendments on Steroids, Intellectual Propery (FECA), & Terrorism/Obstruction of Justice

On these proposed amendments, PAG calls the Commission's attention to the comments previously submitted by PAG and others in response to the Commission's requests for input on the emergency amendments. In particular, PAG references its February 23, 2006 letter on Anabolic Steroids, and a letter on Intellectual Property/FECA submitted by PAG member and University of Richmond Law Professor James Gibson on August 2, 2005, as well as letters submitted by the Federal and Community Defenders.

6. Proposed Amendments Implementing the Transportation Act

The Commission has proposed certain amendments designed to implement Pub. L. 109-59 (the "Transportation Act"), and also issued a related request for comment.

In its proposed amendments, the Commission plans to implement Section 4210 of the Transportation Act, and its new criminal offense for a knowing failure to deliver household goods, by simply adding a cross-reference to U.S.S.G. § 2B1.1. PAG agrees that § 2B1.1 is a catch-all for this type of offense. But we are troubled at the notion that this new Class E felony, established by Congress with a two-year maximum, will be lumped in with far more serious offenses. Under this guideline, the statutory maximum might be reached so easily that the normal incentives to plead guilty in an effort to get an acceptance of responsibility adjustment would prove meaningless.

We note that U.S.S.G. § 2B1.1 was amended to establish a higher base offense level of 7 for offenses with statutory maximums of 20 years or more. The mirror-image should be established for low-end offenses. We ask that a new base offense level of 5 be established for offenses that carry a statutory maximum of less than five years.

On the issue for comment, the Commission's acknowledges that its 2004 amendment to 2Q1.2 was intended to capture the increase in harm associated with offenses involving transportation of hazardous materials. That 2-level increase means that an Offense Level 26 will ordinarily be applied in this situation, and that defendants with a Criminal History Category of VI already will be in a 120-150 month range before any Chapter 3 adjustments. Although the Transportation Act increased the statutory maximum in 49 U.S.C. § 5124 to ten years, these existing guideline numbers are already entirely consistent with a 10-year statutory maximum. Congress did not direct the Commission to revisit this guideline, and no further adjustment is necessary here.

7. Proposed Amendments Implementing the Intelligence Reform and Terrorism Prevention Act of 2004

PAG submits a few comments on these proposed amendments. First, the Commission suggests three options for implementing § 5401 of the Act. Section 5401 increases maximum penalties by up to 10 years if a defendant meets three elements: (1)

the criminal conduct is part of an ongoing commercial organization or enterprise, (2) aliens were transported in groups of 10 or more, *and* (3) aliens were transported in a manner that either endangered their life or a presented a life-threatening health risk to people in the United States. We are asked to comment on the proposed options.

As noted, the new statutory enhancement *does not* apply if *only one* of these three elements is met. This fact points squarely against the Commission's options that would add an enhancement or departure any time only one of these elements (an "ongoing commercial organization") exists. If the statute itself is strong on this, the legislative history is even stronger. The Commission should know that, in an earlier, rejected version of what became Pub. L. 108-458, the House of Representatives had suggested applying this enhancement if any one of these elements applied. *See* H. Rep. No. 108-724 (Part 5), at 69 (then-§ 3041 would have allowed 10-year enhancement if any element existed). That "disjunctive" suggestion was rejected by Conference Committee, with Congress instead passing a law applying the enhancement only in the conjunctive – i.e., only when all three of these elements exist. If the Commission were to enact a new sentencing enhancement that applied whenever an "ongoing commercial organization" is found, it would essentially codify the rejected House approach. The guidelines instead should be modified to enact the final law that Congress passed. In implementing § 5401, the Commission should adopt only proposed Option One, or the Option Three alternative requiring a conviction under 8 U.S.C. § 1324(a)(4).[10]

If the Commission follows this approach, it will also gain the benefit of no longer needing to define "ongoing commercial organization," since an enhancement would only apply if a defendant is found guilty under § 1324(a)(4) (and an "ongoing commercial organization" is found by a jury or via a guilty plea). In any event, however, PAG responds to the Issue for Comment by discouraging any new definition of "ongoing commercial organization." As the Commission notes, the Act did not define the term, and PAG has not located any legislative history that elucidates its meaning. The Commission would essentially be creating a definition from scratch, and before the courts have faced real-world examples that might put meat on these bones. In sum, even if the Commission were inclined to define an "ongoing commercial organization," it would be wise at least to wait until some facts and a real dispute (or circuit conflict) develop instead of trying to establish artificial parameters in the abstract at this time.

