

AMENDMENTS TO THE SENTENCING GUIDELINES

Pursuant to section 994(p) of title 28, United States Code, the United States Sentencing Commission hereby submits to the Congress the following amendments to the sentencing guidelines and the reasons therefor. As authorized by such section, the Commission specifies an effective date of November 1, 2006, for these amendments.

Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary

1. Amendment: Chapter One, Part B is amended by adding at the end the following:

"§1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (Policy Statement)

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

- (1) (A) extraordinary and compelling reasons warrant the reduction; or
(B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;
- (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
- (3) the reduction is consistent with this policy statement.

Commentary

Application Notes:

1. Application of Subsection (1)(A).—
 - (A) Extraordinary and Compelling Reasons.—A determination made by the Director of the Bureau of Prisons that a particular case warrants a

reduction for extraordinary and compelling reasons shall be considered as such for purposes of subdivision (1)(A).

- (B) Rehabilitation of the Defendant.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of subdivision (1)(A).

2. Application of Subdivision (3).—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.

Background: This policy statement is an initial step toward implementing 28 U.S.C. § 994(t). The Commission intends to develop further criteria to be applied and a list of specific examples of extraordinary and compelling reasons for sentence reduction pursuant to such statute."

Reason for Amendment: This amendment creates a new policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons) as a first step toward implementing the directive in 28 U.S.C. § 994(t) that the Commission "in promulgating general policy statements regarding the sentence modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." The policy statement restates the statutory bases for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A). In addition, the policy statement provides that in all cases there must be a determination made by the court that the defendant is not a danger to the safety of any other person or to the community. The amendment also provides background commentary that states the Commission's intent to develop criteria to be applied and a list of specific examples pursuant to 28 U.S.C. § 994(t).

2. Amendment: The Commentary to §1B1.1 captioned "Application Notes" is amended by striking Note 6; and by redesignating Note 7 as Note 6.

Section 2D1.1(c) is amended by striking "(or the equivalent amount of other Schedule I or II Opiates)" each place it appears; by striking "(or the equivalent amount of other Schedule I or II Stimulants)" each place it appears; and by striking "(or the equivalent amount of other Schedule I or II Hallucinogens)" each place it appears.

Section 2D1.1(d)(1) is amended by inserting "or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline" after "Murder".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the first paragraph by striking the third and fourth sentences and inserting the following:

"In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:

- (A) Use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana.
- (B) Find the equivalent quantity of marihuana in the Drug Quantity Table.
- (C) Use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.

(See also Application Note 5.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gm of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kg of marihuana. In a case involving 100 gm of oxymorphone, the equivalent quantity of marihuana would be 500 kg, which corresponds to a base offense level of 28 in the Drug Quantity Table."

Chapter Two, Part J is amended by striking §2J1.7 and its accompanying commentary.

Chapter 3, Part C is amended in the heading by adding at the end "AND RELATED ADJUSTMENTS".

Chapter Three, Part C is amended by adding at the end the following:

"§3C1.3. Commission of Offense While on Release

If a statutory sentencing enhancement under 18 U.S.C. § 3147 applies, increase the offense level by 3 levels.

Commentary

Application Note:

1. Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the 'total punishment' (i.e., the sentence for the offense committed while on release plus the statutory sentencing enhancement under 18 U.S.C. § 3147) is in accord with the guideline range for the offense committed while on release, as adjusted by the enhancement in this section. For example, if

the applicable adjusted guideline range is 30-37 months and the court determines a 'total punishment' of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.

Background: An enhancement under 18 U.S.C. § 3147 applies, after appropriate sentencing notice, when a defendant is sentenced for an offense committed while released in connection with another federal offense.

This guideline enables the court to determine and implement a combined 'total punishment' consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement."

Reason for Amendment: This amendment addresses several problematic areas of guideline application. First, the amendment adds language to the cross reference at subsection (d) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to allow the application of §2A1.2 (Second Degree Murder) in cases in which the conduct involved is second degree murder, if the resulting offense level is greater than the offense level determined under §2D1.1.

Second, the amendment creates a new guideline at §3C1.3 (Commission of Offense While on Release), which provides a three-level adjustment in cases in which the statutory sentencing enhancement at 18 U.S.C. § 3147 (Penalty for an offense committed while on release) applies. The amendment also deletes §2J1.7 (Commission of Offense While on Release), the Chapter Two guideline to which the statutory enhancement at 18 U.S.C. § 3147 had been referenced prior to the amendment. Despite its reference in Appendix A (Statutory Index), 18 U.S.C. § 3147 is not an offense of conviction and thus does not require reference in Appendix A. Creating a Chapter Three adjustment for 18 U.S.C. § 3147 cases ensures the enhancement is not overlooked and is consistent with other adjustments in Chapter Three, all of which apply to a broad range of offenses.

Third, the amendment deletes from the Drug Quantity Table in §2D1.1(c) language that indicates the court should apply "the equivalent amount of other Schedule I or II Opiates" (in the line referenced to Heroin), "the equivalent amount of other Schedule I or II Stimulants" (in the line referenced to Cocaine), and "the equivalent amount of other Schedule I or II Hallucinogens" (in the line referenced to LSD). This language caused some guideline users to erroneously calculate the base offense level without converting the controlled substance to its marijuana equivalency, even though Application Note 10 of §2D1.1 sets forth the marijuana equivalencies for substances not specifically referenced in the Drug Quantity Table. For example, instead of converting 10 KG of morphine (an opiate) to 5000 KG of marijuana and determining the base offense level on that marijuana equivalency (resulting in a base offense level of 34), some guideline users determined the base offense level on the 10 KG of morphine by using the equivalent

amount of heroin (resulting in a base offense level of 36). This amendment deletes the problematic language and also clarifies in Application Note 10 that, for cases involving a substance not specifically referenced in the Drug Quantity Table, the court is to determine the base offense level using the marijuana equivalency for that controlled substance.

3. Amendment: The Commentary to §2A1.1 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1111,".

The Commentary to §2A1.2 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1111,".

The Commentary to §2A1.3 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1112,".

The Commentary to §2A1.4 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1112,".

The Commentary to §2A2.1 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1751(c),".

The Commentary to §2A2.2 captioned "Statutory Provisions" is amended by inserting "1841(a)(2)(C)," after "1751(e),".

