

UNITED STATES SENTENCING COMMISSION

1331 PENNSYLVANIA AVENUE, N.W.
SUITE 1400
WASHINGTON, D. C. 20004
(202) 662-8800

William W. Wilkins, Jr. Chairman
Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
George E. MacKinnon
Ilene H. Nagel
Paul H. Robinson
Benjamin F. Baer (ex officio)
Ronald L. Gainer (ex officio)



March 18, 1988

MEMORANDUM:

TO: Commissioners
FROM: Winston S. Moore *WSM*
SUBJECT: March 22 Commission Meeting & Public Hearing

Just a reminder that the Commission will meet at 8:45 a.m. on Tuesday, March 22, for a brief business session prior to the start of the public hearing. The meeting will be held in the anteroom of the Ceremonial Courtroom, 4th Floor, U.S. Courthouse, 3rd & Constitution Avenue, N.W. This is the same anteroom and courtroom that the Commission has used in its previous hearings. Coffee and donuts will be provided.

A cold buffet lunch is planned in the judge's dining room on the 4th Floor at approximately 12:30 p.m. Due to logistical considerations, staff attendance at the luncheon must necessarily be limited to senior staff and those directly involved in coordinating the hearing.

An updated agenda for the public hearing is enclosed for your review. Paul Martin informs me that the only change from a previously circulated version is Judge Becker's request for a later starting time.

Attachment

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UNITED STATES SENTENCING COMMISSION

*Public Hearing
Ceremonial Courtroom, U.S. Courthouse
Washington, D.C.*

March 22, 1988

9:30 a.m.	William W. Wilkins, Jr., Chairman Introductory Remarks
9:35 a.m.	Arnold I. Burns Deputy Attorney General
10 a.m.	William F. Weld Assistant Attorney General, Criminal Division
10:25 a.m.	✓Breckinridge L. Willcox United States Attorney, District of Maryland
10:45 a.m.	✓Sam Buffone Laurie Robinson American Bar Association
11:05 a.m.	<i>Break</i>
11:20 a.m.	— Tom Rendino Federal Probation Officers Association
11:40 a.m.	✓Bruce Taylor Citizens for Decency Through Law
Noon	<i>Lunch</i>
1:30 p.m.	✓Barry J. Portman Federal Defenders Advisory Committee
1:50 p.m.	✓Allan Ellis National Association of Criminal Defense Lawyers
2:10 p.m.	- Jeffrey Troutt Institute for Government and Politics
2:30 p.m.	✓Edward R. Becker Judicial Conference of the United States
3 p.m.	Public Comment



Washington, D.C. 20530

STATEMENT

OF

HONORABLE ARNOLD I. BURNS
DEPUTY ATTORNEY GENERAL

BEFORE

THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINE AMENDMENTS

ON

MARCH 22, 1988

- Should not lower past practice
- CCE part of 1970 Drug Act
- 2 purposes $\leftarrow$ severely punish major traffickers in drug groups
- deter crim. entrepreneurs
- had minimum mandatory sentences

- Increased offense level for CCE
- serious drug traffickers are sentenced
- want higher than proposed in amendments -

I am pleased to have the opportunity to appear before you today and present the views of the Department of Justice on the proposed amendment to the sentencing guideline on the continuing criminal enterprise (CCE) statute.

Let me begin by commending the Commission and its staff for the yeoman's job it has done in propounding the existing sentencing guideline scheme. The Department appreciates the hard work and long hours that the Commission devoted to insuring that the guidelines enacted are thorough and fair.

We have reviewed the Commission's proposed amendments published in the February 19, 1988 Federal Register. It is our belief that this proposal solves a technical problem in the old guidelines that produced CCE sentences below the sentences for the underlying substantive offense. However, further correction is required to ensure compliance with Congress' intent in enacting this statute to guarantee that sentences imposed under the guideline structure are not lower than those imposed by courts to date, and to punish appropriately these extremely serious criminal offenses.

By way of background and to put my observations in context, I would first like to review the history of the CCE statute. I will then discuss problems in the proposed sentencing scheme using an actual case example to illustrate my points. Finally, I will offer suggestions for additional change. In the course of

fakesters; non payable - piece de resistance for fed pros. If use on drug traffickers. 18 yrs use - fulfilled purpose

*Ua shens
you've come
at
long way
back*

X CCE - 1st time - 269 mo. - imposed -
after parole X - 188 mo - guideline 121-151
102-128 mo.
X under guidelines - 5 - 7 yrs less than current

my remarks, I will answer the four questions set forth in the Federal Register, Notice of Proposed Amendments.

The CCE statute, 21 USC § 848, was enacted as part of the Comprehensive Drug Abuse Prevention Act of 1970. As the legislative history illustrates, Congress had two purposes in mind when it adopted §848. These were: (1) to severely punish major traffickers of illegal drugs who conducted their activities through an organized group of individuals; and (2) to deter prospective criminal entrepreneurs. The authors of the Act explained:

This section ... is the only provision of the bill providing minimum mandatory sentences, and is intended to serve as a strong deterrent to those who otherwise might wish to engage in the illicit traffic while also providing a means for keeping those found guilty of violations out of circulation. 1/

Congress intended by this statute to make the price for participation in drug enterprises prohibitive. As reflected in the House Report, "It should be made too dangerous to be attractive."

1/ H.R. REP. NO. 1444, 91st Cong., 2d Sess. reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4566, 4576.

At the time of its passage, the CCE statute was the only drug enterprise statute in the United States Code. It was the only statute which provided for a mandatory-minimum sentence of ten years without parole and a possibility of life imprisonment without parole. It was the only statute with forfeiture provisions broad enough to encompass all interest in and profits obtained by the criminal venture. In short, it was intended to be the piece de resistance for federal narcotics prosecutors.

Over the past eighteen years, this statute has fulfilled the expectations of its drafters. The highest echelon drug traffickers have been repeatedly convicted of CCE violations. Heavy fines and substantial forfeitures have resulted from these convictions. Additionally, the sentencing statistics from the Administrative Office of the United States Courts show that district court judges have grown familiar with this statute as the vehicle by which the most serious drug offenders are brought to justice. For the 24 month period ending June 30, 1986, the average term of imprisonment imposed on 133 first time CCE defendants was 269 months (22.4 years). This is 118 to 148 months above the present sentencing guidelines base offense level of 121-151 months. Even if you reduce the imposed time by 30% to allow for an approximation of former good time practices, the average sentence actually served is 188.3 months. Under the present guidelines base offense level of 32, the sentencing range for an offender in the lowest criminal history category is 121-151 months, less 54 days annually for good time or 102.8 to

128.4 months. Thus, actual time served under the current guidelines could well be 5 to 7 years less than existing practice. Under the guidelines, a first time CCE defendant would have to reach criminal history category level five before he would be exposed to the same amount of actual time served under existing practice. Furthermore, of the 133 sentences imposed, only 30% of the defendants received the mandatory minimum of 120 months; 33.3% received between 132 and 240 months; 18.7% received sentences from 244 to 360 months; 13.5% were sentenced to 420 to 600 months and approximately 4.5% received the greatest sentences of 768 to 999 months (effectively life sentences). Thus, almost 70% of CCE defendants are routinely sentenced above the existing base guideline offense level.

Beginning in 1984, with the passage of the Comprehensive Crime Control Act of 1984 and continuing through the Anti-Drug Abuse Act of 1986, the options available to narcotics prosecutors seeking stiff sentences, forfeiture opportunity and hefty fines for drug traffickers have dramatically increased. Indeed, many violations of the Controlled Substances Act and the Controlled Substances Imports and Exports Act are subject to mandatory minimum sentences, forfeiture, stiff fines and, for the most egregious violators, up to life imprisonment. (It is noteworthy to digress a moment to point out that only the CCE statute (save for the addition of the principal administrator provision (848(b)) has not been revised since its inception to reflect the

growing threat narcotics traffickers pose to the United States and the entire free world. The Department is presently studying legislative proposals which would substantially increase the penalties for all CCE offenders.) Despite all the changes to substantive drug distribution statutes, the CCE statute remains the favored statute among federal prosecutors for a variety of practical trial reasons. Among the most obvious benefits in charging a CCE offense is the opportunity to present a wide range of financial evidence. Because the prosecutor must prove that a CCE defendant derived substantial income from the enterprise, all financial data which directly relates to this issue is admissible. Net worth analyses, personal and corporate tax returns, CTR and CMIR reports, and testimony of live witnesses who paid or received money for narcotics and/or related money laundering services are relevant. Once admitted, this evidence proves virtually irrefutable. This evidence, however, is generally inadmissible in a substantive distribution, manufacture or importation case. A second advantage in bringing a CCE charge is that it allows for evidence to be presented which details the entire scope of the enterprise's activities. This includes weapons offenses, prior crimes evidence, related criminal activity of enterprise employees not charged as substantive counts for proof or venue problems, the full range of organizational or leadership activities of the CCE defendant, and expert testimony on the workings of a criminal enterprise over a continuing period of time. For example, in Garrett v. United States, 471 U.S. 773 (1984), the defendant was convicted in Washington for

the importation of 12,000 pounds of marijuana. He was subsequently indicted in the Northern District of Florida for several substantive offenses as well as a CCE charge. At trial, the government introduced evidence of the Washington importation as part of its CCE proof. The Supreme Court affirmed the legality of this practice. The defendant was given a sentence in Florida which ran consecutive to the Washington sentence.

While some of this evidence could also be admitted in a broadly worded conspiracy charge, the prior Washington conviction probably could not. Further, a conspiracy charge would not subject the defendant to a mandatory minimum sentence. Thus, the CCE statute, despite its multi-layered burdens of proof, will remain the preeminent drug statute only if the guidelines' sentence is increased. (Indeed, Congress expressed the same belief when it bolstered the statute by adding the principal administrator section in 1986.)

With this in mind, I would like to review a case which highlights the deficiencies in the present and proposed CCE sentencing guidelines.

The case, which the Narcotic and Dangerous Drug Section believes to be typical, is a Miami prosecution, U.S. v. Joseph. Mr. Joseph, a first time CCE defendant was sentenced to forty-two years imprisonment for his CCE activities. Joseph was convicted

as the organizer of a heroin and "crack" distribution enterprise. Like the defendant in the first example, this defendant made his fortune in multiple small time sales in Miami's poor community. Factors addressed by the court as affecting Joseph's sentence included the violent nature of his enterprise, the continuing nature of the enterprise (at least four to five years), the impact on the community which bought Joseph's narcotics and the documented \$1.6 million a year grossed by Joseph, who had no other source of income. (Joseph owned a grocery store and laundromat from which he daily distributed cocaine and heroin by a organized network of subordinate street dealers.) Evidence at trial showed gross seizures of approximately 2½ kilos of heroin and a number of weapons.

The chart attached to my statement contrasts the sentence actually imposed in this case with the likely sentences which would be imposed in a worst case scenario under current guidelines and the proposed amended guidelines. It also lists the likely sentence the defendant would receive under the proposal I will outline today.

The disparity between the sentence actually imposed and that which Joseph would receive under the existing guidelines or proposed amendment exposes the deficiency in the existing guidelines and in the proposed amendments in solely calculating the appropriate sentence by reference to either a base offense level

of 32, or the offense level applicable to the underlying unlawful conduct. 2/ Evidence adduced at trial proved that Joseph directed a major criminal enterprise and yet, the quantity of drugs involved in the individual predicate offenses would not raise the base offense level above 32. As such, he could not possibly receive the type of sentence actually imposed, even assuming the worst case criminal history scenario. Under the Commission's proposal, Joseph's base offense level would remain at 32. Without additions for weapons, size of organization, amount of drugs and money, Joseph's base offense level of 32 could only be enhanced to level 36 by adding four levels for his role as an organizer.

With a base level of 36 and a level 6 criminal history category, Joseph's applicable sentencing range would be 27 to 33.7 years before mitigating factors and the statutory 54 days per year are factored in. Assuming nothing in mitigation, Joseph would actually serve a range of 22 to 28 years. (It is safe to assume that in actual practice not every worst case factor will coalesce in one case as I have assumed in this example thereby enhancing the prospect of an even greater sentencing disparity).

2/ As an aside, I must admit that the structure of the proposed amendment is confusing as printed in the Federal Register. I have assumed that the Commission proposed the greater of: (1) Base level 32 or (2) Underlying unlawful conduct base level plus either 4 levels or 3 levels. The add-on levels appear, at first glance, to apply to either alternative. I presume the Commission only intended these to apply to the second alternative. If this is the correct interpretation, the guideline should be redrafted to more clearly reflect this point.

Under the existing guidelines, Joseph would receive a sentence of 17.5 to 21 years, or less 54 days annually, 14.8 - 17.8 years. Joseph actually received 42 years; discounted this means Joseph will have to actually serve 29.4 years.

A guidelines base offense level of 32 effectively assigns a major trafficker, who by definition had to have committed at least three predicate felony drug violations, the same status as a defendant convicted of one trafficking offense. The Florida case clearly shows that a sentence within the existing guidelines or proposal's range does not adequately punish a CCE defendant commensurate with the crime committed or with existing sentencing practices. For this reason, I suggest that the base offense level be raised to level 36. By so doing, CCE defendants would be placed on the same level as the most serious drug offenders classified in §841 offenses. The applicable range for a base sentence would rise to 188 to 235 months (15 to 19.5 years). This figure reflects the average sentence actually served by first time CCE defendants according to Administrative Office statistics.

The present guideline base offense level of 32 has a built-in disincentive for DEA or FBI agent-investigators to prepare a CCE case. There is no reason for an agent to invest the amount of man hours a wide-ranging intensive CCE investigation requires, when a simple "buy/bust" drug enforcement

strategy will expose a defendant convicted of conspiracy or substantive distributions to a lengthier period of incarceration.

In addition to raising the base offense level, I also suggest that the guidelines be subject to upward adjustment to reflect the various characteristics of CCE enterprises. Such adjustments would empower the court to impose a sentence commensurate with the scope, duration and method of operation of the organization. It is my belief that one base level should be added if the operation employs 6 to 10 persons; two base levels should be added if the enterprise employs 10 to 20 persons and three base levels could be added if the organization is larger than 20 people. Two more levels should be added if the enterprise used force, violence or possessed weapons during its existence. Further, I would urge the Commission to provide base level increases on a sliding scale for the amount of money generated by the enterprise similar to that provided for the money laundering chapter §2S1.1 Finally, I recommend the adoption of a sliding scale of base level increases for the amount of drugs involved in the enterprise. For example, a base level 36 would be established for cocaine distribution involving up to 50 kilograms during the life of the enterprise. Mandatory life (§848(b)) would apply for distribution in excess of 150 kilograms of cocaine. I propose implementation of a base level increase on a sliding scale between these two figures (amount of drugs set in base level 36 and that set at the §848(b) level).

Such a scale would properly differentiate between the various enterprises in the upper end of the distribution scale which do not rise to §848(b) mandatory life treatment. (A proposed scale is also attached at the end of my testimony.)

Under my proposal, Joseph would receive a minimum sentence of 30 years and a maximum of life imprisonment. This is calculated as follows: Base level 36; add 1 level for size of operation (6 to 10 members); add 2 levels for weapons seized; add 2 levels for money generated (\$1-\$4 million). He would then have an offense level of 41 to be computed with the applicable criminal history score. Such a scheme, I submit, will properly insure that the actual sentence imposed accurately reflect the true character of the criminal defendant's behavior.

This proposal also insures the continuing availability of a minimal (10 years) sentence. Two base levels can be subtracted for acceptance of responsibility. A base level 34 allows for the possibility of an actual time served sentence of 10.6 years (151 months less 15% for good time). As such, this proposal permits an available range of sentences from approximately 10½ years served to life imprisonment. This closely approximates the sentencing range contemplated by Congress when this statute was enacted.

In proposing these suggestions, I, of course, would defer to the Commission's expertise to devise the most suitable way to accomplish this objective. I only suggest that these four

factors: size of organization; any use of violence or possession of weapons; amount of money; and, amount of drugs be factored into the calculus used to set the appropriate CCE sentence.

It is my belief that punishment for the leader of a large and wide ranging organization who by virtue of the CCE charge has to have committed these predicate felonies and who is distributing large quantities of narcotics while enforcing his way in the market place through the use of violence in order to generate substantial profits, should reach the level of life imprisonment even if it falls short of §848(b) treatment. This scheme is that which Congress intended when it passed this statute in 1970. (To coin a phrase, I believe the Commission should adopt guidelines to ensure that the original intent of Congress is fulfilled.)

One final comment. Often times one or more of the continuing series of violations required by CCE is proven by using a defendant's prior felony drug conviction. A question is posed in the Federal Register as to how a prior conviction which is used to prove the CCE violation should be considered in determining a defendant's sentence. Two methods have been proposed. First, if the prior conviction is used to prove the CCE violation, then it is not to be considered a prior criminal history. The second proposal considers the prior conviction as part of the defendant's criminal history and does not use it in determining the instant offense level. We have concerns as to both proposals.

As to the first proposal, I foresee the possibility wherein a defendant's prior conviction would not affect the offense level and therefore would not be considered in sentencing. For example, consider the defendant who has two prior convictions for 21 UCS § 843(b) (telephone count) which are §848 predicates. Such violations may not involve any specific drug amounts. They would therefore add nothing to the base offense level. Further, because they were part of the CCE violation they would not be counted as prior criminal history. The defendant would receive the benefit of having two relevant prior convictions not apply in calculating his sentence. Under this fact pattern the second proposal should be applied to insure that the defendant is not improperly benefitted.

As to the second proposal, I foresee a different problem. Suppose a defendant has two prior felony convictions both of which involve large quantities of drugs, and a third predicate act involves only a very small quantity of drugs. Under this proposal, the large quantities of drugs would not be considered in determining the offense level. The offense level would instead be determined by the small quantity involved in the third predicate act. This would place the defendant at a offense level of 32. The two prior convictions would add 6 additional points thereby placing the defendant at category III. The applicable range would then be 151-188. If the drugs were used to determine offense level, defendant would be at level 36. Even under column I, the range (188-235) is higher than level 32 category III.

Thus, the defendant again receives the benefit despite two relevant prior convictions.

We recognize that fact situations can be devised which frustrate the intent of the guidelines no matter how they are written. That is not our purpose. Rather these examples are designed to demonstrate our belief that, as to prior convictions, the greatest amount of flexibility must be afforded to achieve a sentence that accurately reflects the defendant's prior conduct.

Because the CCE offense is such a serious crime and is designed to reach multiple violators, we believe that the guideline should provide a significant sentence not artificially reduced by an overbroad application of the rule against double-counting of prior convictions. To achieve this purpose, we recommend that the guideline provide for alternative calculations for purposes of prior convictions and dictate that the calculation leading to the greater sentence prevails. More specifically, the guideline should direct that if a prior conviction constitutes one of the CCE predicate offenses and involves a quantity of drugs that would result in the application of the cross-reference to the underlying offense, such a conviction should be included in either the criminal history score or as one of the instant CCE offenses, whichever results in the greater sentence. While the guideline we propose is more complex than that offered by the Commission, complexity may be

warranted for serious offenses subject to a statutory minimum term of imprisonment for ten years. Such a guideline would serve the purposes of sentencing set forth in the Sentencing Reform Act while respecting the general principle against double-counting reflected elsewhere in the sentencing guidelines.