On the other proposed amendments, PAG notes a few additional concerns, particularly given the breadth of some of these directives. For example, in implementing § 6903 of the Act, the Commission plans to reference only U.S.S.G. § 2K2.1, since the weapons described "would seem to be covered as destructive devices under 26 U.S.C. § 5845(a)." If they are indeed covered by § 5845(a), PAG does not oppose the suggested reference to § 2K2.1, but PAG must note that § 6903 of the Act also punishes "any part

[10] Tracking the statute will also avoid potential double-counting concerns that would otherwise arise if a defendant received an enhancement for being part of an "ongoing commercial organization" and then other, seemingly-similar adjustments under § 3B1.1 (aggravating role) or § 4B1.4 (criminal livelihood) as well.

or combination of parts" used in "fabricating" a rocket or missile – items that would clearly seem to fall outside of § 5845(a). In such circumstances, the Commission at least should allow for a downward departure. Similarly, under the Commission's proposed implementation of § 6803 of the Act, we question whether providing "material support or resources" is always as culpable as the direct development of the weapons themselves. The divergent statutory maximums (20 years v. life) suggests they are not, yet the Commission suggests that all 18 U.S.C. § 832 convictions must be referenced only to U.S.S.G. § 2M6.1. PAG suggests instead that 18 U.S.C. § 832 be cross-referenced to both § 2M6.1 and § 2M6.2, or at least that a downward departure option be considered.

Finally, on the Commission's implementation of § 6702 of the Act, PAG has no objection to the proposed referral to U.S.S.G. § 2A6.1, but does not understand the proposed cross-reference to § 2M6.1. This new law involves "hoaxes" – where there is, by definition, no intent to carry out a threat. The proposed cross-reference, by contrast, would apply § 2M6.1 when there is "an intent to carry out a threat." In other words, the proposed change does not appear to be an implementation of § 6702 of the Act at all. It instead appears to be a general broadening of 2M6.1's application to cover offenses previously covered by § 2A6.1.

8. Proposed Guideline Amendments on False Domain Names

The Commission proposes to create a new U.S.S.G. § 3C1.3, in an effort to implement the directive in § 204(b) of Pub. L. 108-482. The Commission proposes an increase of 1-4 levels, with no indication of which increase might be chosen, or why.

PAG suggests that any increase should not exceed 2 levels. A higher increase would actually be inconsistent with Pub. L. 108-482, since at the high end of the guidelines (such as an Offense Level 32 with a Criminal History Category VI), a 4-level increase would increase ranges more than 7 years, despite the 7-year cap on increases in the statutory maximum established in the Act's § 204(a). PAG also notes the Commission's recently-proposed 2-level increase for steroids "masking." PAG sees some logic in treating "masking" and hiding one's identity through false domain names as similar, and accordingly believes that any increase here should not exceed 2 levels.

Finally, as the introduction to the Commission's proposed amendment notes, the statute only directs the Commission to establish this enhancements when an underlying "felony" offense is "furthered" through false domain names. Consistent with this statutory directive, the amendment should be changed to clarify that any enhancement does not apply to misdemeanors, and that the underlying offense must be "furthered" by the false domain name before this enhancement can be applied.

9. Proposed Guideline Amendments for "Miscellaneous Laws"

PAG submits two comments to the Commission's proposed "Miscellaneous" changes, the first of which relates to the new proposed Class A Misdemeanor guideline.

PAG believes that a general misdemeanor base offense level of 4, rather than 6, is appropriate. There are several reasons for this. First, the guidelines have historically been structured in ways that preserve a benefit to defendants who accept responsibility. The newly-proposed misdemeanor guideline, U.S.S.G. § 2X5.2, would start at an Offense Level of 6, and then add 2 points for a person who had committed the same offense before.[11] A Category VI offender in this situation would find no guideline benefit at all to pleading guilty in an effort to gain an acceptance of responsibility adjustment, since this would only move him to a 12-18 month range (still in Zone D). Starting at 4 (or even 5), by contrast, would preserve these traditional guideline incentives of skipping a trial. Second, PAG believes the Commission should recognize, and codify, the fundamental difference between a misdemeanor and a felony. Congress has made a formal classification decision that misdemeanors are simply not the same as felonies. The guidelines' catch-all misdemeanor guideline should reflect that difference. The Commission is proposing that this guideline will apply only to misdemeanors not already covered by another guideline, suggesting that it will be used with many unusual regulatory violations. PAG submits that it is simply illogical to start these types of documentation-type offenses at the same base offense level as Class C and D felony thefts and frauds, for example. Regulatory offenses involving controlled substances in U.S.S.G. § 2D3.2, for example, have a Base Level of 4, and PAG believes that is where this catch-all Class A Misdemeanor guideline should start as well. The new guideline would then be in line with numerous similar offenses. *See, e.g.*, U.S.S.G. § 2A2.3 (Base Offense Level 3 for some forms of Minor Assault); § 2B2.3 (Base Offense Level 4 for Criminal Trespass); § 2J1.5 (Base Offense Level of 4 for a material witness' failure to appear at a misdemeanor trial); § 2P1.2 (Base Offense Level of 4 for providing or possessing certain contraband in prison); § 2T1.7 (Base Level of 4 for Failing to Deposit Collected Taxes in Trust Account as Required After Notice); § 2T1.8 (Base Offense Level of 4 for Offenses Relating to Withholding Statements); § 2T2.2 (Base Offense Level of 4 for Regulatory Offenses); § 2T3.1 (Base Offense Level of 4 for smuggling if the tax loss does not exceed $100).

