NEW YORK COUNCIL OF DEFENSE LAWYERS

COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING PROPOSED 1998 AMENDMENTS TO THE SENTENCING GUIDELINES

Once again, we would like to thank the Sentencing Commission for the opportunity to present our views on the proposed amendments. The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than one hundred and fifty attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including previous Chiefs of the Criminal Divisions in the Southern and Eastern District of New York. Our membership also includes attorneys from the Federal Defender Services offices in the Eastern and Southern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense lawyers. In the pages that follow, we address a number of proposed amendments of interest to our organization.

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COMMENTS RESPECTING PROPOSED AMENDMENTS 1-5, RELATING TO REVISIONS OF THE THEFT, FRAUD AND TAX GUIDELINES.

Introduction

The Commission has proposed extensive changes to the sentencing guidelines covering theft, fraud and tax offenses, including a broadening of the definition of "loss" for purposes of calculating monetary adjustments, consolidation of the guidelines for theft, fraud and property destruction, increasing the severity of punishment by changes to the loss tables, and resolving circuit conflicts in the loss area. The NYCDL believes that the Commission should take steps to address the uncertainty and confusion which exists in the District and Circuit courts with respect to the issue of "loss," and that the Commission's lengthy study and thoughtful proposals are valuable. More guidance from the Commission on the numerous and significant issues over which the circuits are split is plainly necessary if the Commission is to fulfill its statutory mandate to enact guidelines which avoid unwarranted sentencing disparities among defendants.

We believe, however, that this is a task which can readily be accomplished within the framework of the current definitions and tables, by resolving circuit splits and providing

additional guidance as to the difficult legal questions which sporadically vex courts and litigants alike. We do not believe it is necessary in pursuit of this mission to revamp the definition of "loss" to broaden the universe of economic harm that is counted in determining the sentence, as Amendment 4 proposes to do, or to modify the enhancement tables to provide for additional punishment, as Amendment 1 proposes to do. We also question the assumption that fraud and similar crimes are not punished severely enough. As set forth below, considerable empirical support exists for the proposition that the current guidelines provide for sentencing ranges of more than sufficient severity. We therefore oppose both Amendments 1 and 4.

Amendment 1 -- Proposed Changes to the Theft, Fraud and Tax Loss Tables

This Amendment presents two options for revising the theft, fraud and tax loss tables to raise penalties for economic offenses. The NYCDL opposes the Amendment.

We question the assumption that is implicit in the proposed amendments which seek to achieve greater punishment for "white collar" defendants. The position that fraud and similar crimes are not punished with sufficient commensurate severity has no basis in any empirical data. It is a sentiment which runs essentially against the grain of the Commission's statutory purpose to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in

cases in which the defendant is a first offender who has not been convicted of a crime of violence. . ." 28 U.S.C. § 994(j). We recognize, of course, that the statute continues, "or an otherwise serious offense." That did not mean, nor could it fairly be interpreted to mean, that the Congress intended to endorse a gradual obliteration of a class of non-violent criminal behavior from the sweep of the section.

In addition, Congress expressly directed the Commission that the guidelines ". . .shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, . ." 28 U.S.C. § 994(g). The NYCDL is unaware of any study that has been undertaken by the Commission which would assess the impact of the increased incarceration that would necessarily result from an escalation of the loss tables and the expanded definition of economic harm that has been proposed. What is particularly ironic, indeed, in the Commission's overall punitive objectives is that the rate of criminal activity has steadily declined in the country since 1990, yet the nation's prison population has steadily increased, with the Federal prison population experiencing one of the highest growth rates. See Appendix, *New York Times* article, "'Defying Gravity,' Inmate Population Climbs," January 19, 1998.

None of these critical matters appear to have been the subject of any rigorous study or consideration. For example, the

Commission's "Loss Issues" Working Paper of October 14, 1997, contains no reference to either the impact on prison population or the Congressionally expressed preference that first time, non-violent felony offenders, be sentenced to non-incarcerative sentences. There is not even a reasoned discussion of why there should be a general increase in sentences of so-called white collar criminals.

It all seems to be nothing more than a viscerally received truth that white collar criminals should be punished more severely than they are already. What the NYCDL finds particularly disturbing in that approach is its attempt to rationalize the sentencing increase under the guise of redressing a disparity in sentencing. That "spin" is reflected, most notably, in the synopsis of the first proposed amendment where the Commission has stated with respect to the two options, each of which would increase sentences: "The purpose of both options is to raise penalties for economic offenses. . .in order to achieve better proportionality with the guideline penalties for other offenses of comparable seriousness." Under the Guidelines, however, disparity in sentencing is a statutorily defined concept that seeks to eliminate disparities in sentences "among defendants with similar records who have been found guilty of similar conduct." (emphasis added) See 18 U.S.C. § 3553(a)(6). Indeed, the limited scope of that injunction is reiterated in 28 U.S.C. § 1991 (1)(B), where the Commission is mandated to avoid

"unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. . . ." The legislative scheme did not broadly mandate the Commission to eliminate disparity between "offenses of comparable seriousness," and certainly not to erode the sharp difference that ought to exist between the punishment of violent and non-violent crime.

The consideration of all of these matters at the staff level and at the pre-amendment stage is of the utmost importance, not only for the reasons we have already outlined but for other reasons as well. The Commission should be, but has not been, institutionally skeptical of the politically expedient clamor to further increase the rate and duration of imprisonment. For example, at the Commission's October 15, 1997 panel discussion concerning loss, all of the invited panelists, with one exception, advocated the theme that sentences were too low, in their views, for white collar defendants.

More than that, the panelists purported, without reference to their authority to do so, to speak on behalf of large and influential institutional groups within the criminal justice system when they endorsed changes that, invariably, will increase the length of imprisonment for first time, non-violent felony offenders.