This concludes my prepared statement. Thank you for affording me the opportunity to testify this morning.

<u>Actual Sentence</u>	<u>Guidelines Sentence</u>	<u>Commission Proposal</u>	<u>DOJ Proposal</u>
<u>Richard Joseph</u>			
21 U.S.C. §848 - 42 years (504 months)	Base offense level 32	32 +4 (Organizer)	36 +1 (1-10 members) +2 (violence) <u>+2 (\$1.2 million)</u>
	Total base offense level 32	<u>36</u>	41
	Criminal History (maximum) 13	13	3-13 3 (minimum for criminal history) 13 points (maximum)
	Sentencing Range 210-262 months (17.5-21 years) (14.8-17.8 years with good time)	324-405 months (27-33 years) (22-28 years with good time)	360 mos.-life (30 years-life)

*Proposed Sliding Scale Add-ons

Amt. of drugs (maximum being \$848(b) equivalents):

50-75	kilos cocaine	1 level
75-100	" "	2 levels
100-125	" "	3 "
125-150	" "	4 "
Greater than 150	kilos cocaine	848(b)

Amt. of \$ generated (maximum \$848(b) amount):

Less than \$1 million	1 level
\$1 - \$4 million	2 levels
\$4 - \$7 million	3 "
\$7 - \$10 million	4 "
Greater than \$10 million	848(b)

Number of Organization members

6 - 10 people	1 level
11 - 20 "	2 levels
more than 20 people	3 "

Use of Violence/Possession of Weapons 2 levels

(A) Death Resulting from the 2 additional levels
Use of Violence or Weapons



U.S. Department of Justice

Washington, D.C. 20530

STATEMENT

OF

WILLIAM F. WELD
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINE AMENDMENTS

ON

March 22, 1988

① 2 A6.2 -
fake info attempt
to destroy aircraft

② plea - 11e (d)(b) -
presentence
reports

Mr. Chairman and members of the Commission, I appreciate the opportunity to appear before you to discuss the recently proposed sentencing guideline amendments. At the outset, I would like to state that the Criminal Division strongly supports the views expressed by Deputy Attorney General Burns on the importance of revising the proposed sentencing guidelines concerning continuing criminal enterprises. The proposed CCE guideline would overcome a serious deficiency which the Commission has recognized in the current guideline -- specifically, that the guideline sentence for a CCE offense may be less than the guideline sentence for a single, underlying offense. However, the proposed guideline does not go far enough. It merely assures that a CCE guideline sentence will be in parity with a guideline sentence for an underlying offense involving a substantial quantity of drugs. It does not require that a CCE conviction result in a greater sentence than that for a single, underlying offense despite the fact that a CCE conviction requires proof that the defendant committed a continuing series of controlled substance offenses. I urge the Commission to recognize that a CCE offense is more serious than a single drug offense -- even one involving a substantial quantity of drugs -- and to adjust the guidelines accordingly, as recommended by the Deputy Attorney General. The purposes of sentencing set forth in the Sentencing Reform Act of 1984, particularly deterrence and incapacitation, would be well served by an increase in the base offense level for persons convicted of this very serious controlled substance offense.

In the main, the Department of Justice favors the proposed amendments of the guidelines, policy statements, and official commentary recently published in the Federal Register and believes they would yield a variety of improvements to the guideline system. For example, the proposed guidelines include several offenses not previously covered, such as obstructing or impeding officers and committing certain crimes aboard aircraft. In addition, the emergency guideline amendments published in January, which would become permanent through submission to Congress, set forth numerous useful corrections and clarifications in the guidelines. One significant area of change is the establishment of a broad relevant conduct standard for certain offenses and the clarification that in a drug distribution case quantities and types of drugs not specified in the count of conviction are relevant to determining the offense level if they were part of the same course of conduct or common scheme or plan as the count of conviction. We are gratified that some of the amendments respond to concerns we expressed regarding the earlier version of the guidelines. We look forward to an ongoing relationship in which the Department will continue to work with the Commission in improving the guidelines.

Our principal recommendation concerns an area not addressed in any of the pending amendments, but let me initially respond to the Commission's request for comments regarding the addition of specific offense characteristics to one of the proposed new guidelines -- the provision concerning imparting or conveying false information regarding an attempt to destroy an aircraft or

1 motor vehicle. §2A6.2. The proposed guideline, which would be applicable to violations of 18 U.S.C. §35(b), includes no specific offense characteristics and provides a base offense level of 12, which translates into 10-16 months' imprisonment for a first offender. We note that the statutory provision establishes a maximum five years' imprisonment for the offense and that the proposed guideline's base offense level is far below this maximum, even for the most seasoned criminal. We believe that the guideline should include adjustments on the basis of the apparent credibility of the threat and the degree of disruption caused so that significantly disruptive false bomb threats, for example, can be distinguished from less troublesome activities. For the most part we believe that these adjustments should be upward, except that the conveying of obviously false information may be adjusted downward slightly. Since the offense requires that the conduct be willful and malicious or committed with reckless disregard for the safety of human life, we do not favor a downward adjustment for lack of premeditation, as the Commission suggests may be an appropriate factor to include in the guideline.

2 Our chief concern relates to an aspect of plea agreement practice as to which the Commission did not propose guideline or policy statement amendments but where we think amendments are needed -- specifically, the timing of the court's decision whether to accept a plea agreement. A policy statement (§6B1.1(c)) directs the court to defer its acceptance or rejection of a plea agreement until there has been an opportunity to

consider the presentence report, unless a report is not required because the court finds that the record contains sufficient information for sentencing purposes. The policy statement in essence links the procedure for the acceptance or rejection of a plea -- the defendant's admission of guilt -- to the sentencing procedure. We believe the policy statement in question is overbroad and, in many instances, is inconsistent with Rule 11(e) of the Federal Rules of Criminal Procedure. Moreover, encouraging a delay in the acceptance of guilty pleas would unnecessarily burden the legitimate, law-enforcement objective of concluding criminal prosecutions.

Rule 11(e)(1) outlines three types of permissible plea agreements: (1) agreements to move for the dismissal of other charges; (2) agreements to make a nonbinding recommendation, or not to oppose the defendant's request, for a particular sentence; and (3) agreements for a specific sentence. Rule 11(e)(2) specifically addresses the deferral of a decision to accept or reject a plea agreement. If the agreement is for the dismissal of other charges or for a specific sentence, the rule expressly grants the court the discretion to accept or reject the plea or to defer its decision until there has been an opportunity to consider the presentence report. The rule is silent on deferring the decision as to a nonbinding recommendation for a particular sentence and, in light of the express authority to defer a decision regarding the other two types of plea agreements, implies that deferral of the court's decision is not authorized in the case of a nonbinding recommendation for a particular

sentence. Nevertheless, the Commission's policy statement advises deferral of the decision to accept or reject the agreement or recommendation for all three types of plea agreements and thereby links the acceptance of the plea agreement to the sentencing determination. Although the policy statement may be read to imply that in the case of a nonbinding recommendation the court can accept the plea itself when it is offered and should merely delay acceptance of the sentencing recommendation pending review of the presentence report, we believe judges will read the policy statement as encouraging the delay of acceptance of the plea as to all three types of plea agreements.

*including
b -
non-
binding*

The rationale set forth in the commentary following the policy statement requiring deferral of acceptance of a plea agreement pending review of the presentence report is premised on the amendment of Rule 32(c)(1) of the Federal Rules of Criminal Procedure by the Sentencing Reform Act. Prior to the amendment an immediate decision on the acceptance of a plea agreement was permissible, according to the Commission's commentary, because Rule 32(c)(1) had allowed the defendant to waive preparation of the presentence report. The Sentencing Reform Act amended the rule by deleting this right to waiver. Under Rule 32(c)(1) as it now reads, a presentence report is required before imposition of sentence unless the court finds that there is sufficient information in the record to enable meaningful exercise of sentencing authority. The Commission concluded that since a presentence report normally will be prepared, the court must defer acceptance

of the plea agreement until the court has had an opportunity to review the report.

We do not agree with the view that the requirement of a presentence report prior to sentencing, except where the record provides sufficient information for sentencing purposes, has implications for the timing of a decision to accept a plea agreement in all cases. Merely because the review of a presentence report must precede sentencing in most cases does not mean that it must precede the acceptance of a plea based on a plea agreement. This is particularly true in the case of a nonbinding recommendation for a particular sentence. The court can make a determination whether there is a basis to accept the plea of guilty to the charges, just as it can in the case of a non-negotiated plea of guilty, without having the information embodied in the presentence report. The sentencing determination can then await consideration of the report, at which time the court will be at liberty to follow or to reject the recommended or requested sentence. This practice would be consistent with the language of Rule 11(e), which is silent as to the timing of acceptance of a plea based on a nonbinding recommendation. In such a case the court does not actually accept or reject an agreement but rather the plea itself and a nonbinding recommendation or request. The rule's silence on deferral makes sense; there simply is no need for the court to defer its decision on acceptance of a plea based on a nonbinding recommendation in order to consider the request for a particular sentence, which

the court is free to reject despite accepting the plea. Such a practice would in no way undermine the sentencing guidelines.

Similarly, in the context of a plea agreement regarding the dismissal of charges, a determination to accept a plea before consideration of the presentence report would be appropriate in some cases. That is, even where a presentence report is ultimately required under Rule 32(c), a determination whether to accept a plea agreement regarding the dismissal of charges can properly be made in advance of consideration of the presentence report under certain circumstances. For example, where the dropped charges would not mandate a higher sentence than that for the remaining charge because of the guidelines regarding the grouping of offenses, a determination as to whether to accept the plea agreement may be appropriate in advance of a presentence report. Of course, any such situation should be considered in light of the need to serve the purposes of sentencing set forth in the Sentencing Reform Act. 18 U.S.C. §3553(a)(2).

Only in the case of a plea agreement for a specific sentence would consideration of a presentence report normally be necessary in advance of the determination to accept the agreement. Even in this context there may be cases in which a presentence report will not be required under Rule 32(c); the present policy statement recognizes that acceptance of the agreement can occur expeditiously in such cases.

From a law-enforcement standpoint, there is a legitimate need for the timely acceptance of plea agreements. Delay may result in a change of heart by the defendant and an unwillingness

to provide assistance regarding other investigations or prosecutions. The longer acceptance of an agreement is delayed, the greater the chance that the defendant will attempt to improve the terms from his standpoint by reopening the negotiations. If this occurs, the prosecutor's attention cannot be devoted to new cases.

Deferral of the decision to accept or reject a plea agreement pending consideration of the presentence report is inevitable in some cases. Rule 11(e) recognizes this fact and gives the judge the discretion to delay in the case of agreements for the dismissal of charges or for a specific sentence. The policy statement in question, however, seems to be based on the premise that because acceptance of a plea agreement must be deferred in some cases, judges should be advised to delay in all cases, except where a presentence report is not required under Rule 32(c). The purposes of the Sentencing Reform Act can be served without such a broad policy statement, while the legitimate, law-enforcement need to close criminal prosecutions can be simultaneously recognized. We urge the Commission to examine the policy statement in light of our comments and to provide greater leeway for the expeditious acceptance or rejection of plea agreements.

STATEMENT OF BRECKINRIDGE L. WILLCOX

UNITED STATES ATTORNEY

DISTRICT OF MARYLAND

BEFORE

UNITED STATES SENTENCING COMMISSION

MARCH 22, 1988

Mr. Chairman and Members of the Commission, it is a pleasure to appear before you again to comment on your on-going process of establishing a rational sentencing structure for federal criminal law. Your efforts, both past and future, are of the utmost importance and significance. You are to be congratulated and commended. Certainly those of us on the front lines of federal law enforcement appreciate the enormous effort that the Commission has devoted to this most worthwhile project.

At the outset, let me make it clear that the views I express are my own. I do not appear on behalf of the Department of Justice, which will be represented today by Deputy Attorney General Burns and Assistant Attorney General Weld. But I have no reason to believe that my views are at variance with those of the Department's.

This morning I want to address two issues. One very specific one - - the Continuing Criminal Enterprise (CCE) guideline; and one very general one - - the use of immunized information in guideline computation.

Continuing Criminal Enterprise

The Commission seems to recognize that the initial base offense level for a CCE offender under 21 U.S.C. §848, as enunciated in guideline §2D1.5, was vastly understated. The proposed amendment to this guideline on which the Commission is

now seeking public comment - - having an alternative offense level based on the quantity of drugs - - is an improvement, but in my view insufficient.

What ought to be clear is that the current §2D1.5 needs to be upgraded. A conviction for a first CCE offense results in a guideline range of 121 to 151 months (offense level 32), barely above the statutory minimum mandatory non-parolable sentence of 120 months imposed upon a conviction of 21 U.S.C. §848.

Regardless of the amount of drugs implicated (except for the Principal Administrator subsection of §848), there is no way to enhance a CCE sentence short of utilizing §4B1.1 of the guidelines relating to career offenders. In the extremely unusual situation of a repeat CCE offender, the guideline range is even more unrealistic. In that situation, current guidelines would result in a range of 235 to 293 months (offense level 38), slightly below the minimum mandatory statutory sentence for this offense. Not only does this result in a frustration of Congressional intent, it creates very practical problems in our plea negotiations and even more severe problems in gaining cooperation of CCE defendants. Where is the incentive to plead guilty or to cooperate when the sentencing structure is so low?

Contrast the existing CCE guidelines with a defendant who has no prior felony conviction and is convicted of a "dry" conspiracy under 21 U.S.C. §846, which we have always viewed as a less serious charge. If the conspiracy concerned a negotiation for 5 to 15 kilos of cocaine, the guideline range would be 121 to 151 months (offense level 32). If 15 to 50 kilos were discussed,

151 to 188 months (offense level 34) would be the range. For greater than 50 kilos, the range would be 188 to 235 months (offense level 36). Thus, a conspiratorial discussion results in higher guideline ranges than a convicted CCE offender. -

It is illustrative to examine the sentences that have been imposed in recent CCE convictions in the District of Maryland. All of the following defendants were first-time CCE offenders:

1. Thomas Ricks - 47 years
2. Maurice King - 50 years
3. Clarence Meredith - 45 years
4. Louis Savage - 30 years
5. Samuel Scalio - 35 years
6. W. Parra-Henao - 10 years
7. Ralph Hildabrand - 15 years (cooperation)
8. Claudio Villoch - 10 years (cooperation)
9. Ronald Bassett - 25 years

All of these sentences, of course, are non-parolable under the terms of 21 U.S.C. §848 (e). The real time to be served, in most of these cases, will far exceed the unenhanceable level 32 under §2D1.5.

The impact of the existing CCE guidelines on our charging practices can be illustrated by a case that we recently indicted. A drug enterprise comprising approximately 50 persons, active on the East Coast, was importing approximately 2 kilos of cocaine per month for at least six months. Under existing guidelines, a 21 U.S.C. §846 count with this amount of cocaine is

a level 32 offense, exactly the same as a CCE. Thus, it makes no sense to undertake the additional items of proof under §848 if the same sentence will be achieved under §846. This is a guidelines case, so we opted to charge it as an §846 conspiracy, even though conceptually it is a classic CCE.

We have reviewed with considerable detail the proposed amendment to guideline 2D1.5, promulgated by the Commission on February 16, 1988. It is our considered opinion that the proposed change to include the greater of either a base offense level of 32 or an offense level commensurate with the underlying unlawful conduct (plus a three or four level adjustment for various managerial roles) does not address the concerns which we have outlined above. In our opinion, the guidelines for a typical CCE offender will continue to be dependent upon the underlying unlawful conduct and not on the CCE charge. As a result, there will remain a disincentive for prosecutors to bring the CCE charge or, more importantly, for the investigators to strive to find the kind of evidence which underlies the CCE charge.

As you know, the government has been vigorously encouraging its investigators to bring prosecutors the quality and quantity of evidence necessary to indict individuals for violation of the CCE statute so that we can cast the widest net possible in developing prosecutable cases, not only against the CCE defendants, but their entire network. Although the government's evidentiary burdens under a CCE theory are greatly enhanced, we think the effort has been worthwhile. By most

accounts, these prosecutions have met with great success. But we believe that the sentencing provisions for conviction of a CCE offense is counterproductive to our goals.

In order for the Continuing Criminal Enterprise statute to continue to be the "kingpin statute" and in order to provide encouragement to our investigators and prosecutors, we must not pick a base offense level which reflects only the minimum mandatory statutory sentence. I am informed that the Commission has empirical data reflecting that the average sentence through 1985 for a conviction under §848 was 15 or 16 years. We, therefore, believe that a base offense level of 36 should be the appropriate starting point for a person convicted under CCE. In point of fact, a level 36 only reflects your proposed level 32 with the addition of four levels for the defendant having been either an organizer, manager or supervisor of a criminal narcotics enterprise. Those managerial responsibilities are required elements in a CCE prosecution and would already have been proven at trial; to add them as enhancement factors seems somewhat superfluous. In that regard, it might be useful for the Commission to re-think the terms which it uses generally in the narcotics area concerning "organizers", "leaders", "supervisors", and "managers". It is believed that a more generic term such as "managerial function" or "managerial role" in a non-CCE enterprise be used with a uniform enhancement in the offense level. This would satisfy the need to more severely punish managerial non-CCE defendants without unnecessarily burdening the courts with holding mini-hearings in attempts at fitting

defendants into specific categories. While there may be a sufficient definition in most Circuits for the terms contained within the CCE statute, it is unclear whether all Circuits have such definitions and it is a certainty that the term "leader" has not as yet received judicial attention.

While we believe that a base offense level of 36 is more reflective of what the sentence for a CCE defendant should be as a starting point, we also are of the opinion that an enhancement of that level under certain conditions should be permitted. Generally, an enhancement of two levels should be made if the enterprise which the defendant was involved in managing caused injury to any persons, used violence, or if weapons were seized from any of its members. Further, should this violence have occasioned the death of an individual, the increase should be four levels above the base offense level of 36. Additionally, increases in the offense level should be permitted for enterprises that are significantly larger than five individuals. For example, for organizations with 10 - 15 members, add one level; 16 - 20 members, add two levels; 21 - 25 members, add three levels; and for organizations in excess of 25 members, add four levels.

I also feel strongly that prior narcotics convictions that form part of the proof of the continuing criminal enterprise should be considered as part of the defendant's criminal history in guideline computation. A defendant's criminal history should be a separate consideration for the purposes of sentencing. This "double counting" is fully appropriate: a defendant who has been

through the criminal justice system previously should be held accountable, and punished, even if his recidivism is part of the proof of the CCE charge.

I believe that these proposed changes, if adopted by the Commission, will not only place the CCE statute where the Congress intended it, but will provide federal prosecutors with the leverage they need during the negotiation process to encourage guilty pleas and cooperation from this most crucial class of witness.

Cooperator's Immunized Information

Let me briefly raise with the Commission another issue that I have discussed with the Chairman previously - - what use, if any, can be made of information furnished by a cooperating defendant under an immunity agreement. I realize that the Commission may feel this issue as one not squarely within its purview, and not susceptible to amelioration by a specific guideline. But the language of guideline §1B1.3 and its subparts, and more significantly the commentary thereto as well as the commentary to §1B1.2, is causing both prosecutors and defense lawyers considerable concern. I believe that the intention of the Commission was not to change historical plea bargaining practices. If that is the case, consideration might be given to dealing with the phenomenon I am about to discuss in a policy statement, a rewording of commentary or some other appropriate enunciation of Commission policy.