Section 2B1.1(b)(6) is amended by inserting "or veterans' memorial" after "national cemetery".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "1369," after "1363,".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "'Trade secret'" the following paragraph:

"'Veterans' memorial' means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).".

Section 2B1.5(b)(2)(E) is amended by inserting "or veterans' memorial" after "cemetery".

The Commentary to §2B1.5 captioned "Statutory Provisions" is amended by inserting "1369," after "1361,".

The Commentary to §2B1.5 captioned "Application Notes" is amended in Note 3 in subdivision (B) by striking "has the meaning given that term" and inserting "and

'veterans' memorial' have the meaning given those terms".

The Commentary to §2N2.1 captioned "Application Notes" is amended by striking Note 3 and inserting the following:

- "3. Upward Departure Provisions.—The following are circumstances in which an upward departure may be warranted:
- (A) Death or bodily injury, extreme psychological injury, property damage, or monetary loss resulted. See Chapter Five, Part K (Departures).
 - (B) The defendant was convicted under 7 U.S.C. § 7734."

Chapter Two, Part T, Subpart 3 is amended in the "Introductory Commentary" in the first sentence by inserting "and 3907," after "1708(b),"; in the second sentence by striking "It is not intended to deal with the importation of contraband," and inserting "It is intended to deal with some types of contraband, such as certain uncertified diamonds, but is not intended to deal with the importation of other types of contraband,"; in the last sentence by inserting "not specifically covered by this Subpart" after "stolen goods"; and by inserting "if there is not another more specific applicable guideline" after "upward".

The Commentary to §2T3.1 captioned "Statutory Provisions" is amended by inserting ", 3907" after "1708(b)".

Chapter Two, Part X, Subpart 5 is amended in the heading by inserting "FELONY" after "OTHER"; and by adding at the end "AND CLASS A MISDEMEANORS".

Section 2X5.1 is amended in the heading by inserting "Felony" after "Other".

Section 2X5.1 is amended by striking "or Class A misdemeanor"; by striking "(b)" after "18 U.S.C. § 3553"; and by adding at the end the following paragraph:

"If the defendant is convicted under 18 U.S.C. § 1841(a)(1), apply the guideline that covers the conduct the defendant is convicted of having engaged in, as that conduct is described in 18 U.S.C. § 1841(a)(1) and listed in 18 U.S.C. § 1841(b)."

The Commentary the §2X5.1 is amended by inserting before "Application Note:" the following:

"Statutory Provision: 18 U.S.C. § 1841(a)(1)."

The Commentary the §2X5.1 captioned "Application Note" is amended by striking "Note" and inserting "Notes"; in Note 1 by inserting "In General.—" before "Guidelines"; and by adding at the end the following:

"2. Convictions under 18 U.S.C. § 1841(a)(1).—

- (A) In General.—If the defendant is convicted under 18 U.S.C. § 1841(a)(1), the Chapter Two offense guideline that applies is the guideline that covers the conduct the defendant is convicted of having engaged in, *i.e.*, the conduct of which the defendant is convicted that violates a specific provision listed in 18 U.S.C. § 1841(b) and that results in the death of, or bodily injury to, a child in utero at the time of the offense of conviction. For example, if the defendant committed aggravated sexual abuse against the unborn child's mother and it caused the death of the child in utero, the applicable Chapter Two guideline would be §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).
- (B) Upward Departure Provision.—For offenses under 18 U.S.C. § 1841(a)(1), an upward departure may be warranted if the offense level under the applicable guideline does not adequately account for the death of, or serious bodily injury to, the child in utero.

3. Application of §2X5.2.—This guideline applies only to felony offenses not referenced in Appendix A (Statutory Index). For Class A misdemeanor offenses that have not been referenced in Appendix A, apply §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).".

The Commentary to §2X5.1 captioned "Background" is amended in the first paragraph by striking "Where there is no sufficiently" and all that follows through "Sentencing Commission.'" and inserting the following:

"In a case in which there is no sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553 control."

Chapter Two, Part X, Subpart 5 is amended by adding at the end the following:

"§2X5.2. Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)

- (a) Base Offense Level: 6

Commentary

Statutory Provisions: 7 U.S.C. § 2156; 18 U.S.C. §§ 1365(f), 1801; 42 U.S.C. §§ 1129(a), 14133.

Application Note:

guideline at §2X5.2 to cover certain Class A misdemeanors.

First, this amendment responds to section 2 of the Veterans' Memorial Preservation and Recognition Act of 2003, Pub. L. 108–29. This Act created a new offense at 18 U.S.C. § 1369 that prohibits the destruction of veterans' memorials and imposes a ten-year statutory maximum term of imprisonment. This amendment refers this new offense to both §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources), and broadens the application of the two-level enhancement under both §§2B1.1(b)(6) and 2B1.5(b)(2) to include veterans' memorials. The two-level enhancement at §2B1.1(b)(6), combined with the cross reference at §2B1.1(c)(4), ensures that the penalty for the destruction of veterans' memorials will reflect the status of a veterans' memorial as a specially protected cultural heritage resource.

Second, this amendment addresses the Plant Protection Act of 2002, Pub. L. 107–171, which created a new offense under 7 U.S.C. § 7734 for knowingly importing or exporting plants, plant products, biological control organisms, and like products for distribution or sale. The statutory maximum term of imprisonment for the first offense is five years, and for subsequent offenses the statutory maximum term of imprisonment is ten years. This amendment modifies Application Note 3 of §2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) to provide that an upward departure may be warranted if a defendant is convicted under 7 U.S.C. § 7734.

Third, this amendment addresses the Clean Diamond Trade Act of 2003, Pub. L. 108–19, and accompanying Executive Order 13312, which prohibits (1) "the importation into, or exportation from, the United States . . . of any rough diamond, from whatever source, unless the rough diamond has been controlled through the [Kimberley Process Certification Scheme]; and (2) any transaction by a United States person anywhere, or any transaction that occurs in whole or in part within the United States, that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this section," and conspiracies to commit such acts. This amendment references the new offense at 19 U.S.C. § 3907 to §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) because the offense involves importing into the United States "conflict" diamonds (so-called because the profits from their sale are frequently used to fund rebel and military activities) without proper certification or payment of duty fees according to the Kimberley Process Certification Scheme, a process that legitimizes the quality and original source of the diamond. Because the essence of this new statutory offense is to avoid proper certification and evade duty fees, penalties for its violation are appropriately covered by §2T3.1. This amendment also adds language referencing "contraband diamonds" to the introductory commentary of Chapter Two, Part T, Subpart Three to indicate that uncertified diamonds are contraband covered by §2T3.1 even if other types of contraband are covered by other, more specific guidelines.