Second, PAG wishes to comment on the two options proposed for Plant Protection Act ("PPA") sentences. PAG does not believe that a new specific offense characteristic is necessary here, especially given the expected infrequency of PPA prosecutions, which the Commission concedes. At most, the Commission should adopt Option Two's establishment of an encouraged upward departure in PPA cases, especially given the wide array of divergent plants (ranging from biological control organisms down to far less significant plants) that may fall within the parameters of the PPA, and the need for judges to factor those into departure decisions. Unfair disparities would arise from lumping all such plants together into a single and uniform specific offense characteristic.

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[11] PAG does not object to the general concept of adding 2 offense levels when a defendant has committed the same misdemeanor before, but as noted, believes this adjustment fits into the general guidelines scheme only if the starting point for Class A misdemeanors is placed at a Base Offense Level of 5.

10. Proposed Guideline Amendments Relating to "Application Issues"

The Commission proposes to create a new U.S.S.G. § 3C1.3 for Offenses Committed While on Release, eliminating § 2J1.7. Although PAG does not object generally to the movement of this guideline to Chapter 3, we do object to the proposed elimination of § 2J1.7's background commentary. Among other things, the existing commentary notes that, although a court should impose a consecutive sentence, "there is no requirement as to any minimum term." That analysis, gleaned from § 3147's legislative history, has been the law and remains the law, yet the proposed amendment would eliminate it. PAG is concerned that this elimination may be improperly construed as a substantive change in the law where none (according to the Commission's explanations for its amendment in a mere "Application" change) was intended. PAG believes that § 2J1.7's background comment should be carried forward to § 3C1.3.

Carrying forward the background commentary would also properly continue the Commission's notice requirement. The Commission claims that "[t]he majority of circuit courts have found that there is no notice requirement in order for 18 U.S.C. § 3147 to apply." But this statement ignores that two very different types of "notice" issues that these circuits have discussed. As the circuits note, cases raising § 3147 and § 2J1.7 issues involve both "pre-release" and "pre-sentencing" notice. "Pre-release" notice arguments have claimed that a defendant might avoid § 3147's enhancement if a defendant did not receive notice of the possibility of additional punishment when released, either on an earlier offense or at the time bond was granted. PAG acknowledges that a majority of circuits have rejected this argument as inconsistent with the mandatory requirements of § 3147 itself. As Judge (now Justice) Alito explained:

> We read the commentary to mandate, not pre-release notice in the first case, but simply pre-sentencing notice in the second case.

United States v. Hecht, 212 F.3d 847, 849 (3d Cir. 2000). This distinction is important, however, for it explains why the subject commentary is worth keeping, even if the Commission believes (as it reasonably may) that this commentary should be clarified so that judges know that only "pre-sentencing" notice is required. To PAG's knowledge, *no circuit* has ever held that "pre-sentencing" notice is unnecessary in this context. And PAG submits that such "pre-sentencing" notice serves a highly useful function here. When a § 3147 enhancement is applied, defendants are being hit with a sentencing enhancement based on another, wholly collateral "offense." In this context, defense counsel should be given advance notice of the possibility of this enhancement, so that counsel can investigate the sometimes-complicated underlying facts of an entirely different offense, and then present whatever relevant arguments may be gleaned, so that the Court can reach a more-informed judgment on what sentence is fair and just. In short, defendants and their counsel should not be surprised at sentencing by an enhancement based upon another "offense" about which they had no earlier notice. The Commission

should keep its notice requirement, and at most clarify that it is intended to require only pre-sentence notice akin to what is required when an upward departure is sought.

11. 3C1.1 (Obstruction of Administration of Justice) Circuit Conflicts

The Commission has proposed certain changes to the text and commentary of Section 3C1.1 (Obstructing or Impeding the Administration of Justice). PAG believes the Commission should adhere to the approach, clarified in 1998 through amendment 581, that this guideline does *not* apply to pre-investigative conduct. The proposed change to expand the guideline to pre-investigative is both unnecessary and unwise. Unnecessary, because the purported circuit conflict that has prompted the proposal is not as significant as appears at first blush and could be cured by re-affirmation of the 1998 clarifying amendment. And unwise, because the amendment would create thorny applicability issues that are likely to produce more, rather than less, unwarranted sentence disparity. We also believe that the Commission's proposed new examples of "covered conduct" are in tension with the definition of obstructive conduct found in the text of the guideline itself, and these new examples would unduly complicate sentencing proceedings. To the extent the conduct mentioned in these examples occurs in individual cases, the sentencing judges and others have sufficient and more desirable options for addressing that conduct.