The problem is simply put. There is no guarantee under

guideline sentencing that information furnished by a cooperating defendant under an immunity agreement (either formal statutory immunity under 18 U.S.C. 6001 et seq. or so-called "informal" immunity or "letter agreement" providing that proffered information will not be used against the defendant) will not be used to his detriment. In fact, there is a suggestion in the guidelines that such information will be so used: the commentary to 1B1.2, and the definition of "relevant conduct" in 1B1.3(a)(1) and (2). The problem is highlighted by the application of 1B1.3(a) together with the requirement that the quantity of drugs involved in a common scheme be aggregated to arrive at the base offense level.

By way of illustration, a drug distributor is arrested while selling six ounces of cocaine to an undercover agent. After arrest, the defendant, through counsel, proffers information concerning his involvement in a much larger historical distribution. In return for an agreement to plead guilty to a 21 U.S.C. 841 charge of distributing six ounces, and cooperation, the government agrees to not use against him any information he provides. He then describes an historical six kilo distribution. The charge to which he plead guilty - - six ounces - - is a level 18 offense. Aggregation of the six kilos makes it a level 32.

Under historical practice, the scope of the historical conspiracy is made known to the Probation Officer and the court, but because of its immunized nature the court presumptively does not consider the total amount of narcotics in imposing sentence. In a guidelines case, my local Probation Office takes

the view that this might well be a level 32 case, based upon the Commentary to 1B1.2 and 1B1.3 and guidance received from the Federal Judicial Center. I am advised that our charge bargain is not dispositive, and the Probation Officer is not bound to ignore evidence of the total amount of narcotics, especially if such information can be obtained independently. In addition to the rather serious constitutional issue that such an interpretation raises, there are much more fundamental problems: we are unable to effectuate the terms of our cooperation agreement; we are placed in an adversarial relationship with the Probation Office; and we may have to deliberately withhold information from the Probation Officer and court. Most importantly, cooperation in narcotics cases will cease if this interpretation of guideline offense level computation prevails. And absent contemporaneous, and immediate, cooperation, drug investigations will come to an abrupt and premature conclusion.

I am confident that the Commission did not intend to alter the Executive Branch's ability to enter into plea agreements and immunize testimony. Unfortunately, that message has not yet reached the United States Probation Office. I invite the Commission to consider adding commentary or a policy statement on this subject. If clarification of the situation is not forthcoming, there will be a very negative effect on federal narcotics investigations.

I appreciate the opportunity to appear before you again.

THE UNITED STATES SENTENCING COMMISSION

1331 PENNSYLVANIA AVENUE, NW

SUITE 1400

WASHINGTON, D.C. 20004

(202) 662-8800

William W. Wilkins, Jr. Chairman
Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
George E. MacKinnon
Ilene H. Nagel
Paul H. Robinson
Benjamin F. Baer (ex officio)
Ronald L. Gainer (ex officio)



March 18, 1988

MEMORANDUM:

TO: Commissioners
Staff Director
Legal, Research, Drafting & Hotline Staffs

FROM: Paul K. Martin *PKM*

SUBJECT: Additional Testimony

Attached for your review is the testimony of Sam Buffone, Chairman of the American Bar Association's Sentencing Commission Liaison Committee.

Attachment

AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

STATEMENT OF SAMUEL J. BUFFONE

CHAIRPERSON
COMMITTEE ON THE U.S. SENTENCING COMMISSION
SECTION OF CRIMINAL JUSTICE
AMERICAN BAR ASSOCIATION

Before the
U.S. SENTENCING COMMISSION

On the
FEDERAL SENTENCING GUIDELINES

March 22, 1988

*plea bargaining
used to deter
plea bargain in mind of
certainly - worried 5th
circuit - now has trap door*

*Want immunity in
sentencing process -
are you advocating that only in
cases where C cooperated or
all cases?*

MR. CHAIRMAN AND MEMBERS OF THE COMMISSION:

My name is Samuel J. Buffone. I appear before you today on behalf of the 330,000 members of the American Bar Association. I am Chairman of the ABA's Criminal Justice Section Committee on the U.S. Sentencing Commission.

Just as the Association is reflective of the legal profession as a whole, so my Committee reflects a broad cross-section of the criminal justice system - prosecutors, defense lawyers, academics, judges and court administrators. When the Committee was established in 1985 as the Association's liaison point with the Sentencing Commission, it drew representation (and expertise) from the other ABA Criminal Justice Section Committees particularly concerned with the criminal justice system and the sentencing function.

I would like to establish at the outset the Association's long-standing support for the general concept of a sentencing guideline system. This support is founded in the Association's twenty-five year history of development and refinement of its Standards for Criminal Justice (Standards) including the specific chapter on Sentencing Alternatives and Procedures. While I will describe these Standards and their adoption fully later in my testimony, I wish to emphasize now that the Association's approach to the work product of the Sentencing Commission is based in large part on a comparison with our own Standards and the extended process of debate, study and constant revision that has gone into them. In addition, our comments draw heavily on the Association's collective experience as an organization

representative of judges, defense attorneys, prosecutors, court administrators, academicians and others involved in the day-to-day workings of the criminal justice system.

We appreciate the opportunity to express our views to you. As an organization both deeply committed to the guideline concept and concerned with the practical implications of implementation of any change in the sentencing system, we are here today in response to Chairman Wilkins' February 24, 1988 invitation to appear and comment on the Commission's January 15, 1988 emergency amendments and proposed Guideline revisions. We understand that the Commission also wishes to receive comments on any other related issues. Accordingly, these comments will address broad areas of concern that we have with the Guidelines as well as specific portions of the emergency amendments and proposed revisions.

While we view the Commission's work to date as significant progress towards our shared goal of workable Guidelines, that goal is far from being achieved. We look forward to working closely with the Commission in the future to accomplish this goal.

The ABA and the Sentencing Commission Process.

A word of background about our own policies may be helpful. Our Committee was established in 1985 as the Association's liaison point with the Sentencing Commission. Since its initial organization the Committee has engaged in a comprehensive effort

to evaluate the Guidelines, participate in the Commission's process and seek the views of our diverse membership. We have welcomed the opportunity to work closely with the Commission since its appointment. We have previously presented testimony to the Commission on specific issues involving organizational sanctions (June 10, 1986), sentencing options in addition to incarceration (July 15, 1986) and the effects on sentencing of guilty pleas and cooperation (September 23, 1986). It is our belief that each of these areas deserves further consideration by the Commission and we urge your attention to our earlier comments.

We have been encouraged by the availability of the Commission and its staff for informal dialogue. I would like to thank the Commissioners and staff members who have met with ABA representatives to discuss a variety of guideline related issues. I would also like to thank the individuals who have assisted the ABA in its efforts to educate the practicing bar on the implementation of the Guidelines.

We wish to express our strongest possible support for an open Commission process as you enter the difficult phase of implementing the Guidelines. While the guideline drafting process was initially an open and thorough one, the release of the Commission's final draft was without benefit of comment or debate. Similarly, revised commentary was drafted without notice or opportunity for comment by interested parties other than the Department of Justice.

The January 15, 1988 emergency amendments were circulated to a limited number of interested parties in advance of their adoption. The ABA did not receive a draft until December 23rd and comments were requested by January 5th. Given the intervening holidays we were only able to submit a brief letter on January 5th. I have attached a copy of our letter containing our comments on the proposed revisions and Chairman Wilkins' thoughtful response of January 15, 1988. I request that both letters be made a part of the record of this public hearing.

The emergency guideline authority granted by §21 of the Sentencing Act of 1987, Pub. L. No. 100-182, is limited to invalidated Guidelines, new or amended offenses and reasons found to be "urgent and compelling". We question the Commissions finding of urgent and compelling need as to many of the revisions and believe that a hearing such as this combined with an opportunity for written comments should have preceded adoption. We urge the Commission in the future to seek the widest possible comment from the diverse elements of the public and the criminal justice community interested in the Guidelines and their efficient implementation.

Our roots with the guideline issue stretch back to the 1970's. At that time, the ABA was actively engaged in the legislative efforts to re-codify the Federal criminal laws. A proposal for a sentencing commission was first incorporated in that process in 1975 and the Association firmly endorsed it.

The ABA Standards in fact date back to 1963. Specific standards were proposed and adopted for police function, pre-trial proceedings, criminal trial, fair trial and free press, prosecution and defense function and of particular significance, sentencing and review.

Thousands of copies of tentative drafts were distributed to the bench and bar for comment, and eventually 17 sets of standards were developed and approved by the ABA House of Delegates in 1968, 1970, 1971 and 1972. While adoption was preceded by an extended process of study and debate, it signaled the beginning of an equally lengthy implementation project. A ten year implementation project was undertaken by the Section of Criminal Justice, with Association and LEAA funding, to encourage adoption of the standards in every state and in the Federal system.

In late 1976, the ABA's Special Committee on Standards launched a major project to produce a second edition of the Standards. Recognizing that almost ten years had passed since many of the first edition Standards had been approved, and that all of the Standards could use some revisiting in light of Supreme Court decisions and other developments, the Special Committee set up drafting task forces and began what was a four-year project to update each of the volumes. As with the first edition, thousands of copies of the tentative draft were circulated for comment; revisions were made; and final proposed

"black letter" standards and commentary were presented to the ABA House of Delegates for approval in 1978, 1979 and 1980.

The introduction to Chapter 18 dealing with sentencing alternatives and procedures begins with the observation that probably no other area of criminal justice had witnessed as intense a debate over fundamental assumptions as the sentencing process:

These and other questions have spawned a number of competing proposals. In this war of models, ideas once taken as self-evident have been discarded and others, long-dormant, have re-emerged to a sudden popularity.

This quote could apply equally to an analysis of the Commission's process. The radical swings in policy positions and assumptions contained in its various drafts are reflective of the long-standing national debate over sentencing policies and priorities.

The introduction to Chapter 18 goes on to adopt a centrist approach founded on the experience of the bench and bar and the long history of scholarly consideration of the issues. The revised Standards contain several significant changes in their sentencing provisions. The first was the adoption of a guideline system. An important component of this adoption was a recommendation that an administrative agency be established with an oversight capacity to deal with the many complex and technical problems posed by sentencing guidelines that are inappropriate for legislative determination. The adoption of a guideline concept was, however, linked to other important considerations. The first was a clear articulation that the goal of guidelines is

not to inhibit the individualization of justice but to enhance it by providing more information and guidance to the sentencing judge. The second important change in the guidelines was the adoption of a general recommendation of non-incarcerative sentencing alternatives wherever possible. The guideline drafting agency was specifically instructed to factor the use of sentencing alternatives into any table of guideline sentencing ranges.

The introduction noted the increasing attacks on judicial discretion in the sentencing process. While it proposed to somewhat limit that discretion through the implementation of guidelines and the establishment of a guideline agency it favored reservation of broad judicial discretion.

The introduction ended with the statement that:

Where it has not been necessary to change, it has been considered necessary not to change, since we know too little today to experiment casually with the liberty of any citizen, including the offender.

We urge the Commission to adopt a similar attitude. As with our own standards, the Commission has set out broad principles for implementation of a guideline system. Sentencing reform of the scale contemplated by the enabling legislation is working a sea change in the law. This dramatic event will not be without cost. We anticipate that some procedural confusion, initial missteps and corrections are inevitable, and urge the adoption of policies to minimize the resulting stress on the entire system. An open process of review and revision of the Guidelines is a necessary component of this process.

In this respect we believe that our own internal processes are a convenient reference point. The Association has spent years in studying and working towards the positions reflected in our Standards. Even these Standards, however, as comprehensive as they are, come nowhere near the detail contained in the sentencing Guidelines.

The number of guideline sentences is increasing daily. While only limited information is now available due to the low volume of sentences and consideration of constitutional challenges the available pool of information could soon be large enough to pose significant problems for the Commission in attempting to gather and interpret it. It is our belief that the gathering and analysis of data on implementation is the most important task facing the Commission. We urge the Commission to open up the process of data retrieval, coding and consideration to public comment. Future decisions will be premised on interpretations of the data and confidence in future decisions will increase if the data base is viewed as reliable.

Probation.

In the past the ABA has been critical of the Guidelines' restriction on the availability of probationary sentences. We urge the Commission to consider ways of expanding the availability of such sentences. Recent legislative efforts to expand the definition of Class B felonies may provide a vehicle for such an expansion. The Guidelines treatment of probation represents perhaps the most dramatic change from existing

practice. Under current practice, approximately 50% of all Federal sentences are probationary or otherwise non-incarcerative. The Commission in its supplemental report at pages 60 and 61 and in Tables 2 and 3 pp. 68, 69, recognized that there would be a decline in the incidence of straight probation and that for some crimes the reduction would be "quite substantial." Our analysis of the Guidelines indicates that the decrease in the availability of probation will in fact be significant.

The dramatic reduction in availability of probation is at odds with ABA Standards and poses an undue restriction on the discretion of the sentencing authority. The virtual abolition of probation for many categories of crimes will in our view also result in additional pressure on limited confinement resources. This increase is at odds with the requirements of § 994(g) that the Commission seek to minimize the likelihood that the Federal prison population will exceed the capacity of Federal prisons.

A cornerstone of the provisions of Chapter 18 of the Standards of Criminal Justice relating to Sentencing Alternatives and Procedures is the least restrictive alternative provision contained in Standard 18-2.2. Standard 18-2.3 calls for the availability of nonincarcerative sentences for virtually every crime.

When probation is not appropriate, the least restrictive alternative principle directs the sentencing authority to search for another solution short of total confinement. Standard 18-

2.4(a) calls for creativity in the construction of "intermediate sanctions."

The principle of the least restrictive alternative recognizes that there are instances in which incarceration is necessary. Standard 18-2.5(c) provides the sentencing authority with some examples of factors that legitimize or fail to legitimize sentences of total confinement. Finally, Standard 18-3.1(c) recognizes that alternative sanctions must be integrated into sentencing Guidelines -- both to assure that the least restrictive alternative principle will be implemented, and to see that it will be implemented consistently and fairly. The position of the ABA, as set out in the Standards, is in our view consistent with the Guidelines legislation.

The Commission appears to believe that 28 U.S.C. § 994(b) (as amended) prohibits the use of probation for offenses for which a guideline sentence would otherwise exceed six months. There is no such limitation in the enabling legislation. The second sentence of § 944(b) merely serves to limit the breadth of the range of sentences to imprisonment. It does not purport to limit the availability of probation as an alternative to a sentence of any length. Section 994(a)(1) specifically distinguishes between "the determination whether to impose a sentence to probation, a fine or term of imprisonment" (subsection (A)) and "the determination as to the appropriate amount of the fine or the appropriate length of a term of probation or a term of imprisonment" (subsection (B)). The

§ 994(b) 25% limitation applies only to the latter determination. Further, 18 U.S.C. § 3551(b) explicitly provides that "an individual found guilty of an offense shall be sentenced . . . to (1) a term of probation . . . or (3) a term of imprisonment." And 18 U.S.C. § 3561 provides that "a defendant who has been found guilty of an offense may be sentenced to a term of probation unless (1) the offense is a Class A or Class B felony; (2) the offense is an offense for which probation has been expressly precluded; or (3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense." Class A and B felonies are defined generally in 18 U.S.C. § 3359 as offenses for which the maximum authorized term of imprisonment is life or twenty years or more, respectively. Consequently, the Congress clearly intended to bar probation as an alternative for crimes punishable by imprisonment for twenty years or more -- not for crimes punishable by imprisonment for more than six months.

This interpretation is supported by the legislative history that accompanied the Comprehensive Crime Control Act of 1984. Senate Report No. 98-225 states, at page 88, ". . . 18 U.S.C. § 3561 authorized the imposition of a sentence to a term of probation in all cases, unless the case involves a Class A or B felony or an offense for which probation has been expressly precluded, or the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense." (emphasis added). ". . . 18 U.S.C. § 3561, unlike current law,

states that probation is a type of sentence rather than a suspension of the imposition or execution of a sentence." The Commission failed to recognize probation as a distinct and separate sentence that is independent of sentences of imprisonment to which are applicable the 25% limitation of 28 U.S.C. § 994(b).

In explaining § 3562, the Senate Report noted, "The effect of these considerations is to require the court to focus carefully upon the needs of the defendants and the needs of society." (at page 91). "This is not meant to imply that the Committee considers a sentence of imprisonment to be the only form of sentence that may effectively carry deterrent or punitive weight. It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose."

Finally, § 994(j) of the Commission's enabling legislation required it 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 or an otherwise serious offense." Section 994(g) requires the Commission to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."

The Commission's unprecedented restriction of the availability of probation directly conflicts with these statutory

mandates. We can perceive no statutory reason, therefore, why a sentence of probation should not be an available alternative well beyond the limit currently imposed by the Guidelines.

The research on sentencing shows that judges use different factors in reaching the "in/out" and "length of sentence" decisions. In general terms, the "in/out" (incarceration versus probation) decision correlates most strongly with offender characteristics, such as prior record and family and community ties. The "length of sentence" decision tends to reflect more strongly the specific elements of the current crime, e.g., weapon use and resultant harm. Research thus suggests that sentences to probation should not be merely a part of the same analytic continuum established to determine the length of sentences to imprisonment.

Section (a)(2)(D) of 18 U.S.C. § 3553 reinforces this reasoning. It requires the court to consider "the need for the sentence imposed" to accomplish four objectives, the last of which is "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." The Commission's limitation of probation effectively reads out of the statute this direction by the Congress that the judge take account of the offender's rehabilitation needs.

Further, 18 U.S.C. § 3553, which specifies the "factors to be considered in imposing a sentence," requires the court to consider "the kinds of sentences available." 18 U.S.C. §

3553(a)(3). This specific statutory language was added by Congress to require consideration of all sentencing possibilities to insure "the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case." Senate Report No. 98-225, at page 3222.

Organizational Sanctions.

On June 10, 1986 a member of our committee, William M. Brodsky presented testimony to the Commission concerning organizational sanctions. It is our understanding that the Commission is now in the process of examining the appropriateness of refining the guidelines' treatment of this issue. I would like to briefly summarize our earlier position, which we still maintain, and urge the Commission to consider our earlier testimony in its entirety.

We view the question of organizational sanctions as one of the more difficult issues facing the Commission. The lack of any major developments in this area in the past creates an opportunity for the Commission to consider novel approaches to the difficult issues posed by the need to punish and deter criminal acts by corporations and other organizations.

Our position is based upon ABA Standard 18-2.8 and its commentary. Our standards are premised on the assumption that the availability of sentencing alternatives is the crucial aspect in the area of organizational sanctions. The sentencing alternatives described within ABA Standard 18-2.8 include: restitution, special fine schedules, disqualification from

office, notice of conviction and continuing judicial oversight. Our standards recommend that the full panoply of alternatives listed above be part of the sentencing tribunal's approach to organizational and corporate criminality.

Relevant Conduct.