Fourth, this amendment implements the Unborn Victims of Violence Act of 2004, Pub. L. 108–212, which created a new offense at 18 U.S.C. § 1841 for causing death or serious bodily injury to a child in utero while engaging in conduct violative of any of over 60 offenses enumerated at 18 U.S.C. § 1841(b). Under 18 U.S.C. § 1841(a)(1) and (a)(2)(A), the statutory maximum term of imprisonment for the conduct that “caused the death of, or bodily injury to a child in utero shall be the penalty provided under Federal law for that conduct had that injury or death occurred to the unborn child’s mother.” Otherwise, under 18 U.S.C. § 1841(a)(2)(C), if the person “engaging in the conduct . . . intentionally kills or attempts to kill the unborn child, that person shall be punished . . . under sections 1111, 1112, and 1113 for intentionally killing or attempting to kill a human being.” The amendment references 18 U.S.C. § 1841(a)(2)(C) to the guidelines designated in Appendix A for 18 U.S.C. §§ 1111, 1112, and 1113, which are §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), and 2A1.4 (Involuntary Manslaughter). This amendment also refers the provisions under 18 U.S.C. § 1841(a)(1) and (a)(2)(A) to 2X5.1 (Other Offenses) and adds a special instruction that the most analogous guideline for these offenses is the guideline that covers the underlying offenses.

Fifth, this amendment creates a new guideline at §2X5.2 (Class A Misdemeanors) that covers all Class A misdemeanors not otherwise referenced to a more specific Chapter Two guideline. The amendment assigns a base offense level of 6 for such offenses, consistent with the guidelines’ treatment of many Class A misdemeanor and regulatory offenses. The amendment also references several new Class A Misdemeanors to this guideline. With the promulgation of this new guideline, the Commission will reference new Class A Misdemeanor offenses either to this guideline or to another, more specific Chapter Two guideline, as appropriate.

4. Amendment: Chapter Two, Part A, Subpart 6 is amended in the heading by inserting "HOAXES," after "COMMUNICATIONS,".

Section 2A6.1 is amended in the heading by adding at the end "; Hoaxes".

Section 2A6.1 is amended by adding at the end the following:

"(c) Cross Reference

- (1) If the offense involved any conduct evidencing an intent to carry out a threat to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), apply §2M6.1 (Weapons of Mass Destruction), if the resulting offense level is greater than that determined under this guideline."

The Commentary to §2A6.1 captioned "Statutory Provisions" is amended by inserting "1038," after "879,".

The Commentary to §2K2.1 captioned "Statutory Provisions" is amended by inserting ", 2332g" after "(k)-(o)".

Section 2L1.1(b), as amended by Amendment 10 of this document, is further amended by adding at the end the following:

"(9) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by 2 levels."

The Commentary to §2M6.1 captioned "Statutory Provisions" is amended by inserting "175c," after "175b,;" by inserting "832," after "831,;" and by inserting ", 2332h" before "; 42 U.S.C."

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 175b the following:

"18 U.S.C. § 175c 2M6.1";

by inserting after the line referenced to 18 U.S.C. § 831 the following:

"18 U.S.C. § 832 2M6.1";

by inserting after the line referenced to 18 U.S.C. § 1037 the following:

"18 U.S.C. § 1038 2A6.1"; and

by inserting after the line referenced to 18 U.S.C. § 2332f the following:

"18 U.S.C. § 2332g 2K2.1
18 U.S.C. § 2332h 2M6.1".

Reason for Amendment: This amendment implements various provisions of the Intelligence Reform and Terrorism Prevention Act of 2004 (the "Act"), Pub. L. 108–458.

Section 5401 of the Act adds a new subsection (a)(4) to 8 U.S.C. § 1324 that increases the otherwise applicable penalties by up to ten years' imprisonment for bringing aliens into the United States if (A) the conduct is part of an ongoing commercial organization or enterprise; (B) aliens were transported in groups of 10 or more; and (C)(i) aliens were transported in a manner that endangered their lives; or (ii) the aliens presented a life-threatening health risk to people in the United States. Offenses under 18 U.S.C. § 1324 are referenced to §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). In response to the new offense, the amendment adds a two-level specific offense characteristic at §2L1.1(b)(7) applicable to offenses of conviction under 8 U.S.C. § 1324(a)(4), to account for the increased statutory maximum penalty for such offenses.

Section 6702 of the Act creates a new offense at 18 U.S.C. § 1038 (False Information and Hoaxes). The amendment references the new offense to §2A6.1 (Threatening or Harassing Communications) and adds a cross reference to §2M6.1 (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy) if the conduct supports a threat to use a weapon of mass destruction. The Commission referenced the new offense to these guidelines because the conduct criminalized by the new statute is analogous to conduct already covered by other statutes referenced to these two guidelines.

Section 6803 of the Act creates a new offense at 18 U.S.C. § 832 (Participation in Nuclear and Weapons of Mass Destruction Threats in the United States), relating to participation in nuclear, and weapons of mass destruction, threats to the United States. Section 6803 also adds this new offense to the list of predicate offenses at 18 U.S.C. § 2332b(g)(5)(B)(i) and amends sections 57(b) and 92 of the Atomic Energy Act of 1954 (42 U.S.C. § 2077(b)) to cover the participation of an individual in the development of special nuclear material. The amendment references 18 U.S.C. § 832 to §2M6.1 because this offense is similar to other offenses referenced to this guideline.

Section 6903 of the Act creates a new offense at 18 U.S.C. § 2332g (Missile Systems Designed to Destroy Aircraft) prohibiting the production or transfer of missile systems designed to destroy aircraft. The amendment references 18 U.S.C. § 2332g to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) because the types of weapons described in the offense would be covered as destructive devices under 26 U.S.C. § 5845(a).