The synopsis of the proposed amendment to Section 3C1.1 states that it addresses a circuit conflict regarding whether pre-investigative conduct can form the basis for the 2-level enhancement. But the Commission has already addressed and resolved the stated conflict. In 1998, the Commission added a new application note to the guideline which reads, in part: "This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction . . . ." The stated purpose of this amendment was to "clarify the temporal element of the obstruction guideline (*i.e.*, that the obstructive conduct must occur during the investigation, prosecution, or sentencing, of the defendant's offense of conviction)." USSG, App. C (Amendment 581).

Although the synopsis of the proposed 2006 amendment identifies four circuits that "have concluded that pre-investigative conduct can be used to support an obstruction enhancement," not one of those cases applied the 1998 clarifying amendment to the facts before it. The case from the D.C. Circuit was decided in 1991. *See United States v. Barry*, 938 F.2d 1327 (D.C. Cir. 1991). The Tenth Circuit case, decided shortly after the 1998 amendment went into effect, merely relied on a pre-1998 case to hold that the enhancement can apply where the defendant is aware of an "impending investigation"; the court made no mention of the effect of the 1998 amendment on the pre-1998 ruling. *See United States v. Mills*, 194 F.3d 1108, 115 (10th Cir. 1999). The Seventh Circuit case, also decided in 1999, noted the promulgation of the 1998 amendment but found it "need not resolve" whether it precludes an enhancement "when the obstructive conduct occurs before any investigation has begun," because the defendant in that case engaged in (and continued) the threatening conduct after the investigation had begun. *United States v. Snyder*, 189 F.3d 640, 649 (7th Cir. 1999). Finally, the First Circuit case mentioned in

the synopsis relied on a pre-1998 case, in addition to *Mills* and *Barry*, *supra*, again without discussing or even acknowledging the 1998 clarifying amendment. *See United States v. McGovern*, 329 F.3d 247, 252 (1st Cir. 2003).

The Commission made the right decision in 1998 when it added language expressly limiting the enhancement to post investigative conduct, and it should not reverse course now. Not surprisingly, most criminals try to avoid getting caught. They do so in a number of ways. Some take steps to shield their identity when they are committing or concluding their offense (*e.g.*, using false identities, disguises or convoluted transactions that make conduct difficult to trace, or destroying a paper trail that would otherwise lead back to themselves). Some endeavor to hide the fact that a crime has occurred. in the hope either that the victim will not realize there is anything to report or that the government will never know there is something to investigate (*e.g.*, structuring a fraudulent investment to make it appear that losses to investors had an innocent explanation). And so on. It is therefore very difficult to draw a predictable line between conduct that is part and parcel of the offense and conduct designed to "prevent" or "hinder" the investigation, prosecution or sentencing of the offense. On which side of the line should the sentencing judge put the structuring of a securities fraud to make it look like the drop in price was the result of market forces, or the disposal of clothing immediately after a bank robbery? By abandoning a clear and logical temporal line – the start of the official investigation – the Commission would be inviting individual judges to draw different lines. Without any logical guidance, the inevitable result is unwarranted disparity.

There undoubtedly will continue to be cases from time to time where pre-investigation conduct designed to prevent or hinder deserves an incremental level of punishment. One of types of conduct that the Commission's proposal would add to application note 4 is a good example. The Commission has proposed making explicit that the obstruction enhancement applies to defendants who make threats to a victim for the purpose of "prevent[ing] the victim from reporting the conduct constituting the offense of conviction." A threat designed to prevent an investigation is usually worthy of enhanced punishment because it results in a separate and tangible psychic harm to another person. In order to address examples like this, the Commission should encourage a higher sentence, perhaps through a departure, as is done with other guideline provisions. But it should not expand the scope of the guideline to cover pre-investigative conduct.

In addition to "victim threats," the Commission has proposed two other categories to add to its list of "Examples of Covered Conduct" in application note 4 to the guideline. Neither should be adopted. New application note 4(l) would include within the guideline "making false statements on a financial affidavit in order to obtain court-appointed counsel." The main problem with this "example" is that the conduct described does not satisfy one of the elements of the enhancement. That is, to receive the enhancement the defendant's object must be to "obstruct" or "impede" the administration of justice. As the Second Circuit has correctly noted, the defendant who lies on a financial affidavit is "not seeking to prevent justice or even delay it." *United States v. Khimchiachvili*, 372

F.3d 75, 80 (2d Cir. 2004). Rather, he is trying to avoid paying his legal fees. *Id.* When the Commission uses, as an example of obstruction, conduct that by its nature does not meet the provision's definition of obstruction, it runs the risk that judges will apply the "object to obstruct or impede" requirement in an inconsistent manner when dealing with other types of allegedly obstructive conduct.

A further problem with this proposed example is that it is likely to cause significant disruption in those cases where the example is invoked. If the government or the probation department alleges that the defendant made false statements to qualify for appointment of the lawyer who has been representing him in the criminal case, that attorney will likely be unable to continue representing the defendant due to a conflict of interest. As a result, new counsel would need to be brought in very late in the case to complete the criminal proceedings, resulting in delay and even greater public expense. This problem is readily avoided. There are a number of ways the courts can remedy lies on a financial affidavit, including separate contempt proceedings. PAG is also unaware of any showing that this type of problem has become both widespread and incapable of redress in those other ways.