In my letter to Chairman Wilkins of January 5, 1988 I expressed the Association's belief that the relevant conduct provisions of § 1B1.3 warranted further clarification and reconsideration by the Commission. Chairman Wilkins' response of January 15, 1988 indicated that the Commission had in fact voted in its January 5th meeting to revise § 1B1.3. Our review of the revisions to § 1B1.3 indicates that further consideration of this matter is justified.

Prior to the proposed revisions the Association's experience in conducting Continuing Legal Education programs was that no other section of the guidelines created as much confusion as the relevant conduct provisions. Much of the discussion at these seminars focused on issues that were part of the Commission's earlier consideration of "real offense" sentencing. Without re-opening that debate we believe that it is important for the Commission to clarify with more precision the extent to which uncharged conduct can serve both as the basis for determining an offense level and fixing a place within the offense range for an appropriate sentence. The revision of § 3B1.1(a)(1) and (2) and § 1B1.4 permit the consideration of a potentially broad range of criminal conduct at sentencing. This broad consideration is

permitted while the judge's discretion to consider most previously relevant offender characteristics is curtailed.

The Guidelines treat only a few offender characteristics as normal determinants of sentences. Section 4A1.1 and .2. They treat others as possible bases for departures from the Guidelines, but not as black-letter criteria for sentences. § 4A1.3. They expressly forbid consideration of still other offender characteristics. § 5H1.3. They implicitly forbid reliance on still others, by illustrating grounds for departure so narrowly as to create the negative implication that other kinds of offender characteristics would not justify departures. § 4A1.3. Finally, even where the Guidelines do cover characteristics of the offender as well as the offense, they give inadequate weight to the offender characteristics. Compare § 2J1.3 and the Sentencing Table (base offense level for subornation of perjury is 20, for at least 33-41 months in prison, if the offender suborned the perjury by causing or threatening physical injury to a person or property, and otherwise is 12, for at least 10-16 months in prison) with §§ 4A1.1 and .2 and the Sentencing Table (a sentence for subornation of perjury is not increased at all for the fact that the offender previously had been convicted and had received a sentence of probation for an earlier subornation of perjury).

The Guidelines' curtailment and undervaluation of offender characteristics are a radical departure from the past federal practice. Congress gave no indication that it intended to

curtail reliance on offender characteristics. On the contrary, some provisions of the 1984 legislation appear based on the view that the broadest variety of offender characteristics were to remain relevant under the Guidelines. 18 U.S.C. §§ 3551(a) and 3553 (a)(2) (" . . . a defendant who has been found guilty . . . shall be sentenced . . . so as to achieve the purposes . . . of just punishment, deterrence, protection of the public and correctional treatment of the offender."); Fed.R.Crim.P. 32(c)(2)(A) (as amended in 1984) ("The Report of the presentence investigation shall contain . . . information about the history and characteristics of the defendant, including his prior criminal record, if any, his financial condition, and any circumstances affecting his behavior that may be helpful in imposing sentencing or in the correctional treatment of the defendant . . .").

While revised § 1B1.4 provides that a court may consider "without limitation, any information concerning the background, character and conduct of the defendant," the commentary makes it clear that certain factors contained in Chapter 5, Part H, should not be considered for any purpose.

We are also concerned that the expansive definition of these two sections will alter the current concept of the meaning of a guilty plea. It creates the risk that anyone who enters a plea of guilty to a specified offense may find that at a sentencing hearing, with diminished due process rights and a reduced standard of proof, the defendant will find that non-charged

conduct significantly aggravates the sentence. For this reason, we would prefer that the Guidelines be construed on the basis the offense of conviction, allowing the judge to take into account all aggravating and mitigating characteristics of the offense and the offender that would justify the deviation from the Guideline sentence. This is the course recommended in the commentary to ABA Standard 18-3.1:

There is encroachment upon the concept, if not yet the case law, of due process when an offender convicted for one offense is sentenced under the guidelines for another, more serious offense. Thus, in cases where the offense of conviction is significantly below the actual offense behavior as indicated in the sentencing record, it may well be preferable for the court to consider this disparity as an aggravating factor. Thus, the court would be more able to impose a sentence in excess of the guideline level. As hazy as the distinction may seem between the recommended use of the "real offense" as an aggravating factor and its disfavored use as the operative guideline indicator, the defendant will be marginally more protected in the former case by the higher burden that exists to justify a sentence outside the guidelines. More important, a practice is not institutionalized that risks infringing the appearance of justice and downgrading the operative significance of the trial stage by pushing back the resolution of material factual issues to the sentencing stage.

In accordance with the above Standard we believe that a sentencing judge should be permitted to consider other relevant conduct as such an aggravating or mitigating factor where its consideration can be justified by the facts of the case. The distinction between such consideration and mandatory inclusion as required by § 1B1.3 is more than a semantic subtlety.

We additionally have more particularized concern with portions of amended § 1B1.3. While subsection (a)(1) requires a particularized finding that the defendant would be otherwise

responsible for an act that occurred during the commission of the offense of conviction, in preparation for it or in the course of attempting to avoid it, subsection (2) aggregates all monetary and drug offenses under the much broader relational requirements of § 3D1.2(b).

The result will be disparate treatment. Financial and drug offenses will be subject to this lower standard while all other offenses will be required to meet the closer relational test of subsection (1). We suggest that a uniform standard be applied to all offenses.

The Association also believes that additional clarity is required in § 1B1.3. For example the prefatory language indicates that relevant conduct is applicable to determining "the applicable guideline range." While this language would seem to imply that relevant conduct is only used in computing the place in the range rather than in selecting the offense level, the specific language of subsection (a) makes it clear that the Commission intended the consideration of relevant conduct in setting the base offense level. Similarly, the specific language in § 1B1.4 for determining place in the range provides a broader standard for this determination than selection of the offense level. The prior Guideline commentaries referenced to Rule 404(b) Federal Rules of Evidence and Rule 8(a) Federal Rules of Criminal Procedure provided some clarity for the expansive definitions of relevant conduct contained in the former section. The new section uses equally expansive language but provides no

established standards for determining their meaning. The broad reference to conduct "for which the defendant is otherwise accountable" does not assume precise enough definitional clarity in application notes (1).

Official Victim.

The amended commentary to § 3A1.2 deletes the phrase that "an organization, agency or the government itself" may not be a "victim." In its place the commentary now says that the Guideline "does not apply when the only victim is an organization, agency or the government." (Emphasis added). This change gives rise to a possible interpretation that an organization, agency or the government may be a victim for purposes of § 3A1.2 as long as it is not the only victim. In other words if there is an individual victim then the commentary could be interpreted as allowing the government itself to be considered as an official victim. Chairman Wilkins' letter of January 15, 1988 responding to the concern expressed in the ABA's letter of January 5, 1988 on this subject stated that "An organization, agency, or the government may never be an 'official victim' within the meaning of this section." We suggest that elimination of the word "only" would remove any potential ambiguity.

Acceptance of Responsibility.

The amendment to § 3E1.1 provides that the two level downward adjustment for acceptance of responsibility will only be applicable where the defendant clearly demonstrates a recognition

and affirmative acceptance of his responsibility for his "criminal conduct." The change to this criminal conduct standard from the prior "offense of conviction" standard, is in our view a significant one. The prior standard of offense of conviction provided a clear standard for the court in assessing the scope of the responsibility that had to be accepted. The court was left with broad discretion to determine whether or not the defendant had clearly demonstrated a recognition and affirmative acceptance of his responsibility. Accordingly, the court was given wide latitude to determine if a defendant was genuinely contrite but not required to determine if there were elements beyond the offense of conviction for which the defendant must demonstrate this degree of remorse.

Under the amendment the court will be required to ascertain the nature of criminal conduct beyond the offense of conviction. We anticipate that situations will frequently arise where an individual will accept responsibility for his offense of conviction in a plea bargain but will dispute other portions of allegations against him. Such disputes, even as to minor allegations, will preclude the downward adjustment associated with acceptance of responsibility if the court determines that these minor elements were part of his "criminal conduct."

We believe that our Criminal Justice Standards provide guidance in this difficult area. Criminal Justice Standard 14-1.8 begins, by making the same judgment that the Guidelines do; that the mere entry of a guilty plea should not in and of itself

be considered as a mitigating factor in imposing sentence. Rather the standards suggest a concession if the defendant "is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct."

An earlier version of the standards had identified a defendant who "has acknowledged his guilt" as one deserving charge or sentence concessions. This exception was tightened in the final version so that it reached only genuine contrition. Similarly, a concession is allowed for offenders who are genuinely considerate of the victims. See pages 14.41-42.

The commentary to the standards provides "that the trial court interrogate the defendant carefully in order to determine whether the defendant's guilty plea truly reflects repentance" Page 14.46. Similarly, "this standard requires the court to judge whether the defendant's plea is motivated by genuine concern for the victims." Page 14.48.

We suggest that the Commission shift its emphasis from judicial determinations of the scope of criminal conduct and focus rather on the genuineness of the defendant's repentance. The thrust of a court's inquiry should be to determine the sincerity of the acceptance of responsibility rather than to have to plumb the outer limits of its scope.

Criminal Livelihood.

The ABA suggests that the Commission consider modification of the Guideline and application notes to § 4B1.3 dealing with criminal livelihood. As currently worded any defendant who

commits an offense "as part of a pattern of criminal conduct from which he derived a substantial portion of his income" must be sentenced to no less than 12 to 18 months with no eligibility for probation. The pattern of criminal conduct is defined broadly as criminal acts occurring over a substantial period of time. The acts need not be closely related to each other but may involve a single course of conduct or independent offenses.

The Association views the current wording of the section as being inconsistent with our Criminal Justice Standards in that it invites disparate treatment based upon the economic status of defendants. While the Guideline application notes specifies that it is not intended to apply to minor or petty offenses, it makes no concessions for levels of income. Accordingly, moderate or low levels of income could be determinant. For example, if a college student who earns a limited amount of money was convicted of several offenses over a period of time a finding of criminal livelihood would be possible. Similarly, a welfare mother who engaged in two or more acts of fraud might meet the substantial portion of income test.

In contrast a middle-class individual or a person of more substantial means could engage in the same criminal acts but due to the level of affluence the total proceeds would not provide a "substantial portion of income" thus permitting this individual to escape the substantial enhancements of § 4B1.3.

The mandate of 28 U.S.C. § 994(i)(2) must be read in the context of the other specified conduct for which Congress

mandated a substantial sentence of imprisonment. The other categories - multiple felony convictions, conspiracies to engage in patterns of racketeering activity and commission of crimes of violence while on release as well as the significant drug offenses of subsection 5 - are on their face significantly more serious than the examples cited above. We urge the Commission to re-draft this Guideline to limit it to derivation of substantial portions of income from a pattern of criminal conduct which raises to the level of severity of the other subsections of § 994(i).

We also urge the Commission to consider more carefully the language "pattern of criminal conduct." The similar language "pattern of racketeering activity" contained in the RICO statute, 18 U.S.C. § 1961, has caused considerable confusion as courts have attempted to interpret the word pattern. The Commission should avoid this pitfall by defining precisely the relational nature of the offenses that would give rise to a pattern.

Continuing Criminal Enterprise.

The Commission proposes amendments to Guideline 2D1.5 dealing with convictions under 21 U.S.C. § 848. Standard 18-2.2 sets forth the keystone principle that should guide every aspect of sentencing decision/making - the "least restrictive alternative."

The sentence imposed in each case should call for the minimum sanction that is consistent with the protection of the public and the gravity of the crime.

This Standard is mirrored in 18 U.S.C. § 3553(a) which requires that a court impose a sentence "sufficient, but not greater than necessary. . . ."

Consistent with these principles we oppose an increase in the base offense level for CCE offenses. The proposed increase in the base offense level from 32 to 35, 36 or 37 in lieu of or in addition to other enhancing factors should be rejected. Raising the base offense level would eradicate the ten year mandatory minimum established by Congress. All CCE defendants, unless there were some downward adjustment or departure, would be sentenced to imprisonment greater than the ten year mandatory minimum.

While past practice might indicate that the average punishment for CCE offenders is greater than the ten year mandatory minimum there are a number of CCE offenders who have been sentenced to the ten year term. Moreover, there are CCE offenders who are appropriately punished by a ten year term given the potential breadth of offenses chargeable under the statute. This statutory breadth gives rise to the problem facing the Commission since the scope of offenders and conduct punishable by the statute moves from relatively small criminal enterprises to the largest and most sophisticated known to law enforcement.

We suggest that this problem be dealt with by identifying specific factors which will allow a meaningful distinction to be made between the large group of CCE offenders guilty of truly

serious offenses and those who make out the bare statutory minimum.

While we favor consideration of offense and offender characteristics as enhancements we urge the Commission to consider further the enhancements listed in its proposed amendment. The proposal to provide an increase of one or two offense levels for an individual who caused injury to any person or used or sanctioned the use of violence may be an appropriate consideration. While the standard of use of violence is clear the concept of sanctioning within the context of CCE criminal enterprise may be a difficult one to apply. For example, would an individual who knew of the use of violence but did not object to it have "sanctioned" the violence? Similarly degrees of violence could not be adequately differentiated with in a one or two level adjustment. For example, an individual who personally committed violent acts of assault or murder in furtherance of a CCE will be dealt with under almost the same standard as an individual who condoned relatively minor acts of violence. A preferable approach might be to limit the Guideline to enhancements where an individual caused physical injury to any person in the course of the offense. Guideline commentary could define caused as encompassing exercise of management or supervisory authority as contemplated by the CCE statute.

While we agree that the size of the enterprise and the defendant's role in the operation are relevant enhancement factors we urge the Commission not to apply a mechanical test.

For example, consideration of the number of individuals organized, supervised or managed may not always provide an accurate distinction. A captain of a boat might supervise a large number of individuals yet occupy a less blameworthy and responsible position than an individual who supervises a relatively small number of distributors for the illegal product. A preferable approach might be to set forth a multi-factor test including the overall size and scope of the operation, the defendants position within it, the number of individuals involved and the length of time that the defendant has occupied a supervisory role and permit a upward enhancement of one to several levels depending on the overall weight of these factors.

Conclusion

We appreciate the opportunity to share these comments with you and look forward to working with the Commission in the future. I will be pleased to answer any questions you may have.

ASBILL, JUNKIN, MYERS & BUFFONE

CHARTERED
ATTORNEYS AT LAW

1607 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20009-2562

202-234-9000

FAX: 202-332-6480

HENRY W. ASBILL
TIMOTHY D. JUNKIN*
MATTHEW L. MYERS
SAMUEL J. BUFFONE
L. BARRETT BOSS

SUSAN L. ARNOLD
Legislative Assistant

COUNSEL
WILLIAM B. MOFFITT+

VIRGINIA OFFICE
655 SOUTH WASHINGTON STREET
ALEXANDRIA, VA 22314

MARYLAND OFFICE
11011 GLEN ROAD
POTOMAC, MD 20854

*ALSO ADMITTED IN MD.
+ADMITTED IN VA.

January 5, 1988

The Honorable William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkins:

In my capacity as chairperson of the American Bar Association's, Criminal Justice Section, Committee on the U.S. Sentencing Commission, I would like to submit the following comments on the Commission's proposed amendments to the Sentencing Guidelines manual of October, 1987. While the Association appreciates the opportunity to comment on the proposed guideline revisions, it is our belief that the manner of their adoption raises significant issues about the Commission's processes.

As you are aware the Association, through our Committee, has participated extensively in the public processes associated with the adoption of the Commission's Sentencing Guidelines. In addition we have actively participated in Congressional hearings and other public forums which have addressed the issues raised by the Sentencing Guidelines. In our most recent testimony before the United States Senate, Committee on the Judiciary, we expressed our concern that the Commission's process during the critical initial implementation phase should be a full, open and public one. The proposed guideline amendments were not made available to the American Bar Association until December 23, 1987. Given the holiday week, our preparation of our comments has been a difficult task. It is our understanding that there has been no public announcement or general distribution of the proposed amendments for public comment.

The following comments are no substitute for open public consideration of modifications to the guidelines. Regardless of the technical or minor nature of any guideline changes we urge

the Commission to adopt a policy of submitting any proposed changes for public comment. Any comment period should build-in a sufficient amount of time for the Commission to consider the comments and if appropriate, make changes in proposed guideline revisions. Additionally we urge the Commission to consider the feasibility of conducting hearings on any future proposed guideline revisions.

The emergency guideline promulgation authority established by § 21 of the Sentencing Act of 1987, Public Law 100-182, requires a finding that a change to the guidelines is "urgent and compelling." There is no indication on the face of the Sentencing Act of 1987 if such authority in any way curtails the requirements of 28 U.S.C. § 994(x) relating to publication in the Federal Register and public hearing procedures. In the event that the Commission interprets its emergency authority as not requiring compliance with these procedures, we urge the Commission as a matter of policy to adopt procedures for public comment and hearing applicable to the exercise of its emergency guideline promulgation authority.

The proposed amendments to the Sentencing Guidelines contained in draft Appendix C appear to be largely technical or corrective in nature. We have not had an opportunity to fully analyze all of the proposed amendments, but we find the majority to be without objection. The Association would, however, like to comment upon the following specific amendments.

1. Section 2B1.2. Receiving Stolen Property - Unlike the bulk of the proposed amendments which appear to be technical or clerical in nature the proposed transposition of the two subsections will have the effect of substantially increasing the potential sentences under this guideline.

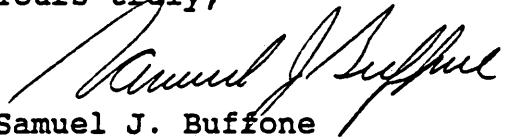
2. Section 2D1.1. Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit these Offenses) - The proposed amendment to commentary paragraph 11 invites consideration of quantities of drugs not specified in the count of conviction and references section 1B1.3(a)(2) dealing with relevant conduct. This subsection in turn permits consideration of conduct and circumstance relevant to the offense of conviction only to the extent they are relevant to the defendant's state of mind or motive in committing the offense of conviction. The Association believes that without further guidance authority to consider uncharged offenses as relevant only to the narrow determination of state of mind or motive warrants further clarification by the Commission. In general the Association believes that the relevant conduct provisions of § 1B1.3 warrant further clarification and reconsideration by the Commission.

3. Section 3A1.2. Official Victims - The proposed deletion of the term "directly victimized" in the commentary notes may lead to uncertainty over the appropriateness of considering indirect victimization or injury. Additionally the change in the second sentence creates the potential that the court will consider the victimization of an organization, agency or the government itself as an enhancing factor in the event that there is some other specified victim in addition to these organizational victims.

4. Section 3E1.1. Acceptance of Responsibility. The proposed amendment of the acceptance of responsibility standard contained in subparagraph a, to require acceptance of responsibility beyond the offense of conviction to "criminal conduct" introduces unnecessary ambiguity into this important provision of the guidelines. Limiting the acceptance of responsibility standard to offense of conviction provides clarity to the sentencing court in making this difficult determination. The proposed amendment would require the court to first ascertain the nature of criminal conduct beyond the offense of conviction. The Association anticipates that situations will frequently arise where an individual will accept responsibility for his offense of conviction in a plea bargain situation but will dispute other portions of allegations against him. Such disputes, even as to minor allegations, will preclude the downward adjustment associated with acceptance of responsibility.