In contrast, for example, to the position expressed by District Judge Rosen, speaking on behalf of the Criminal Law Committee of the Judicial Conference, is the result of a 1996 FJC

Survey of district judges regarding the appropriateness of severity levels of the theft and fraud guidelines. Approximately 46% of the judges polled, believed that the theft and fraud tables appropriately punished defendants. With respect to small monetary losses, the judges were evenly divided (approximately 14% on each side) between those that believed the guidelines over-punished or under-punished defendants. No specific inquiry was made of judges with respect to midrange monetary losses and, even as to large monetary losses, only a minority, slightly more than a third of judges polled, believed that defendants were under-punished.[1]

In actual practice, district judges further underscore the appropriateness of the punishment presently available under the Guidelines. The offense categories of larceny, embezzlement and fraud are fined at higher levels and with greater consistency than any other primary offense category. For example, in the 1991 fiscal year, two thirds of all cases in those categories resulted in either a fine or an order of restitution.[2] Nearly 50% of all such defendants also received prison sentences in 1991.[3] No other primary offense category grouping has the combined rate of imprisonment and fine/restitution that exists

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[1] See, Attachments to April 2, 1997 Memorandum of Commissioner Goldsmith to All Commissioners.

[2] Appendix B, 1991 Annual Report, USSG.

[3] Id.

with respect to those three primary offense categories.

In 1996, the prison punishment of those three primary offenses was reflected in several tables of the Commission's 1996 Sourcebook of Federal Sentencing Statistics. Downward departures were ordered in more than 25% of all fraud cases; in comparison, upward departures were ordered in just 1.4% of fraud cases. In embezzlement cases, the comparison between downward departures and upward departures was even more dramatic: 17.9% versus 0.1%. In larceny cases the comparison was 13.7% as against 1.4%. Even where the substantial assistance departure is eliminated from the calculations, the ratio between downward and upward departures is still significant: fraud, 6½ to 1; larceny, 4½ to 1; embezzlement, 135 to 1. These comparisons demonstrate that, in such individual cases, federal judges believe that downward departures are often warranted while upward departures rarely are. Moreover, the same type of ratios are revealed when an analysis is made of all sentences which have been imposed within the guidelines range. The ratios between sentences in the first and those in the fourth quarter of the range are: larceny, 7 to 1; fraud, 4 to 1; embezzlement, 19 to 1. Thus, it is simply insupportable to suggest that federal judges believe that sentences in this area are too low.

From the overall sentencing statistics, it seems reasonable to conclude that, since the advent of Guideline sentencing, a white collar defendant is far more likely to

receive a sentence of incarceration than he would have before the guidelines. Moreover, there seems little doubt that such a sentence will be a longer one than a pre-Guidelines sentence. The departure pattern described above strongly suggests that judges consider that the current Guideline sentencing provisions provide, in individual cases, a wholly adequate range within which to impose sufficiently punitive sentences of incarceration. No other reasonable conclusion can be drawn from the sharp differences between downward and upward departures and the equivalently high ratio of first to fourth quarter range sentences. In simple terms, such prison sentences have been toward the lower end of the range and district judges have found adequate reasons for downward departures in a statistically significant number of cases.

One would ordinarily expect that this type of long range experience under the Guidelines would logically lead the Commission to conclude that the offense/prison levels for white collar crimes were, if anything, considered by Federal judges to be <u>higher</u> than they ought to be. Instead, the Commission has paradoxically based much of the proposed changes in white collar sentencing on the assumed but unwarranted premise that white collar sentencing should be harshened "in order to achieve better proportionality with the guideline penalties for other offenses of comparable seriousness." Given the faulty premise that underlays that position, a regulatory scheme that seeks to

increase punishment could not be in accord with the Congressional mandate creating this Commission.

Amendment 3 -- Consolidation of Guidelines for Theft, Property Destruction and Fraud Offenses

The NYCDL endorses the Commission proposal to consolidate the guidelines for Theft, Fraud and Property Destruction offenses into a single guideline for Economic Harm. In terms of individual harm, defendant culpability, and breach of societal norms, these offenses are largely synonymous. Most thefts could be charged as frauds, and vice versa; the motives for such offenses are typically the same, and the same social and individual harm is caused. Such offenses are punished under their different guidelines in such similar fashion that it is doubtful that the Commission intended to create different outcomes in the first place. And, as noted above, the minor variations in definitions and application notes under the different sections have led to disparate results and endless speculation as to the Commission's intention in drawing such fine distinctions.

Since a single guideline would eliminate the confusion surrounding the current trifurcated model, streamline application of the guidelines, and impose consistency of definition and application, the NYCDL endorses Amendment 3.

Amendment 4 -- Proposed Change in Definition of "Loss"

Our primary objection to both Option 1 and Option 2 is

the change whereby "actual loss" is defined to include "reasonably foreseeable harm resulting from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct)."

We agree with the view of many courts and commentators that the current, larceny-based definition is imperfect. In a variety of contexts, as case law over the last decade has confirmed, "the value of the property taken, damaged or destroyed" is not a definition of the utmost helpfulness. This situation, in light of theft and fraud guidelines (and the commentary accompanying them) which are slightly different, and subjected to creative litigation, has spawned difficult and irreconcilable issues and holdings. More guidance and greater specificity is called for.[4]

But any algorithm by which certain objective facts are measured, quantified and tabulated, then translated into a subjective factor -- culpability or blameworthiness -- and ultimately translated back again into another, ostensibly objective, measurement -- how much time a particular human being should be imprisoned for -- will be imperfect.