The other example that would be added under the proposed amendment is similarly flawed. It would recognize, as an example of obstruction, perjury "during the course of a civil proceeding pertaining to conduct constituting the offense of conviction." The first problem, again, is that the conduct described in the proposed example is not really an "example" of what the guideline covers. Perjury in a civil proceeding, even where the subject matter of the criminal case is identical, does not by its nature obstruct or impede the administration of justice during the course of the investigation, prosecution or sentencing of the instant offense of conviction, nor is such perjury necessarily "related to" the offense of conviction or other closely related offenses (even though the subject matter of the testimony may in fact be "related"). If the new example is meant to enhance the sentence for defendants who perjure themselves in a civil case in order to thwart the criminal investigation, the proposed amendment needs to be rewritten. It should read: "(b) committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding pertaining to conduct constituting the offense of conviction, with the intent to obstruct or impede the criminal investigation, prosecution or sentencing." (Proposed new language underscored).

To expand the scope of Section 3C1.1 perjury, as proposed in application note 4(b), would do more than conflict with the limiting language of the guideline itself. It would unnecessarily complicate the sentencing process by requiring the judge presiding over the criminal case to assess the impact on "the administration of justice" of alleged perjury that occurred in a separate non-criminal proceeding with which the judge may have little or no familiarity. For example, the sentencing judge would need to review substantially all of the record in a state court private civil suit before he could determine whether the defendant's alleged perjury was an attempt to obstruct or impede the administration of justice in that other proceeding. Even if perjury in civil proceedings that "pertain to conduct constituting the offense of conviction" is common enough to warrant separate mention in the guidelines – a point for which we have seen no data – the

officials that preside over these other proceedings, and the prosecutors with jurisdiction over perjury offenses committed in those tribunals, are well equipped to attach consequences to such misconduct.

In sum, the proposed changes to the obstruction guideline are not needed, would generate little benefit, and impose high costs on the system. PAG urges the Commission to reject these proposals. Instead, the Commission should revise the commentary of Section 3C1.1 to reiterate that the provision applies only to post-investigation conduct. If sufficient evidence is available that judges do not properly account for those instances of pre-investigation obstructive conduct that are outside the heartland (such as threats of physical violence for reporting an offense), the Commission may wish to add language to the commentary recognizing that a departure of up to two levels is available in unusual cases. *Cf.* USSG §§ 2A2.4, comment. (n.3) (encouraging upward departure under offense guidelines for obstructing or impeding officers where substantial interference with government function results) 2B1.1, comment. (n.19) (encouraging upward departures for various reasons where fraud and theft guideline understates seriousness of the offense); 2C1.1, comment. (n.7) (encouraging upward departure where amount paid in bribery case understates seriousness of offense); 2Q1.2, comment. (nn. 4-9) (encouraging various guided departures for environmental offenses).

12. Chapter Eight (Privilege Waiver)

The Commission has solicited comment on whether it should modify or replace the following sentence from the commentary to U.S.S.G. § 8C2.5:

> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) [Self-Reporting, Cooperation, and Acceptance of Responsibility] unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

PAG believes that this sentence should be deleted from Chapter 8 and that the Commission should state, either in the commentary or in the Reasons For Amendment, that the purpose of the change is to establish that an organization's decision whether to waive the attorney-client privilege or work product protections is not a factor for the court to consider in calculating an organization's culpability score. Such an amendment would harmonize U.S.S.G. § 8C2.5(g) with corresponding guideline provisions applicable to individuals – specifically, U.S.S.G. §§ 3E1.1 & 5K1.1 – and would thereby reduce the undue pressure currently placed on organizations to waive these paramount privileges and protections.

A number of diverse groups, including those that provided testimony and written submissions in October 2005, have already offered extensive input on the problems caused by the waiver language in the commentary to § 8C2.5. PAG concurs in the views expressed by these groups. In particular, we echo their reminder of the special status held

by the attorney-client privilege and work-product protections. The attorney-client privilege, in particular, is an irreplaceable element of the American legal system. Without a vibrant privilege, individuals are less likely to seek advice of counsel on how to comply with the law and less likely to report questionable conduct in a timely manner, if at all. Waiver of the privilege in any particular case has negative consequences well beyond that proceeding. In the corporate context, the privilege works – and can only work – if employees and officers can be reasonably certain that the promise of confidentiality will be kept, or at least that a decision by others in the corporation to waive the privilege will not be coerced. The language found in Chapter 8, however, has resulted in greater pressure on organizations to waive the attorney-client privilege and work product protections in order to satisfy government investigators. For that reason, we endorse the recommendation of the American Bar Association that the waiver language be replaced.