Section 6905 of the Act creates a new offense at 18 U.S.C. § 2332h (Radiological Dispersal Devices) prohibiting the production, transfer, receipt, possession, or threat to use, any radiological dispersal device. The amendment references 18 U.S.C. § 2332h to §2M6.1 because of the nature of the offense. Section 2M6.1 covers conduct dealing with the production of certain types of nuclear, biological, or chemical weapons or other weapons of mass destruction, including weapons of mass destruction that, as defined in 18 U.S.C. § 2332a, are designed to release radiation or radioactivity at levels dangerous to human life.

Section 6906 of the Act creates a new offense at 18 U.S.C. § 175c (Variola Virus) that prohibits the production, acquisition, transfer, or possession of, or the threat to use, the variola virus. The amendment references the new offense to §2M6.1 because the variola virus may be used as a biological agent or toxin and, therefore, it is appropriate to reference this new offense to this guideline.

5. Amendment: Section 2B5.3 and Appendix A (Statutory Index), effective October 24, 2005 (see USSC Guidelines Manual, Supplement to Appendix C, Amendment 675), are repromulgated with the following changes:

The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 1, in the paragraph that begins "Uploading" by striking "item in an openly shared file" and inserting "item as an openly shared file"; and by striking "placed in".

Reason for Amendment: This amendment re-promulgates as a permanent amendment the temporary, emergency amendment to §2B5.3 (Criminal Infringement of Copyright or Trademark), and Appendix A (Statutory Index), which became effective on October 24, 2005. The amendment implements the directive in section 105 of the Family Entertainment and Copyright Act of 2005, Pub. L. 109–9, which instructs the Commission, under emergency authority, to "review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of intellectual property rights crimes..."

"In carrying out [the directive], the Commission shall—

(1) take all appropriate measures to ensure that the Federal sentencing guidelines and policy statements...are sufficiently stringent to deter, and adequately reflect the nature of, intellectual property rights crimes;

(2) determine whether to provide a sentencing enhancement for those convicted of the offenses [involving intellectual property rights], if the conduct involves the display, performance, publication, reproduction, or distribution of a copyrighted work before it has been authorized by the copyright owner, whether in the media format used by the infringing party or in any other media format;

(3) determine whether the scope of 'uploading' set forth in application note 3 of section 2B5.3 of the Federal sentencing guidelines is adequate to address the loss attributable to people who, without authorization, broadly distribute copyrighted works over the Internet; and

(4) determine whether the sentencing guideline and policy statements applicable to the offenses [involving intellectual property rights] adequately reflect any harm to victims from copyright infringement if law enforcement authorities cannot determine how many times copyrighted material has been reproduced or distributed."

Pre-Release Works

The amendment provides a separate two-level enhancement if the offense involved a pre-release work. The enhancement and the corresponding definition use language directly from 17 U.S.C. § 506(a) (criminal infringement). The amendment adds language to Application Note 2 that explains that in cases involving pre-release works, the infringement amount should be determined by using the retail value of the infringed item, rather than any premium price attributed to the infringing item because of its pre-release

status. The amendment addresses concerns that distribution of an item before it is legally available to the consumer is more serious conduct than distribution of other infringing items and involves a harm not addressed by the current guideline.

Uploading

The concern underlying the uploading directive pertains to offenses in which the copyrighted work is transferred through file sharing. The amendment builds on the current definition of "uploading" to include making an infringing item available on the Internet by storing an infringing item as an openly shared file. The amendment also clarifies that uploading does not include merely downloading or installing infringing items on a hard drive of the defendant's computer unless the infringing item is in an openly shared file. By clarifying the definition of uploading in this manner, Application Note 3, which is a restatement of the uploading definition, is no longer necessary and the amendment deletes the application note from the guideline.

Indeterminate Number

The amendment addresses the final directive by amending Application Note 2, which sets forth the rules for determining the infringement amount. The note provides that the court may make a reasonable estimate of the infringement amount using any relevant information including financial records in cases in which the court cannot determine the number of infringing items.

New Offense

Finally, the amendment provides a reference in Appendix A (Statutory Index) for the new offense at 18 U.S.C. § 2319B. This offense is to be referenced to §2B5.3.

6. Amendment: Section 2D1.1, effective March 27, 2006 (USSC Guidelines Manual, Supplement to the 2005 Supplement to Appendix C, Amendment 681), is repromulgated without change.

Reason for Amendment: This amendment re-promulgates as a permanent amendment the temporary, emergency amendment that implemented the directive in the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109-76. That Act requires the Commission, under emergency amendment authority, to implement section 3 of the Anabolic Steroid Control Act of 2004, Pub. L. 108-358 (the "ASC Act"), which directs the Commission to "review the Federal sentencing guidelines with respect to offenses involving anabolic steroids" and "consider amending the . . . guidelines to provide for increased penalties with respect to offenses involving anabolic steroids in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use . . ." The emergency amendment became effective on March 27, 2006 (See Supplement to Appendix C, Amendment 681).

The amendment implements the directives by increasing the penalties for offenses involving anabolic steroids. It does so by changing the manner in which anabolic steroids are treated under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The amendment eliminates the sentencing distinction between anabolic steroids and other Schedule III substances when the steroid is in a pill, capsule, tablet, or liquid form. For anabolic steroids in other forms (e.g., patch, topical cream, aerosol), the amendment instructs the court that it shall make a reasonable estimate of the quantity of anabolic steroid involved in the offense, and in making such estimate, the court shall consider that each 25 mg of anabolic steroid is one "unit".

In addition, the amendment addresses two harms often associated with anabolic steroid offenses by providing new enhancements in §2D1.1(b)(6) and (b)(7). Subsection (b)(6) provides a two-level enhancement if the offense involved the distribution of an anabolic steroid and a masking agent. Subsection (b)(7) provides a two-level enhancement if the defendant distributed an anabolic steroid to an athlete. Both enhancements address congressional concern with distribution of anabolic steroids to athletes, particularly the impact that steroids distribution and steroids use has on the integrity of sport, either because of the unfair advantage gained by the use of steroids or because of the concealment of such use.

The amendment also amends Application Note 8 of §2D1.1 to provide that an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) ordinarily would apply in the case of a defendant who used his or her position as a coach to influence an athlete to use an anabolic steroid.