The Association appreciates the opportunity to submit these comments to you. We are hopeful that they will be of assistance to the Commission.

Yours truly,



Samuel J. Buffone
Chairperson
American Bar Association
Section of Criminal Justice
Committee on United States
Sentencing Commission

SJB/ro

cc: John Steer

THE UNITED STATES SENTENCING COMMISSION

1331 PENNSYLVANIA AVENUE, NW

SUITE 1400

WASHINGTON, D.C. 20004

(202) 662-8800

William W. Wilkins, Jr. Chairman
Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
George E. MacKinnon
Ilene H. Nagel
Paul H. Robinson
Benjamin F. Baer (ex officio)
Ronald L. Gainer (ex officio)



January 15, 1988

Samuel J. Buffone, Esq.
Asbill, Junkin, Myers & Buffone
1607 New Hampshire Avenue, N.W.
Washington, D.C. 20009-2562

Dear Sam:

Thank you for your letter of January 5, 1988, commenting on the emergency amendments to the Sentencing Guidelines. Immediately upon receipt, your letter was circulated to all Commissioners for their information and review. We appreciate the American Bar Association's continued interest in, and contribution to, the work of the Sentencing Commission. Throughout the process leading to the adoption of these very limited amendments, the Commission has remained responsive to public input.

Although the guidelines submitted to Congress last spring were generally workable, they contained a number of clerical errors, and several key provisions did not unambiguously convey the Commission's intent. Initially, it was not within the Commission's authority to promulgate emergency guideline amendments. Consistent with its authority to clarify the commentary accompanying the Guidelines, however, the Commission issued revised and reorganized commentary in the form of its October, 1987 Guidelines Manual.

On November 20, 1987, the Commission published the entire Guidelines Manual in the Federal Register. The Commission specifically invited public comment on the revised commentary and solicited other suggestions for improving the guidelines and policy statements. Additionally, the guidelines training process, and continued review by the Commission and its staff, revealed areas in which corrective or clarifying changes might preclude unnecessary application errors and potential litigation.

Subsequently, the Sentencing Act of 1987 granted the Commission emergency guideline promulgation authority (Pub. L. No. 100-182, §21). At its December 16 meeting, the Commission

utilized its emergency authority to adopt formally the revised commentary and to adopt a small number of technical, clarifying and conforming amendments to the Guidelines. Several additional amendments were adopted by the Commission at its January 5 meeting. (These amendments were obviously not included in the material sent to you on December 23. I enclose a complete set of amendments herewith.) These amendments incorporate no new policy judgments by the Commission. The amendments are merely intended to correct clerical errors and to illuminate the Commission's intent, where necessary.

The Commission enacted these clarifying amendments promptly in order to avoid guideline application errors which might result in substantial injustice and needless litigation. The legislative history of Public Law 100-182 supports the Commission's decision to exercise its authority in this manner. In addition, the Commission concluded it was appropriate to use this opportunity to incorporate several important statutory changes embodied in recent legislation. See, e.g., §5D3.2 (maximum term of supervised release); §5E4.2 (maximum fines).

It is the Commission's understanding that the advance notice, comment and hearing provisions of the Administrative Procedure Act do not apply to the issuance of emergency guidelines under section 21 of the Sentencing Act of 1987. The lengthy periods of deliberation required by the A.P.A. are entirely inconsistent with the technical nature of these amendments and the need for their prompt adoption. In any event, the A.P.A. itself contemplates the promulgation of regulations without advance notice and comment when advance notice is "impracticable, unnecessary or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B).

The Commission intends to expose these amendments to thorough public scrutiny before they are proposed as permanent changes. Accordingly, they will be published in the Federal Register of January 15, and, although not required under the 1987 Sentencing Act, they will be forwarded to Congress. The Commission has tentatively scheduled a public hearing for March 21 and 22, at which all interested parties will have an opportunity to comment on both these emergency amendments and other proposals for improving the Sentencing Guidelines. If, as the Commission anticipates, the emergency guidelines serve a salutary purpose, they will then be formally submitted to Congress along with any other proposed amendments by May 1, 1988, pursuant to 28 U.S.C. § 994(p).

It is also important to note that there were several proposed amendments the Commission did not adopt at its December 16 and January 5 meetings because, in our judgment, they represented a shift in policy and therefore could not be fairly characterized as clarifying amendments. Such amendments will be

considered in the coming months under the more deliberative procedures embodied in the Sentencing Reform Act of 1984.

I am pleased that you conclude that the amendments "appear to be largely technical or corrective in nature." That is the Commission's view as well. Let me now respond to your specific comments about the emergency guidelines.

1. §2B1.2 (Receiving Stolen Property). You suggest that the transposition of §2B1.2(b)(2) and §2B1.2(b)(3) increases the length of sentences under this section of the Guidelines. While that may be a result of the amendment, it was not the reason for the amendment's adoption. The amendment merely corrects a clerical error in the April 13 version of the Guidelines. The Commission always intended §2B1.2 to parallel §2B1.1, under which the theft of a firearm, destructive device or controlled substance serves to increase the offense level to at least level seven before factors such as the degree of planning are considered. Evidence of the Commission's intent appears in the October commentary to §2B1.2, note (3), which directs a court to consider §2B1.2(b)(3) before §2B1.2(b)(2). The fact that the new amendment may adversely affect a defendant is no reason to refrain from correcting a clerical error.

2. Section 2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking of Controlled Substances). You do not appear to criticize the substance of amended Application Note 11. Rather, you correctly point out that the new reference to §1B1.3 in Application Note 11 makes it even more important that the meaning of §1B1.3 (Relevant Conduct) be clarified.

The Commission has long recognized that a clear understanding of relevant conduct is essential to the proper application of the Guidelines. Training programs demonstrated that the April 13 version of relevant conduct caused considerable confusion. For this reason, the Commission voted to revise §§1B1.3 and 1B1.4 at its January 5 meeting. The revision is included in the enclosed set of amendments.

Relevant conduct is such an important element of the guidelines that the Commission concluded that its clarification was "urgent and compelling" within the meaning of the Sentencing Act of 1987. Here again, the emergency amendment does not represent any new policy judgment, only a clearer articulation of what the Commission always intended and what it has explicitly stated elsewhere in the Guidelines. The meaning of Application Note 11 to §2D1.1 should be more apparent now that §1B1.3 has been reformulated.

We are aware that relevant conduct remains a difficult and controversial concept. The Commission continues to seek input in this area from interested parties.

3. §3A1.2 (Official Victims). An organization, agency, or the government may never be an "official victim" within the meaning of this section. The Commission has attempted to state this policy plainly. The section has been amended to enhance its clarity. If the amendment has not fully accomplished this purpose, the Commission welcomes public comment which may assist us to achieve clarity.

Your letter expressed concern that the revised commentary invites a court to consider "indirect victimization." If your use of the phrase "indirect victimization" refers to a defendant's unintended victimization of a law enforcement official, I would refer you to §3A1.2 itself, which precludes the enhanced penalty unless "the crime was motivated by [the victim's] status." If by "indirect victimization" you mean secondary victimization, i.e., a bank robber injures both the bank teller and the uniformed police officer pursuing the defendant from the bank, the Commission intends to permit an enhancement when that aggravating circumstance is present.

4. §3E1.1 (Acceptance of Responsibility). This amendment merely clarifies what has always been the Commission's view of Acceptance of Responsibility. As you know, the Guidelines do not award the defendant an automatic sentence reduction because he pleads guilty. Rather, a defendant must demonstrate sincere remorse before he is entitled to a reduction under this section. Use of the phrase "offense of conviction" in the April 13 Guidelines inadvertently suggested that a defendant might qualify for the sentence reduction by a grudging, rehearsed admission that he engaged in conduct constituting the elements of the offense of conviction. Such a hollow expression of contrition should not entitle the defendant to the sentence reduction. Substitution of the phrase "his criminal conduct" for "the offense of conviction" authorizes a court to undertake a broader evaluation of the sincerity of a defendant's remorse.

We certainly do not intend or expect that §3E1.1 will preclude a downward adjustment for a defendant who disputes any part of the Government's allegations against him. In spite of such disputes, a court may well find that a defendant has "clearly demonstrate[d] a recognition and affirmative acceptance of personal responsibility for his criminal conduct." §3E1.1(a). The sentencing judge is uniquely qualified to make this determination. See, §3E1.1, Application Note 5.

The Commission stands by the amendments it has recently adopted and the process by which they were adopted. Without the immediate promulgation of these clarifying amendments, there was a significant possibility that key provisions in the Guidelines would be misinterpreted and inappropriate sentences would be imposed as a result.

On April 13, the Commission referred to its initial guidelines as "the first step in an evolutionary process." Sentencing Guidelines at page 1.4. The emergency amendments are yet another step; the evolutionary process continues. We welcome the continued participation of the American Bar Association in the ongoing effort to create a more honest, equitable and effective sentencing system.

With kindest regards,

Sincerely,

A handwritten signature in cursive script that reads "Billy Wilkins".

William W. Wilkins, Jr.
Chairman

Enclosure



FEDERAL PROBATION OFFICERS ASSOCIATION

**PREPARED STATEMENT OF THE
FEDERAL PROBATION OFFICERS ASSOCIATION
(FPOA)**

**FOR THE
UNITED STATES SENTENCING COMMISSION**

22 MARCH 1988

PUBLIC HEARING

CEREMONIAL COURTROOM

UNITED STATES DISTRICT COURT

**FOR THE
DISTRICT OF COLUMBIA**

DELIVERED BY:

**TOMMASO D. RENDINO
PRESIDENT - FPOA**

Association Officers 1988

President - Tommaso D. Rendino
United States Probation Officer
Burlington, Vermont

Secretary - Charles S. Massey
Supervising U.S. Probation Officer
Fayetteville, N.C.

Vice President - Ralph Ardito, Jr.
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United States Probation Officer
Newark, N.J.

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Belleville, IL

Economics

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U.S. Probation Officer
Galveston, TX

Professional Standards

Western - Charles L. Stearns:
Supervising U.S. Probation Officer
West Covina, CA

Affiliate Liaison

000

Ex Officio

Philip J. Bigger:
Supervising U.S. Probation Officer
Brooklyn, N.Y.

Newsletter Editor

Mr. Chairman and Commissioners, I am Tommaso D. Rendino, President of the Federal Probation Officers Association and currently serving as United States Probation Officer in the District of Vermont, stationed at Burlington, along with liaison duties to local, provincial and federal agencies in the Province of Quebec, Canada.

Upon my election in January 1987, the main priority of the FPOA, for the foreseeable future, became cooperation with and assistance to the Sentencing Commission and I took the unusual step of establishing an ad hoc Committee of the Whole, consisting of the entire FPOA Board, as well as its newsletter editor, for the purpose of closely monitoring and analyzing the Commission's work.

The FPOA has regularly offered, and will continue to offer, its considered opinions on the Commission's work and we are very grateful for the "open door" policy which you, as chairperson, have maintained along with the constant encouragement for input from the field.

In fact, of all the agencies with which the FPOA interacts, the Sentencing Commission has remained, to the practitioners in the field, the most accessible, most cooperative, most interested in improving its work via "field testing" and most responsive body with which we have had the pleasure of working.

The FPOA compliments the Sentencing Commission on the computer soft-ware program already developed -- it really helps during this "break-in" phase -- but, quickly urges continued

development of even better programs for dissemination to the field. As part of the Commission's efforts, all districts received the same computer components, which marked a major improvement in automation for the field where we have sadly been lacking in such assistance.

We are very early into guideline sentencing but one trend that seems to be developing may be of interest to the Commission. It's exact import to us is indistinct at this point but seems to go along with some of our earlier observation, viz., the role of the United States Probation Officer is changing and probably radically so. At any rate, we are seeing an increasing reluctance on the part of defense attorneys to allow defendants to talk with the probation officer (or the Pretrial Services Officer, for that matter), the assumption being that the only result possible is an increase in the guideline punishment.

The FPOA -- again, in these very early stages -- is concerned about the provisions of Guideline 5E4.2.(i) that "...subject to the provisions of subsection (f) herein, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered." Given the other fine, forfeiture and restitution options available to the sentencing court, we are not so sure that (i) is really necessary.

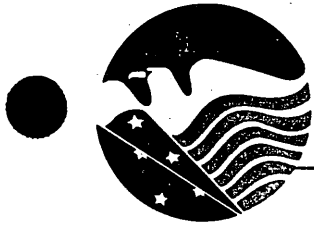
The FPOA is troubled that, absent additional resources (i.e. increased automation plus additional staff), the extra time required for guideline sentencing will hamper the proper supervision of those individuals released to the community via probation, parole or supervised release thereby perpetuating a

false promise, most notably to the public at large. We immediately realize that such is not the Commission's intent; however, it may occur anyway. The Commission is therefore, in our view, at least partially responsible for assisting in our efforts to ward off such a negative result.

We agree with the Commission's proposal to adopt permanently the temporary amendments which became effective on January 15, 1988 under the Commission's "emergency amendments" authority (P.L. 100-182) and we see merit in the Commission's proposed amendments to Guidelines 2A2.4, 2A5.3 and 2A6.2.

As candidly as we can put it, the FPOA believes, very strongly, that field probation personnel are grossly undercompensated for all of the new responsibilities placed on them in recent years, the new duties brought about by guideline sentencing not the least of these. We ask that the Commission be sensitive to this situation and support us in our efforts to rectify it.

Once again the FPOA is happily constrained to applaud the Commission for its conscientious work and to thank you for allowing us to share some of our ideas and concerns with you.



Citizens for Decency through Law, Inc.

Charles H. Keating, Jr.
Founder

Gary W. Hall, M.D.
Chairman of the Board

William D. Swindell
President & Nat'l. Director

Bruce A. Taylor, Esq.
General Counsel

Benjamin W. Bull, Esq.
Legal Counsel

Alan E. Sears, Esq.
Legal Counsel

C. Bradley Keirnes
Vice President

TESTIMONY BEFORE THE

UNITED STATES SENTENCING COMMISSION

1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004
(202) 662-8800

REGARDING

SENTENCING FOR OBSCENITY OFFENSES

ON

MARCH 22, 1988

BY

BRUCE A. TAYLOR

GENERAL COUNSEL

CITIZENS FOR DECENCY THROUGH LAW, INC.

Mr. Chairman and Members of the Commission:

INTRODUCTION

My name is Bruce Taylor, and I am General Counsel of Citizens for Decency through Law. Citizens for Decency through Law is a not-for-profit corporation located in Phoenix, Arizona. CDL is essentially a full-time group of former prosecutors with experience in obscenity cases who provide free legal assistance and advice to prosecutors, police, and legislators in obscenity cases and related crimes. CDL was founded in 1957 by then Cincinnati lawyer Charles H Keating, Jr., who was later named to the President's Commission on Pornography, and who authored one of the two dissenting Minority Reports in 1970.

My experience began as a prosecutor for the City of Cleveland where I worked on obscenity cases from 1973 to 1978. I handled several hundred prosecutions and appeals before joining CDL. In my ten years at CDL, I have participated in over two dozen more jury trials in several states, making my obscenity jury trial experience over 60 cases, and rendered assistance in scores of other state and federal trials and appeals. I have had the honor of arguing appeals before the Supreme Courts of Ohio and Colorado, the U.S. Courts of Appeals for the Sixth and Ninth Circuits, and before the U.S. Supreme Court. I have testified before Congress, several state legislatures, and numerous city and county councils and commissions relating to obscenity, child pornography, zoning and minors laws, and related issues.

Also on the legal staff of Citizens for Decency through Law are two of the nation's most experienced obscenity law enforcement specialists, Benjamin Bull and Alan Sears.

Ben Bull, as prosecutor in Norfolk, closed nearly all the so-called "adult" bookstores, theatres, and massage parlors, and prevented the sale of any hard-core pornography in that city for several years. Ben won all of his several jury trials and appeals and became one of the best obscenity prosecutors in the country.

Alan Sears is best known as the Executive Director of the U.S. Attorney General's Commission on Pornography, which released its Report in July, 1986. The knowledge he gained during his two year study of the issues, industry, effects, victims, and problems is unmatched. Before the Commission, however, Alan was Assistant U.S. Attorney in Louisville, and obtained two sets of convictions for federal obscenity crimes against the largest companies in the worldwide porn and video syndicate and some of their employees. Alan's experience and knowledge of federal obscenity crimes and sentencing is the main first-hand basis of this testimony.

THE PORNOGRAPHY SYNDICATE

In its 31 year efforts nationwide, CDL has developed a collective body of knowledge on the problem of obscenity distribution in the United States. Citizens for Decency through Law has become familiar with the identities of many of the individuals involved in the pornography industry, how this criminal enterprise operates from the smallest retail sales point to the largest multi-million dollar networks of traditional organized crime affiliated individuals. This "enterprise" is known by law enforcement as the "pornography syndicate" and is made up of the members of La Cosa Nostra who direct and dictate to the industry, as well as the authorized producers and

interstate distributors of hard-core pornography in the industry. The pornography syndicate also provides hard-core and edited or "softer" versions of its product to cable, subscription, and satellite TV; hotel pay per view services; "men's sophisticate" magazines; and video store rental outlets.

FOCUS OF THIS TESTIMONY

Based on our experiences, we have examined the Federal Sentencing Guidelines issued by the United States Sentencing Commission in 1987 and have reviewed their probable impact in relation to obscenity and child pornography offenses: Section 2G2.2, Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor, and Section 2G3.1, Importing, Mailing, or Transporting Obscene Matter, and relevant adjustments contained in other appropriate sections of the guidelines.

It is our opinion that the guidelines previously promulgated and now in effect by the U.S. Sentencing Commission are not adequate to deter this organized illegal syndicate, but with a few corrections could permit the federal courts to adequately sentence persons convicted of the underlying offenses under present federal obscenity crimes (Title 18, U.S.C., Sections 1461, 1462, 1464, 2252, and RICO). The most important recognition of the present guidelines is that federal obscenity violations are serious and should involve incarceration for any offense involving pecuniary gain, Section 2G3.1(a),(b)(1), and that all child pornography and related sexual exploitation offenses mandate incarceration, Section 2G2.1(a) and Section 2G2.2(a).

ADULT OBSCENITY OFFENSES

Under the present guidelines contained within Section 2G3.1, for importing, mailing, or transporting obscene matter, it is our belief that the base offense level of six is adequate to encompass those rare cases that do not involve distribution for pecuniary gain. Subsection (b), which contains the Specific Offense Characteristics, states, (1) "If the offense involved an act related to distribution for pecuniary gain, increase by the number of levels from the table in Section 2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels." This subsection makes a realistic beginning at recognition that the pecuniary value involved in the average obscenity prosecution is not a true reflection of the value and size and scope of the enterprise in which the typical interstate obscenity distributor is involved. The enhancement by five levels for any retail valuation is the dollar equivalent, according to the table and Section 2F1.1, of pecuniary gain of \$50-\$100,000. Of necessity, however, many cases against enterprises or persons subjected to prosecution will involve transactions where only a few hundred or a few thousand dollars worth of material will be purchased or seized by federal law enforcement officers, but in truth and fact the size of the criminal enterprise will be nation-wide and multi-million dollars in scope. Section 2G3.1(c) recognizes that if a criminal enterprise exists, enhancement may be appropriate, but in many instances the large criminal enterprises itself will not be subject to racketeering or obscenity prosecution for a variety of legal, jurisdictional, or investigative reasons. It would be wrong for individuals involved in extremely large enterprises to escape serious punishment if they do not have other adjustment factors when a

base level of 6 is enhanced by only 5 for the pecuniary gain, leaving a total offense level of 11, and merely subject to incarceration for 8 to 14 months.