Theoretically, in criminal cases, more harm should be correlated with more punishment, just as in civil cases more

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[4] For this reason alone, we believe, Option 1, which provides for a dramatically simplified and shortened definition of loss, opening the door to maximum discretion and minimal guidance to sentencing judges, makes a bad situation worse and should be rejected.

damages should be correlated with larger monetary judgments. Thus we believe that, while imperfect, the idea of "loss" as an enhancement component in the sentencing determination in theft and fraud cases makes sense. The difficulty for the Commission has always been to strike the balance between little definitional guidance, which inevitably will result in disparity and confusion, and extensive definitional guidance, which will result in burdensome litigation and which, in the final analysis, results in over- or under-punishment in unusual cases anyway. The "solution" to this dilemma is that there is no solution: the answer is almost always ideological and always depends on point of view and frame of reference. Some feel strongly that the system must guard against the too lenient punishment of a criminal who caused no loss (although he intended to cause a large one) while others feel just as strongly that it is wrong to imprison someone for harms caused by factors over which he or she had no control. For every prosecutor who urges a sentencing judge not to reward Professor Bowman's archetypal car thief who stole the Mazda while believing it to be the Maserati, there is a defense lawyer who, just as fervently, urges on the sentencing court the injustice of imposing a luxury-car sentence on his econobox client.[5]

[5] And, as the results of the Commission's Just Punishment survey indicate, there is no consensus as to which of these litigation positions should prevail: the public's view will often depend on whether the driveway from which the car was

We believe, however, that the Commission must not lose sight of the primary purpose of incarceration: to punish the offender. Prison is not for rehabilitation (28 U.S.C. § 994(k)), and the Commission should certainly not be driven by concern for making the victim whole. For purposes of determining how much to punish an offender, there is no need to tabulate each portion of every type of "harm" to each victim, as if these variables somehow translate into the "perfect" prison sentence, or as if justice will be thwarted if some of the variables are omitted.

As presently promulgated, the guidelines determine the quantity of punishment by primary reference to the characteristics of the offender, not characteristics of the victim or other circumstances. Thus, in a fraud case, the base offense level is set at 6. This level is subject to a variety of enhancements which appropriately relate to some attribute of the defendant or the nature of his conduct: if he engaged in more than minimal planning, add 2; if he misrepresented that he was acting on behalf of a charity, add 2; if he violated a judicial order, add 2; if he risked bodily injury to another, add 2, if he used foreign bank accounts, add 2, if he used a special skill, add 2; if he abused a position of trust, add 2; if he was a manager, add 2; and so on. And in addition to these adjustments,

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stolen was located in Alabama or Massachusetts. See Berk and Raggi Report to the U.S.S.C. regarding Just Punishment survey, summarized at U.S.S.C. 1996 Annual Report, p. 42 (noting "strong regional differences in punishment preferences. . ."

there is the additional adjustment for a loss which exceeds $2,000.

We believe this formulation is a practical method of resolving the question "how much time in prison?" because it focuses primarily on the characteristics and conduct of the offender, together with the direct harm he actually caused. It is fundamentally sound to hold a defendant accountable for factors over which he has control. The change proposed by the Commission in Amendment 4 alters this formulation dramatically because it imports into the calculation notions of foreseeable harm and consequential damages, thus introducing the concept that a defendant might deserve a longer prison sentence because of factors over which he had no control. While there may be cases in which foreseeable consequential damages are so significant that an upward departure may be warranted, the NYCDL opposes the proposal to make consequential damages part of the definition of loss.[6]

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[6] If, as hypothesized above, two identical car thieves stole identical Mazdas from two victims, and Victim 1 leased a car for two months until his Mazda was recovered, while Victim 2 had bad credit and therefore had to walk to work for two months until his Mazda was recovered, it makes no sense, we submit, for Thief 1 to get a longer prison sentence because Victim 1 suffered consequential pecuniary harm while Victim 2 did not. Furthermore, might not Thief 1's attorney urge that Victim 1 should have mitigated his damages and walked to work, and that the consequential damages should therefore not be counted because the incurring of them was largely within the victim's own control?

Adding consequential damages to the loss definition will generate a significant additional burden of litigation and fact-finding, to be borne by parties, attorneys, probation officers, district judges and circuit judges alike. Furthermore, disparities are just as likely to emerge, as various courts set precedent on factual questions such as what (and how much) harm is "reasonably" foreseeable, what facts establish "causation," and the like. And finally, the unusual case in which the loss determination does not adequately capture the "harmfulness and seriousness of the conduct" is already accounted for under Application Note 10 of the existing guideline, where a variety of upward departures are invited.

The NYCDL therefore opposes Amendment 4's modified definition of loss.[7] With respect to the balance of Amendment 4, the NYCDL endorses the following options with respect to the loss issues which have arisen under the case law:

Use of "Gain" as an Alternative to Loss Under Application Note 2(a)(6)

The Commission seeks comment on two proposals whereby gain to a defendant may be used as an alternative to loss in

[7] For the same reasons, the NYCDL favors the deletion of the special rule in procurement fraud and product substitution cases. Instead, courts should have discretion to depart upward in cases where reasonably foreseeable consequential damages and administrative costs are so substantial that the direct damages sustained by the victim do not adequately reflect the defendant's culpability.

certain circumstances. We believe that the decision of the Third Circuit in United States v. Kopp, 951 F.2d 521, 530 (3d Cir. 1991), is correct. The enhancements for monetary loss under § 2B1.1 and § 2F1.1 as a measurement of harm, and thus blameworthiness, focus on the victim. To permit the defendant's gain to serve as an alternative measure of loss even in cases where the victim's loss can be precisely measured would undermine this premise. Thus, the rule should be clarified to provide that gain may be used as an alternative to loss only where actual loss cannot be calculated.