7. Amendment: Section 2G2.5 is amended in the heading by adding at the end "; Failure to Provide Required Marks in Commercial Electronic Email".

The Commentary to §2G2.5 captioned "Statutory Provision" is amended by striking "Provision:" and inserting "Provisions: 15 U.S.C. § 7704(d);".

Chapter Three, Part C, as amended by Amendment 2 of this document, is further amended by adding at the end the following:

"§3C1.4. False Registration of Domain Name

 If a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies, increase by 2 levels.

Commentary

Background: This adjustment implements the directive to the Commission in section 204(b) of Pub. L. 108-482."

Appendix A (Statutory Index) is amended by inserting after the line referenced to 15 U.S.C. § 6821 the following:

"15 U.S.C. § 7704(d) 2G2.5".

Reason for Amendment: This amendment (A) implements the directive to the Commission in section 204(b) of the Intellectual Property Protection and Courts Administration Act of 2004, Pub. L 109–9; and (B) addresses the new offense in section 5(d) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub L. 108–187 ("CAN-SPAM Act")(15 U.S.C. § 7704(d)).

Section 204(b) of the Intellectual Property Protection and Courts Administration Act of 2004 directed the Commission to ensure that the applicable guideline range for a defendant convicted of any felony offense carried out online that may be facilitated through the use of a domain name registered with materially false contact information is sufficiently stringent to deter commission of such acts. The amendment implements this directive by creating a new guideline, at §3C1.4 (False Registration of Domain Names), which provides a two-level adjustment for cases in which a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies. Section 3559(f)(1), created by section 204(a) of the Intellectual Property Protection and Courts Administration Act of 2004, doubles the statutory maximum term of imprisonment, or increases the maximum sentence by seven years, whichever is less, if a defendant who is convicted of a felony offense knowingly falsely registered a domain name and used that domain name in the course of the offense. Basing the adjustment in the new guideline on application of the statutory enhancement in 18 U.S.C. § 3559(f)(1) satisfies the directive in a straightforward and uncomplicated manner.

Section 5(d)(1) of the CAN-SPAM Act prohibits the transmission of commercial electronic messages that contain "sexually oriented material" unless such messages include certain marks, notices, and information. The amendment references the new offense, found at 15 U.S.C. § 7704(d), to §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials). Prior to this amendment, §2G2.5 applied to violations of 18 U.S.C. § 2257, which requires producers of sexually explicit materials to maintain detailed records regarding their production activities and to make such records available for inspection by the Attorney General in accordance with applicable regulations. Although offenses under 15 U.S.C. § 7704(d) do not involve the same recording and reporting functions, section 7704(d) offenses essentially are regulatory in nature and in this manner are similar to other offenses sentenced under §2G2.5. In addition to the statutory reference changes, the amendment also expands the heading of §2G2.5 specifically to cover offenses under 15 U.S.C. § 7704(d).

8. Amendment: Section 2J1.2 and Appendix A (Statutory Index), effective October 24, 2005 (see USSC Guidelines Manual, Supplement to Appendix C, Amendment 676), are

repromulgated without change.

Reason for Amendment: This amendment repromulgates as a permanent amendment the temporary, emergency amendment to §2J1.2 and Appendix A (Statutory Index), which became effective on October 24, 2005 (see Supplement to Appendix C, Amendment 676). The amendment implements section 6703 of the Intelligence Reform and Terrorism Prevention Act of 2004 (the "Act"), Pub. L. 108–458, which provides an enhanced penalty of not more than 8 years of imprisonment for offenses under sections 1001(a) and 1505 of title 18, United States Code, "if the offense involves international or domestic terrorism (as defined in section 2331)." Section 6703(b) requires the Sentencing Commission to amend the sentencing guidelines to provide for "an increased offense level for an offense under sections 1001(a) and 1505 of title 18, United States Code, if the offense involves international or domestic terrorism, as defined in section 2331 of such title." Section 3 of the United States Parole Commission Extension and Sentencing Commission Authority Act of 2005, Pub. L. 109–76, directed the Commission, under emergency authority, to promulgate an amendment implementing section 6703(b).

First, the amendment references convictions under 18 U.S.C. § 1001 to §2J1.2 (Obstruction of Justice) "when the statutory maximum term of imprisonment relating to international or domestic terrorism is applicable." It also adds a new specific offense characteristic at §2J1.2(b)(1)(B) providing for a 12 level increase for a defendant convicted under 18 U.S.C. §§ 1001 and 1505 "when the statutory maximum term of imprisonment relating to international or domestic terrorism is applicable." This 12 level increase is applied in lieu of the current 8 level increase for injury or threats to persons or property. The increase of 12 levels is intended to provide parity with the treatment of federal crimes of terrorism within the limits of the 8 year statutory maximum penalty. It is also provided to ensure a 5 year sentence of imprisonment for offenses that involve international or domestic terrorism.

Second, the amendment adds to Application Note 1 definitions for "domestic terrorism" and "international terrorism," using the meanings given the terms at 18 U.S.C. § 2331(5) and (1), respectively.

Third, the amendment adds to Application Note 2 an instruction that if §3A1.4 (Terrorism) applies, do not apply §2J1.2(b)(1)(B).

9. Amendment: Section 2K2.1(a) is amended by striking subdivision (1) and inserting the following:

"(1) 26, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of

violence or a controlled substance offense;";

by striking subdivision (3) and inserting the following:

"(3) 22, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;";

by striking subdivision (4)(B) and inserting the following:

"(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; or (II) is convicted under 18 U.S.C. § 922(d);";

and in subdivision (5) by striking "or 18 U.S.C. § 921(a)(30)".

Section 2K2.1(b) is amended by striking subdivision (4) and inserting the following:

"(4) If any firearm (A) was stolen, increase by 2 levels; or (B) had an altered or obliterated serial number, increase by 4 levels.".

Section 2K2.1(b) is amended by redesignating subdivisions (5) and (6) as subdivisions (6) and (7), respectively; and by inserting after "except if subsection (b)(3)(A) applies." the following subdivision:

"(5) If the defendant engaged in the trafficking of firearms, increase by 4 levels.".