In addition, many of the offenses able to be prosecuted will involve the mainstay of the industry, which is hetero-or homo-sexual hard-core pornography involving adults engaged in explicit sexual acts where penetration is clearly visible. This type of hard-core material is the lifeblood of the syndicate, even though some materials also depict incest or child-sex themes or show sado-masochism or violence. The production of these hard-core films, videos, and magazines involve the pandering of prostitution and deterring this illegal production and its product is the largest single factor in law enforcement's effect on the industry as a whole.

SUGGESTIONS FOR OBSCENITY OFFENSES

Section 2G3.1(b) should be amended to provide the following additional enhancements:

(3) If the offender was involved in distribution of the material between or among at least three states or a foreign country, increase by 5 levels.

(4) If the offense involved imaterial that was produced by means of prostitution or the commercial use of performers to engage in actual sexual penetration, increase by 4 levels.

Existing Subsection 2G3.1(b)(2) should be amended to read:

(2) If the offense involved material that portrays sadomasochistic conduct or other depictions of violence, or represents the sexual conduct as being with a minor or incestuous, increase by 4 levels.

REASONS FOR AMENDMENTS

In recent federal prosecutions, a few specific case examples illustrate some of the problems with the sentencing. In one of the prosecutions in the Western District of Kentucky, prosecuted by Alan Sears in the mid 1980's, the general manager of the largest distributor of hard-core video tapes in the world was subject to federal obscenity charges. The individual in question received a reported income of excess of \$50,000 per year, and was furnished with autos and corporate credit cards that allowed him to live a very "comfortable" style of living while engaged in employment for the corporate offender. Under the present sentencing guidelines he would have been subject to only an enhancement of 3 levels in addition to the pecuniary 11, in that he was a manager and supervisor but not an organizer or leader as set forth in Section 3B1.1, and therefore subject to incarceration for a period of 15 to 21 months though the individual's involvement was at a multi-million dollar annual level. The other indictment in the Western District of Kentucky was of an individual who was an interstate sales agent and driver for the world's largest hard-core pornography distributor. That individual would not qualify for any of the enhancers contained in Section 3B1.1, or elsewhere in the sentencing guidelines, and though living at a very affluent level while distributing several hundred thousand dollars worth of obscene materials on an annual basis, the individual would only have an offense level of eleven and would be subject to incarceration for 8 to 14 months, which is not a serious deterrent. These two examples illustrate the types of individuals involved in these major criminal enterprises at lower management and soldier levels who, due to lack of significant prior enforcement of obscenity laws, have never accumulated a criminal record but have profited substantially from illegal

activities for a number of years and are only subject to ineffective sentences. Pornography, like drugs, is a career where the riches buy out the risks.

The Final Report of the Attorney General's Commission on Pornography contains a recommendation that any obscenity offense should receive at least one year in jail. As discussed above, the federal government will only prosecute (and rightly so) large-scale interstate distributors who should be subject to other enhancements based on size, control, breadth, and type of material. These targets should be receiving two to three years on first offense in order to make it worthwhile for the federal agencies and prosecutors to expend the considerable time and resources to convict these wealthy, well insulated, but substantially responsible operators. Taking some of the profits and assets in fines or forfeitures is important, but the fear of jail is the only real deterrent to the persons who have built and maintained this controlled industry for the past two decades. They don't mind giving up their money, after all - it's not even theirs, but they don't like the thought of giving up their time to pay for their blatant and calculated crimes. The A.G.'s Commission Report also lists several actual sentences given for obscenity convictions in the past and these charts illustrate the low level of incarceration and fines. A copy of these charts is attached hereto as Appendix A. The lack of deterrence in these punishments is proven by the size and openness of the industry, and type of material the syndicate is providing today. The only seriously effective sentence in any major obscenity case was the 25 year and \$30,000 sentence against a major distributor of bestiality films, which was upheld in U.S. Guglielmi, 819 F.2d 451 (4th Cir. 1987).

More typical were the disgracefully inadequate punishments for the major syndicate and LCN figures convicted in the FBI's MIPORN sting in U.S. District Court in Miami. The MIPORN cases were outlined by Strike Force prosecutor Marcella Cohen before the A.G.'s Commission on January 22, 1986. Her testimony, and the sentencing transcript from one of the trials, is attached hereto as Appendix B.

CHILD PORNOGRAPHY

Two important defects in present guidelines hamper more effective use of child porn laws. Although the porn syndicate, and more often certain smaller segments or individuals in the industry, will sell or provide commercial child pornography in films and magazines, the largest number of offenses are one piece mailings or trades among individual pedophiles. When the traffic is commercial, investigators can seldom obtain more than one or a few copies without raising suspicions. Therefore, the dollar value in most child porn trials is small, but the value in harm to the children is always immense. It is also difficult, especially in the commercial cases, to identify the actual children or their ages. The guidelines should guide the courts in better identifying the exploitation of younger victims and provide that larger scale, organized, or commercial suppliers be more seriously punished. We therefore suggest the following amendment to Section 2G2.2(b)(1);

(1) If the material involved a pre-pubescent child or a minor under the age of twelve years, increase by 2 4 levels.

We further recommend the addition of new enhancements to 2G2.2(b) to read as follows:

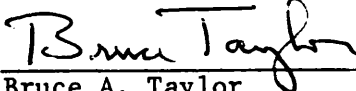
(3) If the offender was involved in distribution of the material between or among at least three states or a foreign country, increase by 5 levels.

(4) If the material depicts actual sexual conduct or sexual penetration of minors by other minors or adults, or depicts sexual contact or conduct between the defendant and a minor, increase by 5 levels.

CONCLUSION

This Sentencing Commission should insure that the irregular and ineffective sentencing experiences of the past are not repeated. We urge the Commission to adopt our suggestions and make violating the federal obscenity statutes a serious matter rather than a profitable profession. The parents and children of America, and the law enforcement officers and decent citizens who care, will be forever in your debt.

Respectfully submitted,


Bruce A. Taylor

Final Report of the Attorney General's Commission on PORNOGRAPHY

Introduction by
Michael J. McManus

RUTLEDGE HILL PRESS
NASHVILLE, TENNESSEE

APPENDIX A

raised the issue of lockbox controls. They contended that,

... the material to which children are exposed on radio and television may be assumed to be subject to parental supervision to a far greater extent than much of the material to which children are likely to be exposed in other media. And, according to Broadcasting magazine, technology is now prepared to provide parents with a device which will permit them to "program" their home television set in advance so that it will only receive material selected by the parent, even in the parent's absence. Broadcasting, February 27, 1978, at 83.³⁷⁷

The addendum to the Pacifica Foundation's brief included a description and photograph of a lockbox device called a "Video Proctor" which is capable of being programmed by a parent to block out any VHF, UHF, cable, or pay television stations.³⁷⁸ The Supreme Court was obviously unimpressed by the "lockbox" argument and upheld the FCC's authority to regulate broadcast content. Therefore, the availability of lockboxes does not prevent the FCC from regulating obscenity on radio and broadcast television. A lockbox performs the same function whether used to block out a broadcast or cable station. There is no reason why the availability of lockboxes should justify the FCC's failure to regulate obscene cable or satellite programming.

The availability of program guides is also advanced as a means of parental control. However, program guides are also readily

available for broadcast television programs in publications ranging from TV Guide to the daily newspaper. Programs guides offer no more protection in the context of cable and satellite television than they do in the realm of broadcast television.

While sexually explicit material may be transmitted by scrambled signals, this method is far from foolproof.

For two weeks in November of 1985, Tampa, Florida, residents received all of the "adult" channels whether they subscribed or not. This phenomenon apparently occurred because of a technological anomaly that was triggered by certain weather conditions.³⁷⁹

In Colorado Springs, Colorado, the Playboy Channel "slipped through an electronic loophole" and supplemented a "Rin Tin Tin" movie on the Disney Channel.³⁸⁰ According to a Naples, Florida, resident, "adult" channels, even though scrambled, can still be heard and sometimes seen clearly enough to be watched.³⁸¹

Finally, controls such as lockboxes, program guides, and scrambling are all based on the premise that consenting adults are entitled to observe what they want to. In *Paris Adult Theatre I v. Slaton*,³⁸² the United States Supreme Court held that obscene materials do not acquire constitutional immunity from state regulation simply because they are exhibited to consenting adults only.³⁸³

The time is long overdue for the FCC to take an active role in enforcing the laws and regulations against obscene cable programming.

RECOMMENDATION FOR OTHER FEDERAL ORGANIZATIONS

RECOMMENDATION 36:

The President's Commission on Uniform Sentencing should consider a provision for a minimum of one year imprisonment for any second or subsequent violation of Federal law

involving obscene material that depicts adults.

Discussion

The Commission has received considerable evidence with regard to the disparity in sen-

377. Brief Appelle, *FCC v. Pacifica Foundation*, 438 U.S., (1978), p. 726.

378. Addendum to Brief Appelle, *FCC v. Pacifica Foundation*, 438 U.S., (1978), p. 726.

379. Tampa Tribune, Nov. 8, 1985.

380. The Daily Sentinel, Aug. 13, 1984.

381. Statement by Rachel Sturdivant, Naples, Florida, submitted by Florida Coalition for Clean Cable.

382. 413 U.S., (1973), p. 49.

383. *Id.*, p. 57.

FINAL REPORT OF THE COMMISSION ON PORNOGRAPHY

tences obscenity law violators receive.³⁸⁴ Congress has enacted the Sentencing Reform Act of 1984. The President's Commission on Uniform Sentencing is a result of this Act.³⁸⁵ According to the Department of Justice,

The principal goal of the Sentencing Reform Act is to establish a uniform, determinate federal sentencing system that will accomplish the purpose of just punishment, deterrence, incapacitation, and rehabilitation. This goal is to be achieved primarily through the use of sentencing guidelines established by a Presidentially appointed Sentencing Commission, which will be composed of seven full time members and a staff. At least three members must be active federal judges who will not be required to resign from the bench to serve on

the Commission. The initial set of guidelines is to be completed in eighteen months. In the course of its work, the Commission will examine the offense and offender characteristics that judges now consider in making sentencing determinations, and will determine which of those should be reflected in the guidelines, which ones occur so infrequently that they should not be considered in the guidelines but might justify a departure from the guidelines, and which ones should not affect the sentence at all.³⁸⁶

In addition, the President's Commission on Uniform Sentencing should specifically consider the problems associated with sentencing obscenity law violations.

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DEFENDANTS SENTENCED IN UNITED STATES DISTRICT COURTS BY MAJOR OFFENSES FOR THE TWELVE MONTH PERIOD ENDED JUNE 30, 1981

IMPRISONMENT					
MAJOR OFFENSE			IMPRISONMENT		FINE
TITLE/SECTION AND LEVEL		DEFEN-DANTS	PRISON MONTHS	PROBATION MONTHS	
18	1461	FELONY	2	60	15,000
18	1461	FELONY	1	120	20,000
18	1461	FELONY	1	180	
18	1461	9810	1	12	
18	1462	FELONY			
18	1462	9820			
18	1462	FELONY			5,000
18	1462	9910		18	15,000
18	1462		1	24	
18	1465	FELONY	1		
18	1465	FELONY			
18	1465	9820			

PROBATION						
MAJOR OFFENSE			DEFEN-DANTS	PROBATION		FINE
TITLE/SECTION AND LEVEL		PROBATION MONTHS		PROBATION MONTHS		
18	1461	FELONY	1	24	5,000	
18	1461	FELONY	1	36		
18	1461	FELONY	1	48		
18	1461	FELONY	1	60		
18	1461	9810	2	24	500	
18	1462	FELONY				
18	1462	9820				
18	1464	FELONY				
18	1464	9910	3	12		
18	1465	FELONY	2	24		
18	1465	FELONY				
18	1465	9820				

Handbook on the Comprehensive Crime Control Act of 1984 and ot

385. United States Department of Justice, Handbook on the Comprehensive Crime Control Act of 1984 and other Criminal Statutes Enacted by the 98th Congress 31 (1984).

386. Id.

SPLIT SENTENCE

MAJOR OFFENSE			SPLIT SENTENCES		
	TITLE/SECTION AND LEVEL		DEFEN- DANTS	PRISON MONTHS	PROBATION MONTHS
18	1461	FELONY			
18	1461	FELONY			
18	1461	FELONY			
18	1461	FELONY			
18	1461	9810			
18	1462	FELONY	1	6	24
18	1462	9820			
18	1462	FELONY			
18	1462	9910			
18	1465	FELONY			
18	1465	FELONY			
18	1465	9820			

FINE ONLY

MAJOR OFFENSE			FINE ONLY	
	TITLE/SECTION AND LEVEL		DEFEN- DANTS	AMOUNT
18	1461	FELONY		
18	1461	FELONY		
18	1461	FELONY		
18	1461	FELONY		
18	1461	9810		
18	1462	FELONY		
18	1462	9820		
18	1462	FELONY		
18	1462	9910		
18	1465	FELONY	3	15,000
18	1465	FELONY	1	200,000
18	1465	9820		

DEFENDANTS SENTENCED IN UNITED STATES DISTRICT COURTS
BY MAJOR OFFENSES FOR THE TWELVE MONTH
PERIOD ENDED JUNE 30, 1982

IMPRISONMENT

MAJOR OFFENSE			IMPRISONMENT		
	TITLE/SECTION AND LEVEL		DEFEN- DANTS	PRISON MONTHS	PROBATION MONTHS
18	1461	FELONY	1	60	60
18	1461	FELONY	1	108	
18	1461	9810			
18	1462	FELONY	1	48	
18	1462	FELONY	1	60	60
18	1462	9820			
18	1464	FELONY			
18	1462	9910			
18	1465	FELONY	1	18	60
18	1465	9820			

FINAL REPORT OF THE COMMISSION ON PORNOGRAPHY

PROBATION

MAJOR OFFENSE			PROBATION		
	TITLE/SECTION AND LEVEL		DEFEN- DANTS	PROBATION MONTHS	FINE
18	1461	FELONY	1	36	
18	1461	FELONY	1	60	
18	1461	9810			
18	1462	FELONY	1	12	
18	1462	FELONY	2	12	1,000
18	1462	9820			
18	1464	FELONY			
18	1464	9910			
18	1465	FELONY	3	12	
18	1465	9820			

SPLIT SENTENCES

MAJOR OFFENSE			SPLIT SENTENCES			
	TITLE/SECTION AND LEVEL	DEFEN- DANTS	PRISON MONTHS	PROBATION MONTHS	FINE	
18	1461	FELONY	1	3	36	1,000
18	1461	FELONY				
18	1461	9810				
18	1462	FELONY				
18	1462	FELONY				
18	1462	9820				
18	1464	FELONY	1	6	60	
18	1462	9910				
18	1465	FELONY				
18	1465	FELONY				
18	1465	9820				

FINE ONLY

MAJOR OFFENSE			FINE ONLY		
	TITLE/SECTION AND LEVEL		DEFEN- DANTS	AMOUNT	OTHER SENTENCES
18	1461	FELONY			
18	1461	FELONY			
18	1461	9810			
18	1462	FELONY	1	5,000	
18	1462	9820			
18	1462	FELONY			
18	1462	9910			
18	1465	FELONY	1	20,000	
18	1465	9820			

DEFENDANTS SENTENCED IN UNITED STATES DISTRICT COURTS
BY MAJOR OFFENSES FOR THE TWELVE MONTH
PERIOD ENDED JUNE 30, 1983

IMPRISONMENT

MAJOR OFFENSE			IMPRISONMENT		
	TITLE/SECTION AND LEVEL	DEFEN- DANTS	PRISON MONTHS	PROBATION MONTHS	FINE
18	1461	FELONY	1	60	60
18	1461	FELONY	1	108	5,000
18	1461	FELONY			
18	1461	FELONY			
18	1461	FELONY			

RECOMMENDATIONS FOR THE JUSTICE SYSTEM

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PROBATION

MAJOR OFFENSE			PROBATION	
	TITLE/SECTION AND LEVEL	DEFEN- DANTS	PROBATION MONTHS	FINE
18	1461 FELONY	1	24	1,000
18	1461 FELONY	2	36	
18	1461 FELONY	1	36	1,500
18	1461 FELONY	1	36	2,000
18	1461 FELONY	2	48	

SPLIT SENTENCES

MAJOR OFFENSE			SPLIT SENTENCES		
	TITLE/SECTION AND LEVEL	DEFEN- DANTS	PRISON MONTHS	PROBATION MONTHS	FINE
18	1461	FELONY			
18	1461	FELONY			
18	1461	FELONY			
18	1461	FELONY			
18	1461	FELONY			

FINE ONLY

MAJOR OFFENSE			FINE ONLY	
	TITLE/SECTION AND LEVEL	DEFEN- DANTS	AMOUNT	OTHER SENTENCES
18	1461 FELONY	1	5,000	
18	1461 FELONY			
18	1461 FELONY			
18	1461 FELONY			
18	1461 FELONY			

DEFENDANTS SENTENCED IN UNITED STATES DISTRICT COURTS
BY MAJOR OFFENSES FOR THE TWELVE MONTH
PERIOD ENDED JUNE 30, 1984

IMPRISONMENT

MAJOR OFFENSE			IMPRISONMENT		
	TITLE/SECTION AND LEVEL	DEFEN- DANTS	PRISON MONTHS	PROBATION MONTHS	FINE
18	1461	FELONY	1	36	
18	1461	FELONY	1	60	
18	1461	FELONY			
18	1461	FELONY			
18	1462	FELONY			
18	1465	FELONY			
18	1465	FELONY	1	24	
18	1465	FELONY	1	36	

PROBATION

MAJOR OFFENSE			PROBATION	
	TITLE/SECTION AND LEVEL	DEFEN- DANTS	PROBATION MONTHS	FINE
18	1461 FELONY	1	24	
18	1461 FELONY	1	36	
18	1461 FELONY	4	60	
18	1461 FELONY			
18	1462 FELONY			
18	1462 9820			
18	1465 FELONY	1	12	
18	1465 FELONY			
18	1465 9820			

FINAL REPORT OF THE COMMISSION ON PORNOGRAPHY

SPLIT SENTENCES

MAJOR OFFENSE			SPLIT SENTENCES		
	TITLE/SECTION AND LEVEL	DEFEN- DANTS	PRISON MONTHS	PROBATION MONTHS	FINE
18	1461 FELONY		3		
18	1461 FELONY				
18	1461 FELONY				
18	1461 FELONY				
18	1461 9810				
18	1462 FELONY	1	6	24	
18	1462 9820				
18	1462 FELONY				
18	1462 9910				
18	1465 FELONY				
18	1465 FELONY				
18	1465 9820				

FINE ONLY

MAJOR OFFENSE			FINE ONLY	
	TITLE/SECTION AND LEVEL	DEFEN- DANTS	AMOUNT	OTHER SENTENCES
18	1461 FELONY	1	15,000	
18	1461 FELONY			
18	1461 FELONY			
18	1461 FELONY			
18	1461 9810			
18	1462 FELONY			
18	1462 9820			
18	1462 FELONY			
18	1462 9910			
18	1465 FELONY	3	15,000	
18	1465 FELONY	1	200,000	
18	1465 9820			

DEFENDANTS SENTENCED IN UNITED STATES DISTRICT COURTS
BY MAJOR OFFENSES FOR THE TWELVE MONTH
PERIOD ENDED JUNE 30, 1985

IMPRISONMENT

MAJOR OFFENSE			IMPRISONMENT		
	TITLE/SECTION AND LEVEL	DEFEN- DANTS	PRISON MONTHS	PROBATION MONTHS	FINE
18	1461 FELONY	1	6		
18	1461 FELONY				
18	1461 FELONY				
18	1461 FELONY				
18	1461 9810				
18	1462 FELONY				
18	1462 9820				
18	1464 FELONY				
18	1464 9910				
18	1465 FELONY				
18	1465 FELONY				
18	1465 9820				

RECOMMENDATIONS FOR THE JUSTICE SYSTEM

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PROBATION

MAJOR OFFENSE			PROBATION	
	TITLE/SECTION AND LEVEL	DEFEN- DANTS	PROBATION MONTHS	FINE
18	1461 FELONY	2	24	
18	1461 FELONY	3	36	
18	1461 FELONY	3	48	
18	1461 FELONY	4	60	
18	1461 9810			
18	1462 FELONY	1	36	
18	1462 9820	3	60	
18	1464 FELONY			
18	1464 9910			
18	1465 FELONY			
18	1465 FELONY			
18	1465 9820			

SPLIT SENTENCES

MAJOR OFFENSE			SPLIT SENTENCES		
	TITLE/SECTION AND LEVEL	DEFEN- DANTS	PRISON MONTHS	PROBATION MONTHS	FINE
18	1461 FELONY	5			
18	1461 FELONY				
18	1461 FELONY				
18	1461 FELONY				
18	1461 9810				
18	1462 FELONY				
18	1462 9820				
18	1462 FELONY				
18	1462 9910				
18	1465 FELONY	1			
18	1465 FELONY				
18	1465 9820				

FINE ONLY

MAJOR OFFENSE			FINE ONLY	
	TITLE/SECTION AND LEVEL	DEFEN- DANTS	AMOUNT	OTHER SENTENCES
18	1461 FELONY			
18	1461 FELONY			
18	1461 FELONY			
18	1461 FELONY			
18	1461 9810			
18	1462 FELONY			
18	1462 9820			
18	1462 FELONY			
18	1462 9910			
18	1465 FELONY			
18	1465 FELONY			
18	1465 9820			

Source: Administrative Offices of the United States Courts.