It is apparent from the wording of the commentary that the Commission made a good faith attempt in 2004 to strike a balance between promotion of the attorney-client privilege and work product protections on the one hand, and legitimate law enforcement objectives on the other. In practice, however, this language has the unintended consequence of placing undue pressure on organizations to waive such privilege and protections at the early stages of an administrative, civil or criminal investigation.

The problem lies in the inherent inability of organizations to know, until it is too late, whether waiver is needed to satisfy the requirements for a reduced sentence. The commentary makes waiver a prerequisite to reductions in the culpability score for self-reporting and cooperation (along with acceptance of responsibility) if "such waiver is necessary" to provide "timely" and "thorough" disclosure of "all pertinent information known to the organization." Because the commentary requires disclosure in a "timely" manner, the organization must make its decision whether to turn over the protected information early in the investigation, usually before counsel for the organization has had time to assess the facts in anything approaching a thorough manner. Especially at this early stage, the organization also is not in a position to know the scope of information already in the government's possession. Indeed, it is the rare case where a lawyer for an organization is aware of the full universe of pertinent information known to the government until the government's investigation is complete (and many times, not even then). Counsel for the organization therefore simply cannot know, until it is too late, whether the government has, from its own sources, all of the pertinent information that the organization's counsel has separately acquired through an attorney-client communication or as the product of work conducted by counsel.

A second reason organizations feel undue pressure to waive their rights is this: Even assuming the decision-makers at the organization know the government lacks certain information that the organization gathered in a privileged or otherwise protected manner, the organization cannot reliably predict *when* the government might acquire that information absent waiver. If the organization incorrectly predicts that the government will independently acquire the pertinent information sooner rather than later, it may learn after-the-fact that it still has failed the "timely" and "thorough" disclosure test. Thus, in

all but the rarest of investigations, an organization cannot rationally choose whether to waive a privilege that serves as the foundation for our legal system—the privilege that enables individuals to seek the advice and guidance of legal counsel.

The undue pressure to waive that the commentary creates is confirmed by the recent survey conducted by a coalition of organizations including the National Association of Criminal Defense Lawyers and the Association of Corporate Counsel. Among other things, the majority of outside counsel responding to the survey reported that enforcement officials have directly or indirectly requested waiver of the attorney-client privilege in investigations involving companies that the responders represent. These counsel also report that the commentary to Section 8C2.5 is second only to the relevant DOJ memoranda on prosecution policies on the list of reasons cited by the government for the company to waive the privilege.

The attorney-client privilege retains its value in our legal system only if the client can count on the confidentiality of the communications covered by the privilege. As the Supreme Court emphasized in the seminal case on the availability of the attorney-client privilege to organizations, "an uncertain privilege . . . is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). As more and more corporations give in over time to undue pressure to waive the privilege, it is inevitable that employees – whatever their level – in corporations across the country will be deterred from seeking advice about how to comply with an increasingly complex matrix of rules, regulations and statutes.

It is no answer that waiver serves a valuable purpose, or even that its benefits outweigh its costs in some instances. That may be true sometimes, and in those cases the organization may very well choose on its own to waive the privilege. But such a choice should not be coerced through the threat of harsher treatment – or the unavailability of more lenient treatment – if it "insists" on playing by the venerable rules of our adversary system.

The language of the relevant guidelines for individuals is instructive on this point and, in our view, dispositive. To qualify for acceptance of responsibility credit or a substantial assistance downward departure, an individual must make difficult choices including the possible waiver of certain constitutional rights. For example, the extra one-level reduction for acceptance of responsibility in § 3E1.1(b) is conditioned upon timely waiver of the Sixth Amendment right to a jury trial and the Fifth Amendment right not to incriminate one's self. Although these required waivers have generated controversy, to our knowledge it has never been suggested that the Commission include as a factor in the availability of either of these provisions the individual's decision whether to waive the attorney-client privilege or work-product protections. No doubt this is due to a universal recognition that these protections are basic to the operation of our legal system, even in those instances where the defendant has ultimately agreed to "give up the fight." Before a defendant can get to the point where he decides to accept responsibility or cooperate or both, he must be able to discuss his conduct and his options in confidence with counsel,

safe in the belief that he will not be coerced into revealing those confidences at some later date.

The same is true for organizations. The attorney-client privilege and work-product protection are part of the basic rules that make the adversary system work. Indeed, they are the very tools that make it possible for defendants – be they individuals *or* organizations – to get to the place where they can make the fully informed decision whether to self-report, cooperate and accept responsibility. We urge the Commission to harmonize the commentary of § 8C2.5 with the guideline provisions applicable to individuals and remove the decision whether to waive from the sentencing guidelines calculus.