The Commentary to §2K2.1 captioned "Application Notes" is amended by striking Note 2 and inserting the following:

"2. Semiautomatic Firearm Capable of Accepting a Large Capacity Magazine.—For purposes of subsections (a)(1), (a)(3), and (a)(4), a ‘semiautomatic firearm capable of accepting a large capacity magazine’ means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.".

The Commentary to §2K2.1 captioned "Application Notes" is amended by striking Note 4; by redesignating Notes 5 through 10 as Notes 4 through 9, respectively; by striking Note 11; by redesignating Notes 12 through 14 as Notes 10 through 12, respectively; and by striking Notes 15 and 16.

The Commentary to §2K2.1 captioned "Application Notes" is amended by striking Note 8, as redesignated by this amendment, and inserting the following:

"8. Application of Subsection (b)(4).—

- (A) Interaction with Subsection (a)(7).—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, if the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).

- (B) Knowledge or Reason to Believe.—Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number."

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 4, as redesignated by this amendment, by inserting "Application of Subsection (a)(7).—" before "Subsection (a)(7)"; in Note 5, as redesignated by this amendment, by inserting "Application of Subsection (b)(1).—" before "For purposes of calculating"; in Note 6, as redesignated by this amendment, by inserting "Application of Subsection (b)(2).—" before "Under subsection (b)(2)"; in Note 7, as redesignated by this amendment, by inserting "Destructive Devices.—" before "A defendant"; in Note 9, as redesignated by this amendment, by inserting "Application of Subsection (b)(7).—" before "Under"; and by striking "(b)(6), if" and inserting "(b)(7), if"; in Note 10, as redesignated by this amendment, by inserting "Prior Felony Convictions.—" before "For purposes of"; in Note 11, as redesignated by this amendment, by inserting "Upward Departure Provisions.—" before "An upward departure"; in Note 12, as redesignated by this amendment, by inserting "Armed Career Criminal.—" before "A defendant who"; and by

inserting at the end the following:

"13. Application of Subsection (b)(5).—

- (A) In General.—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—
 - (i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and
 - (ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—
 - (I) whose possession or receipt of the firearm would be unlawful; or
 - (II) who intended to use or dispose of the firearm unlawfully.
- (B) Definitions.—For purposes of this subsection:

‘Individual whose possession or receipt of the firearm would be unlawful’ means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. ‘Crime of violence’ and ‘controlled substance offense’ have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1). ‘Misdemeanor crime of domestic violence’ has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term ‘defendant’, consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant’s own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

- (C) Upward Departure Provision.—If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted.
- (D) Interaction with Other Subsections.—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in

connection with another felony offense (i.e., an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6) also would apply.

14. 'In Connection With'.—

(A) In General.—Subsections (b)(6) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.

(B) Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(1) and (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) Definitions.—

'Another felony offense', for purposes of subsection (b)(6), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

'Another offense', for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

(D) Upward Departure Provision.—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted."

Section 5K2.17 is amended to read as follows:

"§5K2.17. Semiautomatic Firearms Capable of Accepting Large Capacity Magazine

(Policy Statement)

If the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A 'semiautomatic firearm capable of accepting a large capacity magazine' means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case."

Reason for Amendment: This four part amendment addresses various issues pertaining to the primary firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). First, the amendment modifies four base offense levels that provide enhanced penalties for offenses involving a firearm described in 18 U.S.C. § 921(a)(30), the semiautomatic assault weapon ban that expired on September 13, 2004. The Commission received information regarding inconsistent application as to whether the enhanced base offense levels apply to these types of firearms in light of the ban's expiration. The amendment deletes the reference to 18 U.S.C. § 921(a)(30) at §2K2.1(a)(1), (a)(3), and (a)(4) and replaces the reference with the term, "a semiautomatic firearm capable of accepting a large capacity magazine," which is defined in Application Note 2.

While the amendment deletes the reference to 18 U.S.C. § 921(a)(30) at §2K2.1(a)(5), it does not include the phrase "a semiautomatic firearm that is capable of accepting a large capacity magazine" in this subsection because a defendant sentenced under subsection (a)(5) does not have the same "prohibited person" status as a defendant sentenced under subsections (a)(1), (a)(3), or (a)(4).

The amendment also amends §5K2.17 (High-Capacity, Semiautomatic Firearms) in a manner consistent with §2K2.1, as amended, except that it excludes the language pertaining to .22 caliber rim fire ammunition in order to remain in conformity with a prior congressional directive. As amended, §5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine) provides that an upward departure may be warranted if a defendant possesses a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense.

Second, the amendment provides a 4-level enhancement at §2K2.1(b)(5) if the defendant engaged in the trafficking of firearms. The definition of trafficking encompasses

transporting, transferring, or otherwise disposing of two or more firearms, or receipt of two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual. The definition also requires that the defendant know or have reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual whose possession or receipt would be unlawful or who intended to use or dispose of the firearm unlawfully. With respect to an individual whose possession would be unlawful, the amendment includes individuals who previously have been convicted of a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence, or who at the time of the offense were under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Additionally, the definition provides that the enhancement applies regardless of whether anything of value was exchanged.

Third, the amendment modifies §2K2.1(b)(4) to increase penalties for offenses involving altered or obliterated serial numbers. Prior to this amendment, §2K2.1(b)(4) provided a 2-level enhancement if the offense involved either a stolen firearm or a firearm with an altered or obliterated serial number. The amendment provides a 4-level enhancement for offenses involving altered or obliterated serial numbers. This increase reflects both the difficulty in tracing firearms with altered or obliterated serial numbers, and the increased market for these types of weapons.

Fourth, the amendment addresses a circuit conflict pertaining to the application of current §2K2.1(b)(5) (re-designated by this amendment as §2K2.1(b)(6)) and (c)(1)), specifically with respect to the use of a firearm "in connection with" burglary and drug offenses. The amendment, adopting the language from Smith v. United States, 508 U.S. 223 (1993), provides at Application Note 14 that the provisions apply if the firearm facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. Furthermore, the amendment provides that in burglary offenses, these provisions apply to a defendant who takes a firearm during the course of the burglary, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary. In addition, the provisions apply in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug manufacturing materials, or drug paraphernalia. The Commission determined that application of these provisions is warranted in these cases because of the potential that the presence of the firearm has for facilitating another felony offense or another offense.