WRITTEN TESTIMONY
ON BEHALF OF
FEDERAL PUBLIC AND COMMUNITY DEFENDERS

United States Sentencing Commission Hearing
Washington, D.C.
March 22, 1988

Prepared by: BARRY J. PORTMAN
Acting Federal Public Defender
San Francisco, California

The Federal Public and Community Defenders are grateful for the opportunity to comment on the January and proposed February amendments to the sentencing guidelines. Rather than attempt a comprehensive treatment of all the amendments, we have decided to limit our presentation to three section of the January amendments: section 1B1.3 (Relevant Conduct); section 1B1.4 (Information to be Used in Imposing Sentence); and section 3E1.1 (Acceptance of Responsibility). These three amendments while addressing different specific concerns are interrelated and significantly broaden the scope of behavior for which the defendant is to be held responsible. We would also like to comment on section 4B1.3 (Criminal Livelihood) both as to its scope and with regard to practice problems encountered with it. Finally, we wish to comment on three of the February proposed amendments.

Section 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

The January amendment of section 1B1.3 is of great concern to us because it explicitly authorizes the use of unadjudicated, and even uncharged, conduct to aggravate a sentence. We have both policy and practical concerns with this approach.

A. The Relevant Conduct Guideline Changes a "Charge Offense" System into a "Real Offense" System Contrary to the Commission's Stated Policy

The Commission stated in the introduction to the present guidelines that it had considered efforts to devise a "pure real offense system" and a "modified real offense" system. It rejected those systems on grounds that they were neither fair nor

workable. It characterized the present guidelines as a "charge offense" system with a number of "real elements." Chapter 1A4(a) (pp. 1.5-1.6) We are concerned that the amended definition of relevant conduct will, in most cases, permit the "real elements" to swallow the "charged offense" and become the determinative factor in the sentence.

For example, while section 1B1.2(a) requires on its face that the offense guideline section be drawn from the offense of conviction, in most drug cases the base offense level is set by the Drug Quantity Table (section 2D1.1(a)(3)). Under the amended definition of relevant conduct, the type and quantity of drug is set not by the amount specified in the count of conviction but by all drugs that can be considered to be part of "the same course of conduct or common scheme or plan as the offense of conviction." Section 1B1.3(a)(2). This is made explicit by Note 11, the January amendment to the Commentary on section 2D1.1. Thus, in drug cases the Commission has adopted real offense not charge offense sentencing.

By including all offenses that under section 3D1.2(d) would require grouping of multiple counts, the new definition of relevant conduct makes real offense sentencing the rule for the most common types of federal offenses, i.e., drug, tax, counterfeit, check, fraud and embezzlement cases. It is true that each type of offense (with the exception of drugs) has its own offense level governed by the offense of conviction. But that level is usually not the predominant factor in determining

the total offense level. The specific offense characteristic based on the quantity of the entire scheme or course of action is usually equal to or greater than the base offense level. For example, in an embezzlement case, the base offense level is 4 but the amount taken can add up to 13 additional levels; in a fraud case, the base offense level is 6 but the estimated or intended loss can add 11 additional levels. The only common type of federal offense where the offense of conviction determines the sentence is bank robbery. Thus, contrary to the express philosophy of the Commission, it is a real offense not a charge offense system that dominates guideline sentencing.

B. Reliance on Unadjudicated Conduct at Sentencing Encourages the Prosecution to Avoid the Jury System Where Proof Is Weak.

We have strong objections to the widespread reliance on unadjudicated conduct that the amended section 1B1.3 would permit. First, it is our belief that, if Congress, when enacting criminal statutes, thought that the "other crime" fact was of such significance that it merited serious possible punishment, the other crime fact should generally be established the way Congress anticipated - through adjudication by trial or guilty plea. Any other system allows a defendant to be sentenced for more serious conduct even though the prosecution's case might not be strong enough to prove the conduct to a jury. In other words, it encourages the prosecutor to "end run" the jury system by charging and obtaining a conviction on a lesser crime on which his evidence is strong and then seeking a sentence based on more serious criminal conduct on which his proof is weak.

C. Procedural Safeguards are Inadequate to Guarantee Accurate and Fair Resolution of Disputes Regarding Unadjudicated Conduct

It is true that the Commission has recognized that there will be a need for judicial procedures to resolve disputes over unadjudicated behavior. The Commentary to Guideline section 6A1.3 states:

In current practice, factors relevant to sentencing are often determined in an informal fashion. The informality is to some extent explained by the fact that particular offense and offender characteristics rarely have a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2nd Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law. (Emphasis added)

We applaud the Commission's reference to Fatico in the Commentary to guideline section 6A1.3. Nevertheless, we believe that section 6A1.3 itself, which concerns "Resolution of Disputed Factors", is inadequate. Guideline section 6A1.3 reads as follows:

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In

resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

The difficulty with this provision is that neither it nor the provisions of Rule 32, Federal Rules of Criminal Procedure to which it refers, explicitly contain the Fatico requirements. Indeed, amended Rule 32, effective November 1, 1987, merely gives the defendant "an opportunity to comment" upon the probation officer's determination of the applicable sentencing guideline or other aspects of the presentence report. Furthermore, while Rule 32(c)(3)(A) allows a defendant "to introduce testimony or other information relating to any alleged factual inaccuracy" contained in the presentence report, this opportunity is wholly within the discretion of the district court.

We strongly believe that Rule 32 should be amended to make explicit what the Commentary to section 6A1.3 implies: namely, that if there is a dispute about a fact relevant to the sentence which, depending on whether or not the fact was true, would result in one guideline and score rather than another, the fact is to be determined (1) after a hearing, (2) with the parties having the right to present evidence, (3) with the opposing party having the right to cross-examine witnesses, (4) with a

requirement that any hearsay evidence presented be corroborated and justified upon a showing of need, and (5) with a requirement that the proponent of a disputed fact be required to establish it by clear and convincing evidence.¹ This standard of proof is particularly important when unadjudicated, uncharged prior misconduct or sentencing factors as subjective as criminal purpose are used to aggravate sentences under the guidelines.

We realize that the burden of establishing a detailed procedural framework for resolving factual disputes at sentencing is not the Commission's alone to bear. But by opening wide the floodgates of unadjudicated conduct without waiting for the erection of procedural devices to channel it, the Commission risks flooding our courts with unresolved factual disputes.

D. Reliance on Unadjudicated Conduct Introduces Uncertainty Into Plea Agreements and Will Require More Trials and Sentence Hearings.

In addition to the foregoing policy reasons, we feel there are several practical reasons which make the expansion of relevant conduct unfair and unworkable. The first of these reasons is the element of uncertainty that is introduced in to the plea agreement and sentencing processes. A defendant, entering a plea of guilty to an offense where the discovery indicates that his conduct involved a single instance with a relatively low offense level, may first learn from the pre-sentence report that the charged offense is only the last in a series for which he will be held accountable at sentence. This

¹The Federal Defenders have submitted to Congress a proposed amended version of Rule 32, Federal Rules of Criminal Procedure, with accompanying commentary.

could result from conscious "sandbagging" where a prosecutor withholds such information from the defense in order to induce the plea. Or it might be the result of information discovered after the plea by the government or the probation officer acting independently. A stipulation by the parties to sentencing facts as part of the plea agreement does not protect the defendant from such an unpleasant surprise because the stipulation binds neither the pre-sentence officer nor the sentencing court. Section 6B1.4.

The potential for surprise at sentencing can be illustrated by several scenarios drawn from frequently charged federal offenses. A defendant pleads guilty to distributing in a single transaction 99 grams of cocaine which would place his base offense level at 16. During the pre-sentence investigation, the prosecution reveals that its informants allege that the defendant has been distributing the same quantity on a weekly basis for the previous year. This amount would bring the defendant to at least a level 34. The defendant would be facing a sentence seven times greater than he expected. Thus, a relatively minor drug conviction could be punished as a major one.

Another defendant pleads guilty to bank embezzlement. It is stipulated by the parties that the loss of \$1,500 resulted from a one-time taking and that the total offense level is 6 [4 (base offense level) + 2 (specific offense characteristic)]. The pre-sentence officer receives information from the victim bank that the defendant is suspected of a series of embezzlements

totaling \$25,000 over the period of a year. This would establish a total offense level of 12 [4 (base offense level) + 6 (specific offense characteristic) + 2 (more than minimal planning)]. Since the government bound itself by stipulation to a lower offense level, it appears it could not present witnesses in support of the probation officer's conclusions nor defend the court's decision on appeal if the court adopted the higher offense level. Perhaps this might have an impact on the trial court's willingness to follow the pre-sentence officer's conclusions. Nonetheless, it presents the prospect of a defendant pleading under one set of expectations and being sentenced under a dramatically different one.

The uncertainty as to what conduct the defendant will actually be held responsible is heightened by a number of additional factors: the limited right defendants have to discovery; the reluctance of victims to speak to defense investigators; the enlarged role of independent investigator given the pre-sentence officer under the guidelines; the lack of precision in terms and standards used in the specific offense characteristics (see, e.g., Application Note 8, Commentary to section 2F1.1, "amount of loss need not be precise"; Application Note 2, Commentary to section 2D1.4, where no drugs seized or seizure amount "does not reflect the scale of the offense," court can approximate from other sources). What is clear is that as long as the relevant conduct cannot be identified and "nailed down" at the time of plea, there will be great reluctance of defendants to plead guilty.

A corollary consequence of this uncertainty is the well-founded reluctance of a defendant to speak candidly with a pre-sentence officer until he knows what the relevant conduct is. A prudent defendant would give his version of the offense only after the pre-sentence officer has completed his investigation. Otherwise, he might be accused of obstruction (section 3Cl.1), paint himself into a more serious role in the offense than otherwise known (section 3Bl.1) or disclose facts that might be deemed a basis for a finding of criminal livelihood (section 4Bl.3). Where the defendant is out-of-custody, this may lengthen the pre-sentence investigation but should not present a serious problem. But for detained defendants in districts where prisoners are held a great distance from the courthouse, it is a serious problem because the only chance the defendant has to talk to the pre-sentence officer is at the outset of the investigation. Over half the detainees in the Northern District of California are held 450 miles away in Los Angeles. One week after their trial or plea in San Francisco, they are returned to a federal correctional institution in Los Angeles. They are not brought back to San Francisco until after the pre-sentence report has been prepared. These defendants have to choose either to remain silent about their version of the offense and risk losing the acceptance of responsibility and role in the offense adjustments or speak and risk being seen as less than forthcoming about the true extent of the offense behavior which is later discovered.

Another consequence of the enlarged scope of offense behavior under section 1B1.3(a)(2) will be an increased number of trials because there is little or no inducement to enter a plea of guilty. Unless a defendant's guideline would require service of a sentence longer than the maximum sentence for the count(s) of conviction the defendant is offered in a plea agreement, there seems little advantage in entering such a plea. If the defendant will be held to the same level of offense behavior whether convicted of one or twenty counts, it is to his advantage to try the case if only to guarantee that he will get a hearing on the otherwise unadjudicated conduct that will be held against him.

Section 1B1.4 Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

The Federal Defenders feel that the amendment to section 1B1.4 when read in conjunction with section 3553(c)(1) as amended by the Sentencing Act of 1987, Pub. L. 100-182 section 17 (December 7, 1987) violates the equal protection clause because it denies due process and the Sixth Amendment right to counsel to a large class of defendants sentenced under the statute.

The imposition of a term of imprisonment requires a court to compute the points pursuant to the relevant guidelines and policy statements, compare the offense level points and the criminal history category with the grid on the sentencing table to locate the appropriate guideline, and then select the point within the sentencing range that will be the time a defendant will serve in custody. At present, every case requires that a

court make the selection because every sentence on the grid includes a range: each has a minimum and maximum number of months for custody and the spread between the minimum and maximum is from one month (0 months to one month) up to eighty one months (324 months to 405 months), unless the maximum is life imprisonment.

Section 3553(c)(1), as amended, requires that a judge state the reason for the selection of the point in the sentencing range unless the range is 24 months or less, in which case no reason need be given. The sentencing table includes 43 offense severity levels and six criminal history categories. Altogether, there are 258 possible positions into which a defendant can come on the grid, although some positions include the same range. Of the 258 positions, 160 or almost two thirds, have sentence ranges at 24 months or below. Because most defendants in federal cases fall within these 160 categories, it can be assumed that a substantially high number of defendants will now have a sentence imposed for which no reason for selecting the point within the range need be given.

The statute which authorizes imposition of a sentence without a statement of reasons has substantial effect on a defendant's ability to challenge, either before the district court or on appeal, a sentence that denies liberty for up to 24 months more than minimum under the appropriate guideline. Under amended guideline section 1B1.4, "the Court may consider, without limitation, any information concerning the background, character

and conduct of the defendant, unless otherwise prohibited by law." The broad power given is limited by a basic requirement that the information considered not be prohibited by law, which pre-existed the guidelines. Pursuant to 18 U.S.C. section 3742(a), the defendant can challenge on appeal not only the guideline selection (18 U.S.C. section 3742(a)(2)), but the legality of the sentence imposed. 18 U.S.C. section 3742(a)(1). The requirement that a sentence be imposed in conformity with the law is a safeguard for all defendants, whatever the length of their term of imprisonment. To protect this right a defendant must be given notice of the reason for sentence, In re Oliver, 333 U.S.C. 257, 273, 275 (1948), enabling him to respond by presenting to the trial judge claims that the period of confinement is not based on accurate and complete information or is based on irrational and unreasonable inferences. Due process requires no less. United States v. Tucker, 404 U.S. 443 (1972). The universal right to the process that is due under the Fifth Amendment is itself protected by the Sixth Amendment right to counsel both at sentencing, Strickland v. Washington, 466 U.S. 668, 686-87, (1984), and on appeal. Griffin v. Illinois, 372 U.S. 353 (1963).

The distinction in the statute denies to the class of defendants whose sentences can be enhanced by one to twenty-four months the due process protections given to other defendants. Possible legal challenges to the selection of the point in the guidelines may be based on the guidelines themselves or the

commentary. Presumptions or instructions included in the commentary may be facially or factually unsupportable and therefore unlawful as a basis for sentence. For example, the presumption that a defendant played a major role in a drug transaction because of the possession of drugs of a high purity (Commentary to section 2D1.1, Application Note 9) or using a "reasonable estimate of the range of the loss caused" by a fraud (Commentary to section 2F1.1, Application Note 8) may in a particular case be contrary to the facts. If, however, the defendant and counsel are unaware that the inference or estimate is being made, no response can be mounted.

The Commentary accompanying amended section 1B1.4 provides an excellent example of how the "silent" imposition of sentence under section 3553(c)(1) can deprive a defendant of his right to challenge a sentence illegally imposed. The Commentary suggests that "if the defendant committed two robberies but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range." The Commentary does not tell us how the court arrives at the conclusion that the defendant "committed" the second robbery. If it did so based on speculation and uncorroborated hearsay, the defendant's sentence would be illegal. But the defendant would have no remedy on appeal because the court did not state its reasons for placing the defendant at the top of the guideline.

At the sentencing proceeding, counsel may make challenges to factual allegations and inferences which might provide the basis for the selection of the point in the range if these items appear in the pre-sentence report or the prosecutor's memorandum. However, this is inadequate notice at the district court level and prevents review of the issues allowed by section 3742. Because the judge may consider any information in making the sentencing decision, the judge may be influenced by material from undisclosed or informal sources. Further, traditional practice has been for the judge and the probation officer to have ex parte conferences prior to sentencing. These conferences are for the purpose of discussing the case. They may yield information undisclosed in the report, but more frequently will produce subtle inferences from the information. If the judge gives no reason for the sentence, the inferences will remain unchallenged.

A judicial statement of reasons is also needed because the sentence recommendation and reasons for it contained in the presentence report is not ordinarily disclosed to the defense. Fed.R.Crim.P. 32(c)(3)(A). Donald L. Chamlee, director of the Division of Probation of the Administrative Office of the United States Courts stated at the annual meeting of Federal Defenders on January 12, 1988, that the probation officer will not disclose the precise sentence recommendation or its reasons. Both the policy of ex parte communications and the denial of disclosure of the presentence report are, under guideline sentencing, a denial

of due process for all defendants. However, defendants in the category of sentence ranges between one and 24 months are denied all notice because the judge need not make any statement of reasons.