The NYCDL does not believe that the Guidelines should be amended to permit gain to be used whenever it is greater than actual or intended loss. As noted above in our discussion of the proposed amendments to the loss tables, the calculations under the existing tables typically lead to adequate sentences, and there is no need to change the rule. However, the discretion now given to the courts in Application Note 10 to consider an upward departure where the loss calculation does not fully capture the harmfulness or seriousness of the conduct should be amended to make explicit reference to cases in which the defendant's gain far exceeds the victim's loss. Such a change will help assure that unjust results are avoided where, in the court's view, the defendant's gain is a more reliable indicator of culpability than the victim's loss.

Inclusion of Interest under Application Note 2(C)

The NYCDL favors Option A, which provides that loss does not include interest of any kind, so long as in an unusual case the district court retains the power to depart. As discussed above, actual loss should ordinarily drive the calculation of the loss enhancement, if any. The length of a jail sentence under the Guidelines should not be determined upon consequential damages, and the same principle, we submit, precludes the inclusion of interest. Sentencing should not be based upon frustrated expectations. For purposes of calculating loss, we do not believe there is a meaningful distinction between the time-value of money diverted from a victim who could otherwise have invested his funds, and the interest another victim expected to receive on a fraudulent transaction itself. This is particularly true when the bargained for return is itself part of the fraudulent misrepresentation. A defendant who fraudulently borrows $100 on the promise to repay $150 is no more culpable than the defendant who steals $100 on the promise to repay $125.

Even if the rule were otherwise, in most cases interest would be only a small portion of the overall loss figure. The added litigation burden, and increased complexity of the guideline, would therefore not substantially alter, let alone improve upon, the use of "loss" as an analog for culpability.

We therefore endorse Option A, excluding interest except as a possible ground for departure.

Special Rules for Credits Against Loss and for Ponzi Schemes under Application Note 2(B) and 2(D)(2)

Section 2F1.1 currently allows a defendant to receive a credit against the loss figure in two specific types of cases, but is silent on others. In product substitution cases, the value of the fraudulently substituted product is credited against the loss amount. In loan application cases, under § 2F1.1, comment. (n. 7(a), (b)), the amount of payments made before the crime is discovered plus the value of "any assets pledged to secure the loan" are credited against the amount of the loan.

The NYCDL endorses proposed Application Note 2(B), which provides for a general rule that economic benefit given to the victim prior to discovery of the offense shall be credited in determining the amount of loss. This rule is consistent with current Application Note 7, and consistent with the general rule that net loss adequately measures harm. This proposal has the benefit, however, of defining the time of measurement, defining the "time the offense is detected," and clarifying the impact of acts of the defendant which diminish the value of pledged collateral. These issues have produced several circuit conflicts, and greater guidance from the Commission is warranted to produce sentencing results which are consistent with one another. In addition, the special rule providing that in a

Ponzi-type scheme, the loss consists of the net loss to losing victims represents a thoughtful proposal which avoids both the overpunishment created by excluding all such repayments to victims (United States v. Mucciante, 21 F.3d 1228, 1237-38 (2d Cir.), cert. denied, 513 U.S. 949 (1994), and underpunishment by crediting payments to "investors" who made a profit. (See, United States v. Orton, 73 F.3d 331 (11th Cir. 1996)).

Special Rule for Cases Involving Diversion of Government Benefits under Application Note 2(D)(4)

The NYCDL believes Option B is preferable. Although basing loss on the gain to criminally responsible participants, is an apparent contradiction to the comments set forth above, in fact this option adequately measures the defendant's culpability. Where the benefits are simply pocketed, the "gain" to the defendant and the loss to the intended recipient are identical; where goods or services are provided by the defendant to the intended recipients, an offset to the defendant's gain will, to that extent, occur; and where loss is simply impossible to determine accurately (e.g., a medical provider paying kickbacks to a referring physician), the gain will adequately measure harm. United States v. Barnes, 117 F.3d 328 (7th Cir. 1997). Option A, which simply adds up the "value of the benefits derived from intended recipients," while easy to apply, will undoubtedly produce overpunishment in many instances, and cause some district judges to stretch departure factors to compensate. Option B is

more sensible and provides much more guidance, and is therefore preferable.

Non-Economic Factors Under Application Note 2(E)

Option 2 presents two additional proposals for treatment of non-economic considerations which themselves might warrant upward departures. Option A identifies five non-economic factors (a primary non-monetary objective, the risk of substantial non-monetary harm, an offense committed for the purpose of facilitating another felony, risk of reasonably foreseeable physical or psychological harm, and a risk of "reasonably foreseeable... substantial loss in addition to the loss that actually occurred) as specific aggravating offense characteristics, warranting either a 2- or 4-level upward adjustment. Option B makes such factors, in addition to other specified non-economic factors, departure considerations only. Option B is the lesser of two evils.

These non-economic factors are already identified in the application notes as factors which, if present in a particular unusual case, might warrant an upward departure. Furthermore, such factors are infrequently utilized as departure considerations. Statistics contained in the Commission's 1996 Sourcebook of Federal Sentencing Statistics indicate that upward departures occurred in only 1.4% of fraud cases.

In connection with the instant proposals, the Commission has identified no reason or justification for making these rarely-used factors specific offense characteristics.

Since in the vast majority case the direct economic harm caused by a defendant's conduct is apparently adequate to serve as a rough analog for harm and, correspondingly, punishment, there is no reason to further refine, let alone complicate, the loss determination. Option B, which continues the treatment of non-economic factors as departure considerations only, is preferable.