10. Amendment: Section 2L1.1 is amended by redesignating subsections (a)(1) and (a)(2) as subsections (a)(2) and (a)(3), respectively; and by inserting after "Base Offense Level:" the following:

"(1) 25, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);".

Section 2L1.1 is amended by redesignating subsections (b)(4) through (b)(6) as

subsections (b)(5) through (b)(7), respectively; and by inserting after subsection (b)(3) the following:

"(4) If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor's parent or grandparent, increase by 2 levels."

Subsection (b)(7), as redesignated by this amendment, is amended by striking "8 levels" and inserting "10 levels"; and by redesignating subdivisions (1) through (4) as subdivisions (A) through (D), respectively.

Section 2L1.1(b) is amended by adding at the end the following:

"(8) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (A) after the alien was smuggled into the United States; or (B) while the alien was transported or harbored in the United States, increase by 2 levels. If the resulting offense level is less than level 18, increase to level 18."

Subsection 2L1.1(c)(1) is amended to read as follows:

"(1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline."

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 1 by striking "For purposes of this guideline—" and inserting "Definitions.—For purposes of this guideline."; and by adding at the end the following:

"'Minor' means an individual who had not attained the age of 16 years.

'Parent' means (A) a natural mother or father; (B) a stepmother or stepfather; or (C) an adoptive mother or father."

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 2 by inserting "Interaction with §3B1.1.—" before "For"; and by adding at the end the following:

"In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 typically will apply."

The Commentary to §2L1.1 captioned "Application Notes" is amended by striking Notes 3 and 4 and inserting the following:

"3. Upward Departure Provisions.—An upward departure may be warranted in any of

the following cases:

- (A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.
- (B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).
- (C) The offense involved substantially more than 100 aliens.";

by redesignating Notes 5 and 6 as Notes 4 and 5, respectively; in Note 4, as redesignated by this amendment, by inserting "Prior Convictions Under Subsection (b)(3).—" before "Prior felony"; and in Note 5, as redesignated by this amendment, by inserting "Application of Subsection (b)(6).—" before "Reckless"; by striking "(b)(5)" each place it appears and inserting "(b)(6)"; and by striking "(b)(4)" and inserting "(b)(5)".

The Commentary to §2L1.1 captioned "Application Notes" is amended by adding at the end the following:

"6. Inapplicability of §3A1.3.—If an enhancement under subsection (b)(8) applies, do not apply §3A1.3 (Restraint of Victim).".

The Commentary to §2L1.1 captioned "Background" is amended by striking the last sentence.

Section 2L2.1(b) is amended by adding at the end the following:

"(5) If the defendant fraudulently obtained or used (A) a United States passport, increase by 4 levels; or (B) a foreign passport, increase by 2 levels.".

Section 2L2.2(b)(3) is amended by inserting "(A)" after "used" and by inserting "; or (B) a foreign passport, increase by 2 levels" after "4 levels".

Reason for Amendment: This two-part amendment addresses various issues pertaining to §§2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law), and 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport).

The first part of this amendment modifies §2L1.1. First, this amendment addresses national security concerns pertaining to the smuggling of illegal aliens. Specifically, a new base offense level of 25 at §2L1.1(a)(1) provides increased punishment for defendants convicted of 8 U.S.C. § 1327 involving an alien who is inadmissible because of "security or related grounds," as defined in 8 U.S.C. 1182(a)(3). To further address concerns related to national security, an application note provides that an upward departure may be warranted if the defendant had specific knowledge that the alien the defendant smuggled, transported, or harbored was inadmissible for reasons of security and related grounds, as set forth in 8 U.S.C. § 1182(a)(3). This upward departure note applies regardless of whether the defendant is convicted of 8 U.S.C. § 1327.

Second, the amendment provides a two-level enhancement for a case in which the defendant smuggled, transported, or harbored a minor unaccompanied by the minor's parent or grandparent. This enhancement addresses concerns regarding the increased risk involved when unaccompanied minors are smuggled into, or harbored or transported within, the United States. Application Note 1 defines "minor" as "an individual who had not attained the age of 16 years" and defines "parent" as "(A) a natural mother or father; (B) a stepmother or stepfather; or (C) an adoptive mother or father."

Third, the amendment makes two changes with respect to offenses involving death. First, the amendment increases the enhancement from 8 levels to 10 levels if any person died as a result of the offense. Additionally, the cross reference at §2L1.1(c)(1) is expanded to cover homicides other than murder. This amendment ensures that any offense involving the death of an alien will be sentenced under the guideline appropriate for the particular type of homicide involved if the resulting offense level is greater than the offense level determined under §2L1.1.

Fourth, the amendment adds a two-level enhancement and a minimum offense level of 18 in a case in which an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, after the alien was smuggled into the United States, or while the alien was transported or harbored in the United States. This conduct may not be covered by §3A1.3 (Restraint of Victim) because an illegal alien, as a participant in the offense, may not be considered a "victim" for purposes of that adjustment. Additionally, application of §3A1.3 requires "physical restraint," as that term is defined in §1B1.1, and the involuntary detainment involved in offenses sentenced under §2L1.1 may not involve physical restraint. Finally, the amendment provides an application note, as a corollary to Application Note 2 in §3A1.3, that instructs the court not to apply §3A1.3 if the involuntary detainment enhancement applies

The second part of the amendment modifies §§2L2.1 and 2L2.2. First, this part of the amendment adds a new specific offense characteristic at §2L2.1(b)(5)(A) that provides a four-level enhancement in a case in which the defendant fraudulently used or obtained a United States passport. The same specific offense characteristic was added to §2L2.2, effective November 1, 2004 (see USSC Guidelines Manual Supplement to Appendix C,

Amendment 671). The addition of this specific offense characteristic to §2L2.1 promotes proportionality between the document fraud guidelines, §§2L2.1 and 2L2.2.

Second, the amendment provides, at §2L2.1(b)(5)(B) and §2L2.2(b)(3)(B), a two-level enhancement if the defendant fraudulently obtained or used a foreign passport. This modification addresses concern regarding the threat to the security of the United States in document fraud offenses involving foreign passports.