13. Proposed New Guideline Related to Crime Victims' Rights

On this proposal, PAG does not object generally to the new U.S.S.G. § 6A1.5's directive that courts must afford crime victims the rights described in 18 U.S.C. § 3771. PAG does, however, object to the Commission's call for new sentencing procedures that would extend beyond § 3771. In particular, we do not understand what might be encompassed in the Commission's policy statement calling on courts to adopt procedures related to "any other provision of Federal law pertaining to the treatment of crime victims." PAG can envision how a court might use this phrase to create new procedural rights for victims that Congress never intended. As the Justice for All Act of 2004's Crime Victims' Rights Amendment ("CVRA") itself showed, the establishment of new procedural rights in this area involves a very careful balancing of interests, not only for defendants, but also for prosecutors who inherently lose certain control of a case when victims' procedural rights increase. PAG respectfully suggests that the Commission should respect that procedural balancing established by Congress in the CVRA, and omit the clause quoted above so that § 6A1.5's new language is tailored specifically to the procedural rights the CVRA intended. If the Commission wishes to expand the list of procedural rights, it should do so later upon reflection of specific requests, rather than adopting a catch-all clause whose meaning and parameters are wholly unknown.

14. Proposed New Guideline for Bureau of Prisons Motions to Reduce Terms of Imprisonment Pursuant to 18 U.S.C. § 3582(c)(1)(A)

We commend the Commission for its decision to promulgate policy guidance for courts considering motions filed by the Bureau of Prisons to reduce sentences under 18 U.S.C. § 3582(c)(1)(A)(i). As we noted in our June 14, 2005 letter to the Commission, it is essential to have some "safety valve" in a determinate sentencing scheme, so that the government may respond to any extraordinary and compelling situations that arise after sentencing that render continued imprisonment unjust or meaningless. We believe that Congress intended § 3582(c)(1)(A)(i) to serve just such a safety valve function, and the legislative history of the Sentencing Reform Act of 1984 supports this interpretation. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 37-150 at p. 121 ("safety valves" contained in § 3582(c) "keep[] the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations").

We are concerned, however, that the Commission's new policy statement at U.S.S.G. § 1B1.13 is largely a restatement of the statutory language in § 3582(c)(1)(A), and that it still does not respond to the directive in 28 U.S.C. § 994(t) that the Commission describe what should be considered extraordinary and compelling reasons, "including the criteria to be applied and a list of specific examples." In the expectation and hope that the Commission intends to include criteria and examples in its final rule, we make some recommendations below.

Before doing so, however, we note that proposed U.S.S.G. § 1B1.13(2) appears to improperly narrow the statutory circumstances in which sentence reduction may be sought. First, it extends the requirement in § 3582(c)(1)(A)(ii) that the court determine that the prisoner "is not a danger to the safety of any other person or the community, as provided in 18 U.S.C. § 3142(g)," to motions under § 3582(c)(1)(A)(i). Subsection (i) contains no such requirement. While we agree that a determination of *present* dangerousness is an appropriate consideration when deciding whether or not to reduce a prisoner's sentence, we do question whether § 3142(g), which governs pretrial release decisions, is the appropriate source of standards in this situation. For example, § 3142(g)(1) requires consideration of the nature and circumstances of the offense of conviction, "including whether the offense is a crime of violence or involves narcotic drug," and § 3142(g)(2) refers to "the weight of the evidence against the person." Neither of these sections is necessarily relevant to the question of present dangerousness, which may be many years after the original offense. It would be particularly inappropriate to infer present dangerousness from the mere fact that the underlying offense "involves narcotic drugs." Even § 3142(g)(3), which requires the court to consider of "the history and characteristics of the person," may not always be relevant to a finding of present dangerousness. It would seem preferable in this context to refer only to § 3142(g)(4), which requires consideration of "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." Applying the broader standard of dangerousness under § 3142(g)(1) through (3) may unfairly invite rejection of prisoner petitions at the administrative level on grounds that have no relevance to any danger the prisoner may currently present.

We also note what may simply be a drafting oversight – the Commission's reference to a singular "extraordinary and compelling reason" in proposed U.S.S.G. § 1B1.13(1)(A). We assume that the Commission did not mean to suggest that a court must rely upon a single reason that is both extraordinary and compelling, as opposed to a combination of such reasons. We therefore recommend that proposed § 1B.1.13(1)(A) be amended to state "reasons" in the plural, as in the statute.[12]

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[12] Alternatively, the Commission could adopt the language in the FAMM Proposal for Policy Guidance published in the Federal Sentencing Reporter in 2001:

> An "extraordinary and compelling reason" may consist of several reasons, each of which alone is not extraordinary and compelling, that

We now turn to the matter of criteria and examples of "extraordinary and compelling reasons" warranting sentence reduction. As a general matter, we do not believe that Congress intended this statute to apply only to medical cases, much less cases involving terminal illness. Rather, Congress intended a court to be able to respond affirmatively to a government motion for sentence reduction in a broad range of circumstances, both medical and non-medical. The language of § 3582(c)(1)(A)(i) suggests no specific limits on the government's ability to bring cases warranting sentence reduction to the court's attention, and the reference to "rehabilitation alone" in § 994(t) strongly suggests that Congress contemplated use of the statute in circumstances where rehabilitation would be a relevant reason to consider sentence reduction together with other factors.