Proposed Issues for Comment

7(A) Aberrant Behavior

We support the proposal to create a chapter 5 guideline identifying aberrant behavior as a suggested ground for downward departure. We suggest, however, that the second sentence of the proposed guideline requiring that the act be both "spontaneous" and "thoughtless" is unnecessarily restrictive. Almost no criminal acts, except perhaps a purely impulsive theft, are committed completely spontaneously. And "thoughtless" is not a useful standard in this context. Any act committed with literally no thought whatsoever is almost impossible to imagine, and, in any event, probably not a crime in the first place. If it was the intent of the drafters in using the word "thoughtless" to convey the notion that the departure should be limited to those whose criminality was uncharacteristic and impulsive, then that should be more clearly defined.

7(B) Misrepresentation with respect to Charitable Organizations

We oppose any amendment of the guideline at this time

because there is no true conflict among the circuits. The Fourth Circuit has held that the enhancement required by § 2F1.1(b)(3) for misrepresenting that one is acting for a charitable organization applied to a president of a charitable organization that collected money from the public for bingo games but kept ten percent of the proceeds for himself and his cronies. United States v. Marcum, 16 F.3d 599 (4th Cir.), cert. denied, 513 U.S. 845 (1994). The Tenth Circuit has held that the enhancement did not apply to an official of a public agency who diverted money that the agency received as grants from the government. United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995). These decisions are not inconsistent. Frazier simply held that the facts of that case did not involve any misrepresentation whereby the defendant preyed on the charitable impulses of his victims, and the Circuit distinguished Marcum on this basis. The proposed amendment is therefore unnecessary and may invite unintended sentence enhancements whenever an offense involves a charitable organization--a result plainly not intended by the Commission.

7(C) Violation of Judicial Process

The Commission has proposed two options for amending the commentary to § 2F1.1(b)(3) which requires a two-level enhancement "[i]f the offense involved . . . violation of any judicial or administrative order, injunction, decree or process not addressed elsewhere in the guidelines." Option one would

expand the explicit scope of the enhancement to require its application "if the offense involves a violation of a special judicial process, such as a bankruptcy or probate filing." Option two would limit the scope of the enhancement to those cases in which "the defendant commits a fraud in contravention of a prior official judicial or administrative warning, in the form of an order, injunction, decree or process, to take or not to take a specified action." The Commission has stated that some amendment is necessary to address a conflict among the circuits as to whether the enhancement applies when the defendant has filed fraudulent forms in bankruptcy or probate courts.

We oppose any amendment of § 2F1.1(b)(3) at this time because there is no real conflict among the circuits. There is no indication in the appellate case law that similarly situated defendants are being treated differently as a result of different interpretations of the guidelines by different circuits.

Every circuit which has considered the issue (the seventh, eighth, ninth, tenth and eleventh) has held that § 2F1.1(b)(3) applies in the case of bankruptcy fraud. United States v. Mesner, 107 F.3d 1448 (10th Cir. 1997); United States v. Welch, 103 F.3d 906 (9th Cir. 1996) (per curiam); United States v. Michalek, 53 F.3d 325 (7th Cir. 1995); United States v. Bellew, 35 F.3d 518 (11th Cir. 1994) (per curiam); United States v. Lloyd, 947 F.2d 339 (8th Cir. 1991) (per curiam). The First Circuit declined to reach the issue because it had not been

considered by the district court; that circuit, however, explicitly invited the district court to consider the issue on remand. United States v. Shadduck, 112 F.3d 523 (1st Cir. 1997). Finally, the Second Circuit declined to extend the reasoning of these decisions from bankruptcy court filings to probate court filings. United States v. Carrozella, 105 F.3d 796 (2d Cir. 1997).

The only hint of a "conflict" among the circuits is dicta in one Second Circuit decision concerning probate court, which may suggest that it might question the applicability of the enhancement in bankruptcy fraud cases were the issue to be presented. Nevertheless, the state of the law is overwhelmingly clear: application of the enhancement has been affirmed in every bankruptcy fraud case in which the issue has been squarely presented and there is no suggestion that bankruptcy fraud defendants are being treated differently by different circuits.

There is insufficient appellate consideration of the issue in contexts other than bankruptcy filings to warrant promulgating an amendment that may have unintended consequences. Option one invites litigation over the meaning of "special" process, invites application of the enhancement in any case involving bankruptcy or probate, and invites litigation of the question of what sorts of proceedings are analogous to bankruptcy and probate. Although option two is preferable to option one

(because it gives a more clear indication of what the Commission views as the proper scope of the enhancement), we would suggest waiting until the issue has been discussed in more than one reported opinion.

7(D) Grouping Failure to Appear Count with Underlying Offense

We support the Commission's proposal to clarify the application of § 2J1.6 and to make clear that the procedure does not violate any statutory mandate.

7(E) Impostors and the Abuse of Trust Adjustment

The Commission has proposed an explicit expansion of the scope of § 3B1.3 to require a two-level enhancement whenever "the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not." We oppose this expansion of the enhancement which will result in an unnecessarily vague definition of "abuse of position of trust" and the possibility of duplicative or even multiplicitous enhancements for the same factors.

The appropriate sentence for an imposter is typically an issue in a fraud case. The issue has arisen, for example, when a con-artist holds himself out as an investment adviser, United States v. Queen, 4 F.3d 925 (10th Cir. 1993), cert. denied, 510 U.S. 1182 (1994), or medical professional, United States v. Gill, 99 F.3d 484 (1st Cir. 1996); United States v. Echervarria, 33 F.3d 175 (2d Cir. 1994). The guidelines appropriately punish such con-artists by treating their conduct as fraud; the guideline for fraud (§ 2F1.1) obviously takes into account that the gist of the offense is some scheme by which the perpetrator held himself out to be something he was not or otherwise tricked the victim out of his funds. The fraud guideline itself already provides an enhancement if the fraud was perpetrated by a particular misrepresentation that the defendant

was "acting on behalf of a charitable, educational, religious or political organization, or a government agency." § 2F1.1(b)(3). An additional enhancement of two-levels is already required if the victim was "unusually vulnerable" or "otherwise particularly susceptible to the criminal conduct." § 3A1.1(b). Two more levels are required on top of that if the defendant abused a "special skill." § 3B1.3. Finally, an upward departure is invited if the victim suffered unusual psychological harm. § 5K2.3.