11. Amendment: Section 3C1.1 is amended by striking "during the course of" and inserting "with respect to".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 1 by inserting "In General.—" before "This adjustment"; by striking "during the course of" and inserting "with respect to"; and by inserting at the end the following:

"Obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by this guideline if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction."

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 2 by inserting "Limitations on Applicability of Adjustment.—" before "This provision"; in Note 3 by inserting "Covered Conduct Generally.—" before "Obstructive"; in Note 5 by inserting "Examples of Conduct Ordinarily Not Covered.—" before "Some types"; in Note 6 by inserting "'Material' Evidence Defined.—" before "'Material' evidence"; in Note 7 by inserting "Inapplicability of Adjustment in Certain Circumstances.—" before "If the defendant"; in Note 8 by inserting "Grouping Under §3D1.2(c).—" before "If the defendant"; and in Note 9 by inserting "Accountability for §1B1.3(a)(1)(A) Conduct.—" before "Under this section".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 4 by inserting "Examples of Covered Conduct.—" before "The following"; in subdivision (b) by inserting ", including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction" after "suborn perjury"; by striking the period at the end of subdivision (j) and inserting a semi-colon; and by adding at the end the following subdivision:

"(k) threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction."

Reason for Amendment: This amendment addresses a circuit conflict regarding the issue of whether pre-investigative conduct can form the basis of an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice). The First, Second, Seventh, Tenth, and District of Columbia Circuits have held that pre-investigation conduct can be

used to support an obstruction adjustment under §3C1.1. Compare United States v. McGovern, 329 F.3d 247, 252 (1st Cir. 2003)(holding that the submission of false run sheets to Medicare and Medicaid representatives qualified for the enhancement even though "the fact that there was no pending federal criminal investigation at the time of the obstruction did not disqualify a defendant from an enhancement when there was a 'close connection between the obstructive conduct and the offense of conviction.'"(quoting United States v. Emery, 991 F.2d 907, 911(1st Cir. 1992))); United States v. Fiore, 381 F.3d 89, 94 (2nd Cir. 2004)(defendant's perjury in an SEC civil investigation into defendant's securities fraud constituted obstruction of justice of the criminal investigation of the same "precise conduct" for which defendant was criminally convicted, even though the perjury occurred before the criminal investigation commenced); United States v. Snyder, 189 F.3d 640, 649 (7th Cir. 1999)(holding the adjustment appropriate in case in which defendant made pre-investigation threat to victim and did not withdraw his threat after the investigation began, thus obstructing justice during the course of the investigation); United States v. Mills, 194 F.3d 1108, 1115 (10th Cir. 1999)(holding that destruction of tape that occurred before an investigation began warranted application of the enhancement because the defendant knew an investigation would be conducted and understood the importance of the tape to that investigation); and United States v. Barry, 938 F.2d 1327, 1333-34 (D.C. Cir. 1991)("Given the commentary and the case law interpreting §3C1.1, we conclude that the enhancement applies if the defendant attempted to obstruct justice in respect to the investigation or prosecution of the offense of conviction, even if the obstruction occurred before the police or prosecutors began investigating or prosecuting the specific offense of conviction."), with United States v. Baggett, 342 F.3d 536, 542 (6th Cir. 2003)(holding that the obstruction of justice enhancement could not be justified on the basis of the threats that the defendant made to the victim prior to the investigation, prosecution, or sentencing of the offense); United States v. Stolba, 357 F.3d 850, 852-53 (8th Cir. 2004)(holding that an obstruction adjustment is not available when destruction of documents occurred before an official investigation had commenced); United States v. DeGeorge, 380 F.3d 1203,1222 (9th Cir. 2004)(perjury during a civil trial as part of a scheme to defraud was not an obstruction of justice of a criminal investigation of the fraudulent scheme because the criminal investigation had not yet begun at the time the defendant perjured himself); see also United States v. Clayton, 172 F.3d 347, 355 (5th Cir. 1999)(holding that defendant's threats to witnesses warrant the enhancement under §3C1.1, but stating in dicta that the guideline "specifically limits applicable conduct to that which occurs during an investigation. . .").

The amendment, which adopts the majority view, permits application of the guideline to obstructive conduct that occurs prior to the start of the investigation of the instant offense of conviction by allowing the court to consider such conduct if it was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction. The amendment also adds, as examples of covered conduct in Application Note 4, (A) perjury that occurs during the course of a civil proceeding if such perjury pertains to the conduct that forms the basis of the offense of conviction; and (B) conduct

involving threats to the victim of the offense if those threats were intended to prevent the victim from reporting the conduct constituting the offense of conviction. Finally, the amendment changes language in §3C1.1(A) from "during the course of" to "with respect to."

12. Amendment: Chapter Six is amended in the heading by striking "AND" and inserting a comma; and by adding at the end ", AND CRIME VICTIMS' RIGHTS".

Chapter Six, Part A is amended by adding at the end the following:

"§6A1.5. Crime Victims' Rights (Policy Statement)

In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and in any other provision of Federal law pertaining to the treatment of crime victims.

Commentary

Application Note:

1. Definition.—For purposes of this policy statement, 'crime victim' has the meaning given that term in 18 U.S.C. § 3771(e)."

Reason for Amendment: This amendment creates a new policy statement at §6A1.5 (Crime Victims' Rights) in response to the Justice for All Act of 2004, Pub. L. 108-405, which sets forth at 18 U.S.C. § 3771 various rights for crime victims during the criminal justice process, including at subsection (a)(4) the right to be "reasonably heard at any public proceeding . . . involving release, plea, sentencing, or any parole proceeding." The amendment also changes the title of Chapter Six to reflect the addition of the policy statement.

13. Amendment: The Commentary to §8C2.5 captioned "Application Notes" is amended in Note 12 by striking the last sentence.

Reason for Amendment: This amendment deletes the last sentence of Application Note 12 to §8C2.5 (Culpability Score), which stated that "[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." The Commission added this sentence to address some concerns regarding the relationship between waivers and §8C2.5(g), and at the time stated that "[t]he Commission expects that such waivers will be required on a limited basis." See Supplement to Appendix C (Amendment 673, effective November 1, 2004). Subsequently, the Commission received public comment

and heard testimony at public hearings on November 15, 2005, and March 15, 2006, that the sentence at issue could be misinterpreted to encourage waivers.