The legislative history of the 1984 Sentencing Reform Act also indicates that § 3582(c)(1)(A)(i) was intended to be applied in circumstances other than those involving a prisoner's health. See S. Rep. No. 225, 98th Cong., 1st Sess. 37-150 at p. 5 (statute available to deal with "the unusual case in which the defendant's circumstances are so changed, *such as* by terminal illness, that it would be inequitable to continue the confinement of the prisoner"); *id.* at 55 (changed circumstances warranting sentence reduction would include "cases of severe illness, [and] cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence"). The use of terminal illness as one example ("such as") of an extraordinary and compelling reason in the first quoted passage, and the distinction drawn between "severe illness" and "other extraordinary and compelling circumstances" in the second, demonstrate that Congress clearly expected the statute to be available in circumstances other than those involving the prisoner's medical status.

While in practice the Bureau of Prisons (BOP) has thus far not invoked this statute except in cases of imminent death, its own regulations recognize that sentence reduction may be sought for both medical and non-medical reasons. *See* 28 C.F.R. § 571.61 (directing prisoner to describe plans upon release, including where he will live and how he will support himself and, "if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment." *See also* 28 C.F.R. § 571.62 (a) through (c)(describing a process by which sentence reduction requests based on medical reasons are reviewed by the Medical Director, and non-medical cases are reviewed by the Assistant Director for Correctional Programs). Moreover, BOP's policy under the predecessor statute § 4205(g) was to invoke the statute "in particularly meritorious or unusual circumstances which could not reasonably have been foreseen by the court at the time of sentencing," including "if there is an

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together make the rationale for a reduction extraordinary and compelling.

See Mary Price, The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A), 13 Fed. Sent. Rep. 188, 191 (2001).

extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill." BOP Program Statement No. 5050.41 (October 5, 1983). In practice, BOP invoked § 4205(g) in cases involving a broad range of equitable circumstances. *See, e.g., United States v. Diaco*, 457 F. Supp. 371 (D.N.J. 1978)(federal prisoner's sentence reduced because of unwarranted disparity among codefendants); *United States v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977)(good behavior in prison). In the *Banks* case, the Director of the Bureau of Prisons noted that "Prior to the passage of the Parole Commission and Reorganization Act, applications for relief in cases of this type had to be processed through the Pardon Attorney to the President of the United States. The new procedure offers the Justice Department a faster means of achieving the desired result." 428 F. Supp. at 1089. *See also Diaco*, 457 F. Supp. at 372 (same).

It may be, as Vice Chairman Steer has suggested, that BOP's reluctance to invoke this statute more broadly and frequently stems from the absence of codified standards and policy guidance from this Commission, as well as from its conception of its own role in as that of turnkey. *See* John Steer and Paula Biderman, "Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences," 13 Fed. Sent. R. 154 (2001). If that is the case, it is all the more imperative for this Commission to step forward to give explicit policy guidance in this area, and to spell out the criteria and give examples so that the statute can begin to function as the "safety valve" that Congress intended it to be.

In developing specific criteria and examples, we cannot improve upon the thorough and thoughtful approach taken in the Families Against Mandatory Minimums (FAMM) Proposal for Policy Guidance, published as an Exhibit to Mary Price's article. *See* Mary Price, The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A), 13 Fed. Sent. Rep. 188, 191 (2001). Both the general criteria in FAMM's proposed § 1B1.13(b) and the more specific examples set forth in the proposed "application note," deserve the Commission's careful consideration. The criteria define "extraordinary and compelling reasons" to include a situation or condition 1) that was unknown to the court at sentencing; 2) that may have been known to the court but has changed significantly since sentencing; and 3) that the court was prohibited from taking into account at the time of sentencing but would no longer be prohibited from considering. Examples include terminal illness, severely diminished physical capacity, deteriorating health as a result of aging, substantial assistance to the government, changes in the applicable law that have not been made retroactive, disparity among codefendants, and compelling family circumstances. Rehabilitation may be relevant and properly be taken into account in many of these situations, even though it cannot serve as the sole reason for sentence reduction. The FAMM proposal is appended to this letter.

In addition to the criteria and examples proposed by FAMM, we would suggest that the Commission consider the criteria for equitable reduction in sentence that the Department of Justice itself has identified in the United States Attorneys' Manual as grounds for recommending commutation of sentence to the President. Section 1-2.113 of the U.S.A.M. states that commutation may be recommended in cases involving

"disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, e.g. cooperation with investigative or prosecutive efforts that has not been adequately rewarded by other official action." The section goes on to say that "a combination of these and/or other equitable factors may also provide a basis for recommending commutation in the context of a particular case." Particularly in light of the original purpose of the sentence reduction authority when it was enacted in 1976 to provide a judicial alternative to clemency, it seems appropriate that the circumstances identified by the government as appropriate for clemency should also be appropriate in this situation.

Thank you in advance for considering our comments, and please let us know if we may be of further assistance to the Commission.

Sincerely,

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