In the context of this carefully drafted system of multiple enhancements, the purpose of an additional enhancement for abuse of a position of trust is, as stated in the present commentary, that "[p]ersons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature." Present § 3B1.3, by requiring an enhancement for abuse of position of trust or use of a special skill, is thus tailored to identifying a class of defendants who are deserving of more punishment because they took advantage of a relatively insulated position bestowed as a perquisite of professional achievement, to commit a crime that they believed would not be discovered. The proposed amendment, by extending the enhancement to impostors who did not otherwise use a special skill, converts the enhancement from one limited to a carefully defined class of more culpable defendants to one potentially applicable in garden-variety fraud

cases whenever a con-artist takes advantage of a naive victim by holding himself out to be something he is not. That conduct, as suggested above, is already squarely taken into account by the existing fraud guidelines and potentially applicable enhancements. The Commission has not cited any data or case studies whatsoever tending to indicate that such fraud is under-punished and that fraud sentences should generally be increased. In the absence of such a showing, there is no reason to amend the guideline.

7(F) <u>Instant Offense and Obstruction of Justice</u>

The Commission has suggested three alternative amendments to § 3C1.1 and/or the Application Notes to clarify the scope of the phrase “instant offense” as used in this section. The Commission asserts that there is a need for clarification because several circuits have interpreted “instant offense” as going beyond the investigation and prosecution of the defendant to include proceedings involving co-defendants. Thus, the Commission believes that § 3C1.1 should define “instant offense” so as to eliminate the differing interpretations.

We support option two, which limits the scope of the obstruction of justice enhancement to conduct relating to the "defendant's instant offense of conviction." Option one would extend the enhancement to conduct in the course of related cases but beyond the scope of the relevant conduct for the offense of

conviction. The cases cited by the Commission in support of option one all arise from the same limited fact pattern: a defendant pleads guilty but is believed to have committed perjury at a co-defendant's trial.

While we acknowledge that this fact pattern is troubling, we suggest that it is inappropriate to extend application of any chapter three adjustment beyond the scope of relevant conduct. The guidelines are drafted carefully in view of the preponderance standard that applies at sentencing to limit consideration to matters defined as relevant conduct--a standard that applies to all issues under chapters two and three. The limitation provided by the relevant conduct guideline is necessary to avoid the prospect of using a sentencing proceeding to punish a defendant for any wrong he may have committed over the course of his life. Perjury at a co-defendant's trial is a separate criminal offense that can and should be prosecuted separately. Such an act of perjury can already be considered in the case of a defendant who has pled guilty as relevant to the determination whether he should be awarded a downward adjustment for acceptance of responsibility. Carving out an exception to the relevant conduct rule for one chapter three guideline inappropriately erodes the principal foundation of guideline sentencing and whatever claim to legitimacy the guideline accordingly may possess.

We believe that the Second and Seventh Circuits have properly interpreted the phrase "instant offense" as being limited to the actual investigation and prosecution of the defendant. See United States v. Perdomo, 927 F. 2d 111 (2d Cir. 1991) and United States v. Partee, 31 F. 3d 529 (7th Cir. 1994). As the Partee court noted, any broader definition would require the concept of "relevant conduct" being applied to § 3C1.1 without there being any indication that the Commission intended this result. Id. at 532. In fact, the wording of § 3C1.1 strongly suggests that this two point enhancement was intended to be applicable only when a defendant took steps to interfere with his or her own prosecution. Only under those circumstances was an enhancement for an uncharged obstruction or perjury offense considered appropriate.

Despite this seemingly clear limitation in the application of § 3C1.1, several circuits have upheld enhancements where a defendant who has pleaded guilty provided allegedly false testimony exculpating co-defendants, United States v. Walker, 119 F.3d 403, 405-07 (6th Cir. 1997), United States v. Powell, 113 F.3d 464, 468-69 (3d Cir. 1997); United States v. Acuna, 9 F.3d 1442,1444-46 (9th Cir. 1993), or falsely exculpated co-defendants as part of a plea allocution, United States v. Bernaugh, 969 F. 2d 858,860-862 (10th Cir. 1992). In each case, the court held that "instant offense" included the prosecution of co-conspirators for the same offense of which the defendant was

convicted. Although the result in these cases seems to be inconsistent with the narrow language of § 3C1.1, each court has upheld the enhancement based primarily on the sentencing court's familiarity with the case itself and its ability to make an informed assessment of the truthfulness of the testimony at issue. However, as the Third Circuit made clear in Powell, § 3C1.1 does not apply to false statements or other obstructive conduct of a defendant concerning crimes for which the defendant has not been charged regardless of whether there is a close relationship between the charged and uncharged offenses. Powell at 468.

This limited expansion of "instant offense" to include prosecutions of co-defendants results more from a pragmatic reaction to perjury before a sentencing judge than from a reasoned analysis of § 3C1.1 itself. Although it is obviously difficult for courts to ignore such perjury in sentencing, the expansion of "instant offense" beyond the prosecution of the defendant creates a slippery slope which the Commission should avoid. In fact, neither of the options which purport to implement the "majority appellate view" are clearly limited to instances of perjury in trials of co-defendants and, therefore, create a risk of expanding § 3C1.1 well beyond its intended scope. For instance, option 1(a) proposes a definition of "instant offense" which includes any state or federal offense committed by the defendant or another person that is closely

related to the offense of conviction. Under this definition, a two point enhancement would be appropriate if a defendant made a false statement about crimes for which the defendant was investigated but not charged or even about related crimes in which the defendant was not alleged to have participated but about which he or she is believed to have knowledge. This expansive definition of § 3C1.1 was explicitly rejected by the Powell Court, see also United States v. Woods, 24 F.3d 514, 516(3d Cir. 1994), United States v. Kim, 27 F.3d 947, 958 (3d Cir. 1994) and should not be incorporated into the Guidelines.

Option 1(b)'s use of the phrase "closely related offense" is similarly problematic. Although this proposed amendment includes an Application Note which mentions a co-defendant's case as an example of a "closely related case", it does not limit "closely related case" to trials of co-defendants. Moreover, it does not provide any other limiting definition, thereby creating the opportunity for creeping expansion as well as disparities as courts struggle to define "closely related case".

Section 3C1.1 was not intended to be extended in this way and the Commission should adopt the second option to make clear that even this limited expansion goes beyond the intended reach of § 3C1.1. Short of that result, the Commission should decline to amend the section at all.

7(G) Failure to Admit Drug Use While on Pretrial Release

We support the Commission's proposal to amend the commentary § 3C1.1 by making clear that "lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release" will ordinarily not warrant a two-level enhancement for obstruction of justice. The enhancement should be reserved for material obstruction as described in application note 3 of the present guideline.

7(H) Meaning of "Incarceration" for Computing Criminal History

The Commission has proposed two alternative amendments to the Application Notes to § 4A1.2 to resolve the question of whether a sentence directing that someone reside in a community treatment center or halfway house following revocation of parole or probation constitutes "incarceration" for purposes of computing a defendant's criminal history score.

We support option two, which excludes confinement in a community treatment center or a halfway house, and home detention from the definition of incarceration in determining the defendant's subsequent criminal history. Placement in such facilities is often necessary to deal with such problems as substance abuse. Indeed, we have often advised defendants with substance abuse problems to consent to such confinement in the course of their probation or supervised release to assure that they receive the help they need to overcome their problems. The prospect of an increased criminal history score in the future would create a disincentive, however, for consenting to such treatment and cooperating with such placements. Option one would therefore introduce an unnecessarily adversarial element into the relationship between a defendant and counsel, on the one hand, with the Probation Department on the other.

The need for this particular amendment has been created by the conflict between the decision in United States v. Rasco,

963 F. 2d 132 (6th Cir. 1992) which held that residence in a halfway house after the revocation of parole constituted a sentence of incarceration for purposes of § 4A1.2(e)(1) and the decision in United States v. Latimer, 991 F.2d 1509 (9th Cir. 1993) which explicitly rejected the reasoning of the Rasco court and held that residence in a community treatment or halfway house did not constitute a sentence of incarceration.

The reasoning of the Latimer court is consistent with both the language and the underlying policy of the Sentencing Guidelines and should be incorporated into the Application Notes through adoption of Option 2. As the Latimer court points out, the Guidelines make clear distinctions between sentences of incarceration and halfway house or community confinement at various places in the Guidelines including Article 4 concerning the calculation of criminal history. The distinction is created in the Guidelines as part of the effort to ascertain the significance of a prior conviction without the need to relitigate or reconsider the prior offense. If a defendant was incarcerated during the fifteen year period prior to the offense for which sentence is being imposed, the Guidelines presume that the offense was sufficiently serious to warrant increasing the defendant's criminal history score by two or three points. Conversely, if the particular defendant was placed in some sort of community confinement, the Guidelines presume that the offense was not sufficiently serious and only adds one point to a

defendant's criminal history score.

The same analysis should apply in the context of parole or probation revocation. Section 4A1.2(k) explicitly refers to a "term of imprisonment" upon the revocation as being the operative factor. Thus, it is clear that not all revocations of parole or probation will trigger criminal history analysis; rather, it is only those revocations that result in a defendant having been incarcerated. Given that there are many possible grounds for revocation which will vary from jurisdiction to jurisdiction, and given that the available penalties upon revocation also vary from jurisdiction to jurisdiction, it is clear that the Commission determined that it was the imposition of a sentence of imprisonment which would signal a sufficiently serious violation to require inclusion in criminal history calculation. Thus, the use of the word "incarceration" in § 4A1.2(k)(2)(b) demonstrates that the commission reserved the possible application of a three point criminal history increase for those situations where the revocation was considered sufficiently serious to result in a return to prison.

The appropriateness of this result is made clear when one considers the differing bases for revocation decisions. Although the Rasco defendant (as well as Latimer) had his parole revoked because of a subsequent conviction, parole and probation can be revoked for behavioral reasons such as a failure to report or cooperate with supervising officers or because of a substance

abuse problem. Although these situations could well result in some sort of community confinement as a way to facilitate the offender's adjustment or treatment, it does not equate with the sort of conduct which is intended to result in a three point increase in a criminal history calculation.

The Guidelines should remain internally consistent so that sentences of incarceration do not include residence in community confinement or halfway house under any circumstances. Revocation decisions should not be considered differently from the original sentence and the decision to require residence in a community non-prison facility should not be treated as a sentence of incarceration.

7(I) Whether Downward Departure Precluded if Defendant Commits a "Crime of Violence."

The Commission invites comment on four options presented which address a circuit conflict on whether a downward departure is available if the defendant has committed a crime of violence. As it currently exists, the Policy Statement set forth in § 5K2.13 provides that Diminished Capacity not resulting from voluntary use of drugs or other intoxicants may warrant a sentence below the applicable guideline range only if the defendant has committed "a non-violent offense." The issue dividing the circuits has arisen from district and circuit court analysis of whether or not "non-violent offense" under § 5K2.13 is the same as the term of art "crime of violence," as defined in

§ 4B1.2 in connection with career offenders. While many courts have construed the terms as synonymous, the NYCDL believes that the view enunciated in United States v. Chatman, 986 F.2d 1446 (D.C. Cir. 1993) and United States v. Weddle, 30 F.3d 532 (4th Cir. 1994) is correct, and the rule should be changed.

The guidelines should make a distinction between definitions applicable to the conduct of career offenders -- recidivists who commit repeated crimes of violence or narcotics dealing -- and offenders whose capacity is diminished because of some mental or psychological infirmity. When the defendant suffers from a mental infirmity, several of the traditional justifications for imprisonment -- punishment, incapacitation and specific deterrence -- are diminished, since the mental infirmity to some extent affected the actions or the defendant's volition in the first place. The reasons career criminals are sentenced for longer periods of time is that earlier punishment has been an ineffective incapacitant and deterrent, and because society must protect itself from such individuals for longer periods of time. These precepts are inapplicable to an offender suffering from diminished capacity. Such an individual needs less punishment and more treatment and/or medication. While the protection of society is clearly paramount, that need can be adequately addressed without the limitations contained in § 5K2.13 as it currently exists. We also believe that the § 4B1.2 definition of "crime of violence" as one involving the "use, attempted use or threatened use of physical force" refers to intentional crimes, and not to crimes with a lesser mental state, i.e., crimes committed through recklessness or by defendants suffering from diminished capacity. This seems plain from the syntax of the section, and from its placement in the definitional section for

"career offenders," since it seems obvious that one could not become a career offender through diminished capacity, negligence, recklessness, or the like. This was the reasoning behind the Seventh Circuit's decision in United States v. Rutherford, 54 F.3d 370 (7th Cir. 1995), construing the career offender section.[8]

The NYCDL therefore endorses Option 4, which eliminates § 5K2.13's unwarranted limitation to nonviolent offenses, while maintaining that a departure will not be appropriate where the offense or the defendant's criminal history indicate a need to protect the public.

7(A) Proposed Issue for Comment; Should Policy Statement § 5K2.0 Be Amended to Incorporate the Analysis and Holding of Koon v. United States and, if so, How?

Policy Statement § 5K2.0 of the Sentencing Guidelines makes clear that sentencing courts retain the authority under the Sentencing Guidelines to depart from the applicable Guideline range. However, this Policy Statement describes the scope of this authority in fairly general and non-instructive terms.

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[8] Indeed, it is arguable that the "crime of violence" definition in §4B1.2 is itself overbroad. We believe that subdivision (ii), the catch-all provision, or so-called "'otherwise' clause," in §4B1.2, was in fact an impermissible broadening, if not a misreading, of the original Congressional enactment of the Sentencing Guidelines. See the discussion in United States v. Parson, 955 F.2d 858, 874 (3d Cir. 1992), and United States v. Rutherford, 54 F.3d 370 (7th Cir. 1995), in which both Circuit Courts invite the Commission to reexamine the "crime of violence" definition.

Given the insights into departures provided by the Supreme Court in its decision in Koon v. United States, 116 S. Ct. 2035, 135 L.Ed. 392 (1996), the policy statement should be amended to incorporate both the Supreme Court's own statement as to the role of departures in the sentencing scheme and its analytical structure for determining whether and to what extent a sentencing court may rely on certain considerations to base a departure determination.

With respect to amplifying on the policy underlying departures, the Policy Statement should be introduced by the first paragraph of Section V of Justice Kennedy's decision. In this paragraph, the Court made clear that the sentencing judge retains discretion under the Guidelines

> "to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." 135 L.Ed. 2d at 422.

Although this expression of policy is not inconsistent with § 5K2.0 as presently worded, its inclusion in the Policy Statement will make clear that departure analysis is to play a central role in any sentencing decision.

In addition, a Policy Statement introducing the subject of discretionary departures is incomplete without the Supreme Court's analysis of how a sentencing court should approach the issue of whether a departure is appropriate in a particular case.

To that end, the existing Policy Statement should be amended to add the following language from the Court's decision.

> Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with other Guidelines cases. 135 L.Ed. 2d at 413.

The Koon decision also made clear that a sentencing court may consider any factor as an appropriate basis for departure except for those few factors proscribed by the Sentencing Commission itself. Thus, if a factor is not explicitly proscribed, a sentencing court may exercise its discretion to "determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable guideline." This statement should be added to the Policy Statement.

Finally, the Koon decision clarifies the distinction between "encouraged" and "discouraged" factors and sets forth the scope of the sentencing court's discretion with respect to the different categories of sentencing factors. The Court's definitions of "encouraged" and "discouraged" factors should be

explicitly incorporated into the Policy Statement in the language used by the Court. Moreover, the Supreme Court's analysis of how a sentencing court is to apply "encouraged factors" and "discouraged factors" to the facts of a particular case must be added to the Policy Statement in the Supreme Court's own words.

As to “encouraged factors”, the Policy Statement should first clarify that the factors that the Sentencing Commission concedes have not adequately been taken into consideration have been deemed “encouraged factors” by the Supreme Court. Having defined “encouraged” factors in this way, the Policy Statement should then incorporate the Supreme Court’s explicit direction that a sentencing court is authorized to depart based on an encouraged factor if the applicable Guideline does not already take the factor into account.

As to “discouraged” factors, the Policy Statement should incorporate the Supreme Court’s statement as to how such factors are be used:

> If the special factor is a discouraged factor or an encouraged factor already taken into account by the applicable guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. 135 L.Ed. 2d at 411.

This statement would substitute for the last paragraph of the current Policy Statement. In addition, the Supreme Court’s prescription as to when and how “discouraged” factors can be used as the basis of a departure is inconsistent with the Commentary to the Policy Statement and the Commentary should be deleted.

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Respectfully submitted,

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