Section 3E1.1 Acceptance of Responsibility

By changing three words "offense of conviction" to two "criminal conduct," the January amendment of this adjustment has drastically curtailed one of the few mitigating sections of the guidelines. "Criminal conduct" is undefined in section 3E1.1. One might argue by reference to section 1B1.3 which defines relevant conduct that it includes common scheme/plan behavior if the offense of conviction is one requiring grouping under section 3D1.2(d). Thus, to qualify for this adjustment, a defendant who is charged with and has pled to a one ounce sale of cocaine would have to admit to numerous other uncharged sales of cocaine that were part of the same pattern of drug trafficking. In doing so, the defendant might gain a reduction of two levels by his candor, but earn an increase of many more levels by establishing that the quantity of drugs was of a far greater level than the offense of conviction. More importantly, the defendant exposes himself by his admissions to further federal and state prosecutions.

The Federal Defenders suggest that the October version of this adjustment be restored to avoid the conflict with the privilege against self-incrimination.

4B1.3 Criminal Livelihood

While this guideline is not part of the January or proposed February amendments, it is having an impact on indigent defendants and on the criminal justice process such that the Defenders wish to bring it to the Commission's attention. The guideline adjusts the offense level upward to at least level 13 and makes probation unavailable where the offense is "part of a pattern of criminal conduct from which (the defendant) derived a substantial portion of his income." Neither the guideline nor the Commentary defines the type of offense to which the guideline is applicable or the term "substantial portion of income." As a consequence, the guideline threatens to unfairly burden indigent defendants simply because they are poor.

A. Type of Offense to Which Adjustment Is Applicable.

The Commentary to section 4B1.3 states that this guideline is "not intended to apply to minor or petty offenses." Therefore, infractions and Class B and C misdemeanors are excluded. See, Criminal Fine Improvements Act of 1987, Pub.L. 100-185 section 4 (December 11, 1987). The term "minor" appears not to be defined in the Guidelines or the enabling legislation. Whether the term "minor" refers to a misdemeanor other than a petty offense, i.e., a Class A misdemeanor, or only to a felony is unclear because neither the guidelines or the enabling legislation defines it.

There is considerable support in the legislative history that this adjustment was intended to apply only to felonies. As noted in the Commentary to section 4B1.3, the guideline implements 28 U.S.C. section 994(i)(2), which requires the

Sentencing Commission to specify a "substantial term of imprisonment" for defendants who "committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income." The legislative history, S. Rep. No. 225, 98th Cong.1st Sess., reprinted in 1984, U.S. Code Cong. & Admin. News, 3182, 3359, shows that the statute implemented by the guideline is derived from former 18 U.S.C. section 3575(e)(2). That statute allowed enhanced sentencing for "dangerous special offenders" who are being sentenced for a felony committed "as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income" See also United States v. Burt, 802 F.2d 330, 332 (9th Cir. 1986) (dangerous special offender category under 18 U.S.C. section 3575(e)(2) intended to apply to "professional offenders"). Thus, a misdemeanor is not the type of crime intended by the Congress, or, we hope, by the Sentencing Commission to justify enhanced treatment under the Criminal Livelihood adjustment.

There is strong policy argument to support this position as well. We represent numerous defendants in misdemeanor cases where the amount of money involved is not great but, as compared with the meager income of the defendant, is a substantial part of his livelihood. Typical are the bank tellers in districts around the country who are prosecuted under what is known as the "fast track system." To be placed on this track, the amount taken must be less than \$10,000 and the defendant have no prior

record. The government prosecutes these cases as misdemeanors and seeks only probation conditioned on restitution and a fine or community service. But if misdemeanors are subject to the Criminal Livelihood Adjustment, many of these tellers will be going to jail for the maximum term of one year because the embezzlement is usually accomplished through a planned pattern of small thefts over period of time and the total amount the teller takes is often equal to her salary for that period.

B. Substantial Portion of Income

Sentencing Guideline section 4B1.3 does not define "a substantial portion of his income." A definition is provided by the precursor statute, dealing with "dangerous special offenders," repealed 18 U.S.C. section 3575:

[A] substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, . . . and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income
(emphasis added).

We do not necessarily support this particular definition but without some definition, defendants from a poverty or borderline economical background will find the probation alternative foreclosed. For example, assume a mother receiving \$400 a month from Aid to Dependent Children fraudulently endorsed five \$500 checks over a five month period. Her offense level including an increase for more than minimal planning would be 10. Because the checks represented more than half her income for the relevant

period, her offense level could be raised under the Criminal Livelihood Adjustment to 13. Such a result punishes poverty not criminality. It surely is not the result the Commission intended by adoption of this guideline.

The Criminal Livelihood guideline is already seriously impacting the indigent defendant's interaction with the criminal justice system. Because the information contained in financial affidavits used to establish qualification for appointed counsel can be used to establish this adjustment, magistrates in our district, in guidelines cases, are receiving the affidavits ex parte and sealing them until the end of the case. Clients generally are well advised not to discuss their income or employment history with the probation or pre-trial services officers² for the same reason. This occasions difficult dilemmas particularly on the issue of bail because employment history and financial resources are important factors in deciding whether the defendant should be released. See 18 U.S.C. section 3141(g)(3)(A). Financial information and employment history are also useful to the pre-sentence officer and the court in corroborating the defendant's minor or minimal role in the offense (section 3B1.2), establishing a basis for waiver of imposition of a fine (section 5E4.2), and qualifying the defendant for an alternative to imprisonment (section 5C2.1) as well as designing appropriate conditions of supervised release or

²Information given to a pre-trial services officer in the course of a "bail study" which is otherwise confidential is accessible to the probation officer for purpose of preparing the pre-sentence report. 18 U.S.C. section 3153(c)(2)(C)

probation. But by disclosing such information, the defendant risks enhancement of the offense to a level 13. Thus, this guideline sets up an unfair dilemma for poor defendants and inhibits the flow of information in the justice process.

The Federal Defenders do not believe that the Commission intended this guideline to punish defendants merely because they are poor. That, however, is the effect of the Criminal Livelihood guideline as presently enacted. We urge the Commission either to eliminate it or clarify its terms so it will be applied even-handedly.

PROPOSED GUIDELINE AMENDMENTS - FEBRUARY 1988

A. PROPOSED ADDITIONAL OFFENSE GUIDELINE (section 2A2.4)

Application Note 3 says the base level "does not assume any significant disruption of governmental functions," and suggests the possibility of an upward departure under section 5K2.7. We would hope the qualifier "significant" is adequate to deter probation officers from advocating this departure in every case.

B. PROPOSED ADDITIONAL OFFENSE GUIDELINE (section 2A5.3)

This guideline would extend guideline coverage to violations of 49 U.S.C. section 1472(k)(1), acts committed in the special aircraft jurisdiction which, if committed within the special maritime and territorial jurisdiction, would be offenses under specified sections of Title 18. The guideline merely says the base level is the offense level applicable to the underlying offense.

Application Note 2 would say that if the conduct "endangered the safety of the aircraft or the passengers, an upward departure would be warranted." This note may be misinterpreted to suggest a departure in every case. Under existing guideline section 2A5.2, Interference, higher base levels apply if the defendant "intentionally" (level 30) or "recklessly" (level 18) endangered safety. The Application Note should include some qualifier such as "intentionally or recklessly", or "directly".

This Part B, unlike Part A, does not include proposed conforming amendments. If the guideline is promulgated, it should include:

PROPOSED CONFORMING AMENDMENT

"In Appendix A (Statutory Index), insert the following in the appropriate place:

"49 U.S.C. section 1472(k)(1) Section 2A5.3"

C. PROPOSED ADDITIONAL OFFENSE GUIDELINE (section 2A6.2)

This proposal would extend guideline coverage to offenses under 18 U.S.C. section 35(b), Imparting or Conveying False Information Regarding Attempt to Wreck or Destroy Aircraft or Aircraft Facility, Motor Vehicle or Motor Vehicle Facility, or Vessel.

At a base offense level of 12, almost all cases would be nonprobable, absent a departure. The Background note says the typical case involves a false report of a bomb aboard an aircraft, and the "NOTE" requests comments on whether specific

offense characteristics adjusting for lack of premeditation, the apparent credibility of the threat, or degree of disruption should be included.

The statute facially covers the de minimis violation of a wisecrack made by a traveler directly to security screening or airline personnel, where there is no apparent premeditation, the lack of credibility of the threat may be quickly determined, and the degree of disruption is minimal. Since the offense is strictly a felony, it would be hoped that prosecution in such cases would be rare, affording a suspect the benefit of the doubt as to whether the conduct was willful and malicious. The guideline, however, should include those specific offense characteristics, by adding:

"(b) Specific Offense Characteristic

- "(1) If the conduct evidenced little or no deliberation, or the threat carried little or no apparent credibility, and the degree of disruption was minor, decrease by 4 levels."

As with the previous proposal, if the guideline is promulgated, there should be no addition to the Statutory Index:

"PROPOSED CONFORMING AMENDMENTS

"In Appendix A (Statutory Index), insert the following in the proper place:

"18 U.S.C. section 35(b) section 2A6.2

workable. It characterized the present guidelines as a "charge offense" system with a number of "real elements." Chapter 1A4(a) (pp. 1.5-1.6) We are concerned that the amended definition of relevant conduct will, in most cases, permit the "real elements" to swallow the "charged offense" and become the determinative factor in the sentence.

For example, while section 1B1.2(a) requires on its face that the offense guideline section be drawn from the offense of conviction, in most drug cases the base offense level is set by the Drug Quantity Table (section 2D1.1(a)(3)). Under the amended definition of relevant conduct, the type and quantity of drug is set not by the amount specified in the count of conviction but by all drugs that can be considered to be part of "the same course of conduct or common scheme or plan as the offense of conviction." Section 1B1.3(a)(2). This is made explicit by Note 11, the January amendment to the Commentary on section 2D1.1. Thus, in drug cases the Commission has adopted real offense not charge offense sentencing.

By including all offenses that under section 3D1.2(d) would require grouping of multiple counts, the new definition of relevant conduct makes real offense sentencing the rule for the most common types of federal offenses, i.e., drug, tax, counterfeit, check, fraud and embezzlement cases. It is true that each type of offense (with the exception of drugs) has its own offense level governed by the offense of conviction. But that level is usually not the predominant factor in determining

the total offense level. The specific offense characteristic based on the quantity of the entire scheme or course of action is usually equal to or greater than the base offense level. For example, in an embezzlement case, the base offense level is 4 but the amount taken can add up to 13 additional levels; in a fraud case, the base offense level is 6 but the estimated or intended loss can add 11 additional levels. The only common type of federal offense where the offense of conviction determines the sentence is bank robbery. Thus, contrary to the express philosophy of the Commission, it is a real offense not a charge offense system that dominates guideline sentencing.

B. Reliance on Unadjudicated Conduct at Sentencing Encourages the Prosecution to Avoid the Jury System Where Proof Is Weak.

We have strong objections to the widespread reliance on unadjudicated conduct that the amended section 1B1.3 would permit. First, it is our belief that, if Congress, when enacting criminal statutes, thought that the "other crime" fact was of such significance that it merited serious possible punishment, the other crime fact should generally be established the way Congress anticipated - through adjudication by trial or guilty plea. Any other system allows a defendant to be sentenced for more serious conduct even though the prosecution's case might not be strong enough to prove the conduct to a jury. In other words, it encourages the prosecutor to "end run" the jury system by charging and obtaining a conviction on a lesser crime on which his evidence is strong and then seeking a sentence based on more serious criminal conduct on which his proof is weak.

C. Procedural Safeguards are Inadequate to Guarantee Accurate and Fair Resolution of Disputes Regarding Unadjudicated Conduct

It is true that the Commission has recognized that there will be a need for judicial procedures to resolve disputes over unadjudicated behavior. The Commentary to Guideline section 6A1.3 states:

In current practice, factors relevant to sentencing are often determined in an informal fashion. The informality is to some extent explained by the fact that particular offense and offender characteristics rarely have a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2nd Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law. (Emphasis added)

We applaud the Commission's reference to Fatico in the Commentary to guideline section 6A1.3. Nevertheless, we believe that section 6A1.3 itself, which concerns "Resolution of Disputed Factors", is inadequate. Guideline section 6A1.3 reads as follows:

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In

resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

The difficulty with this provision is that neither it nor the provisions of Rule 32, Federal Rules of Criminal Procedure to which it refers, explicitly contain the Fatico requirements. Indeed, amended Rule 32, effective November 1, 1987, merely gives the defendant "an opportunity to comment" upon the probation officer's determination of the applicable sentencing guideline or other aspects of the presentence report. Furthermore, while Rule 32(c)(3)(A) allows a defendant "to introduce testimony or other information relating to any alleged factual inaccuracy" contained in the presentence report, this opportunity is wholly within the discretion of the district court.

We strongly believe that Rule 32 should be amended to make explicit what the Commentary to section 6A1.3 implies: namely, that if there is a dispute about a fact relevant to the sentence which, depending on whether or not the fact was true, would result in one guideline and score rather than another, the fact is to be determined (1) after a hearing, (2) with the parties having the right to present evidence, (3) with the opposing party having the right to cross-examine witnesses, (4) with a

requirement that any hearsay evidence presented be corroborated and justified upon a showing of need, and (5) with a requirement that the proponent of a disputed fact be required to establish it by clear and convincing evidence.¹ This standard of proof is particularly important when unadjudicated, uncharged prior misconduct or sentencing factors as subjective as criminal purpose are used to aggravate sentences under the guidelines.

We realize that the burden of establishing a detailed procedural framework for resolving factual disputes at sentencing is not the Commission's alone to bear. But by opening wide the floodgates of unadjudicated conduct without waiting for the erection of procedural devices to channel it, the Commission risks flooding our courts with unresolved factual disputes.

D. Reliance on Unadjudicated Conduct Introduces Uncertainty Into Plea Agreements and Will Require More Trials and Sentence Hearings.

In addition to the foregoing policy reasons, we feel there are several practical reasons which make the expansion of relevant conduct unfair and unworkable. The first of these reasons is the element of uncertainty that is introduced in to the plea agreement and sentencing processes. A defendant, entering a plea of guilty to an offense where the discovery indicates that his conduct involved a single instance with a relatively low offense level, may first learn from the pre-sentence report that the charged offense is only the last in a series for which he will be held accountable at sentence. This

¹The Federal Defenders have submitted to Congress a proposed amended version of Rule 32, Federal Rules of Criminal Procedure, with accompanying commentary.

could result from conscious "sandbagging" where a prosecutor withholds such information from the defense in order to induce the plea. Or it might be the result of information discovered after the plea by the government or the probation officer acting independently. A stipulation by the parties to sentencing facts as part of the plea agreement does not protect the defendant from such an unpleasant surprise because the stipulation binds neither the pre-sentence officer nor the sentencing court. Section 6Bl.4.

The potential for surprise at sentencing can be illustrated by several scenarios drawn from frequently charged federal offenses. A defendant pleads guilty to distributing in a single transaction 99 grams of cocaine which would place his base offense level at 16. During the pre-sentence investigation, the prosecution reveals that its informants allege that the defendant has been distributing the same quantity on a weekly basis for the previous year. This amount would bring the defendant to at least a level 34. The defendant would be facing a sentence seven times greater than he expected. Thus, a relatively minor drug conviction could be punished as a major one.

Another defendant pleads guilty to bank embezzlement. It is stipulated by the parties that the loss of \$1,500 resulted from a one-time taking and that the total offense level is 6 [4 (base offense level) + 2 (specific offense characteristic)]. The pre-sentence officer receives information from the victim bank that the defendant is suspected of a series of embezzlements

totaling \$25,000 over the period of a year. This would establish a total offense level of 12 [4 (base offense level) + 6 (specific offense characteristic) + 2 (more than minimal planning)]. Since the government bound itself by stipulation to a lower offense level, it appears it could not present witnesses in support of the probation officer's conclusions nor defend the court's decision on appeal if the court adopted the higher offense level. Perhaps this might have an impact on the trial court's willingness to follow the pre-sentence officer's conclusions. Nonetheless, it presents the prospect of a defendant pleading under one set of expectations and being sentenced under a dramatically different one.

The uncertainty as to what conduct the defendant will actually be held responsible is heightened by a number of additional factors: the limited right defendants have to discovery; the reluctance of victims to speak to defense investigators; the enlarged role of independent investigator given the pre-sentence officer under the guidelines; the lack of precision in terms and standards used in the specific offense characteristics (see, e.g., Application Note 8, Commentary to section 2F1.1, "amount of loss need not be precise"; Application Note 2, Commentary to section 2D1.4, where no drugs seized or seizure amount "does not reflect the scale of the offense," court can approximate from other sources). What is clear is that as long as the relevant conduct cannot be identified and "nailed down" at the time of plea, there will be great reluctance of defendants to plead guilty.

A corollary consequence of this uncertainty is the well-founded reluctance of a defendant to speak candidly with a pre-sentence officer until he knows what the relevant conduct is. A prudent defendant would give his version of the offense only after the pre-sentence officer has completed his investigation. Otherwise, he might be accused of obstruction (section 3C1.1), paint himself into a more serious role in the offense than otherwise known (section 3B1.1) or disclose facts that might be deemed a basis for a finding of criminal livelihood (section 4B1.3). Where the defendant is out-of-custody, this may lengthen the pre-sentence investigation but should not present a serious problem. But for detained defendants in districts where prisoners are held a great distance from the courthouse, it is a serious problem because the only chance the defendant has to talk to the pre-sentence officer is at the outset of the investigation. Over half the detainees in the Northern District of California are held 450 miles away in Los Angeles. One week after their trial or plea in San Francisco, they are returned to a federal correctional institution in Los Angeles. They are not brought back to San Francisco until after the pre-sentence report has been prepared. These defendants have to choose either to remain silent about their version of the offense and risk losing the acceptance of responsibility and role in the offense adjustments or speak and risk being seen as less than forthcoming about the true extent of the offense behavior which is later discovered.

Another consequence of the enlarged scope of offense behavior under section 1B1.3(a)(2) will be an increased number of trials because there is little or no inducement to enter a plea of guilty. Unless a defendant's guideline would require service of a sentence longer than the maximum sentence for the count(s) of conviction the defendant is offered in a plea agreement, there seems little advantage in entering such a plea. If the defendant will be held to the same level of offense behavior whether convicted of one or twenty counts, it is to his advantage to try the case if only to guarantee that he will get a hearing on the otherwise unadjudicated conduct that will be held against him.

Section 1B1.4 Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

The Federal Defenders feel that the amendment to section 1B1.4 when read in conjunction with section 3553(c)(1) as amended by the Sentencing Act of 1987, Pub. L. 100-182 section 17 (December 7, 1987) violates the equal protection clause because it denies due process and the Sixth Amendment right to counsel to a large class of defendants sentenced under the statute.

The imposition of a term of imprisonment requires a court to compute the points pursuant to the relevant guidelines and policy statements, compare the offense level points and the criminal history category with the grid on the sentencing table to locate the appropriate guideline, and then select the point within the sentencing range that will be the time a defendant will serve in custody. At present, every case requires that a

court make the selection because every sentence on the grid includes a range: each has a minimum and maximum number of months for custody and the spread between the minimum and maximum is from one month (0 months to one month) up to eighty one months (324 months to 405 months), unless the maximum is life imprisonment.

Section 3553(c)(1), as amended, requires that a judge state the reason for the selection of the point in the sentencing range unless the range is 24 months or less, in which case no reason need be given. The sentencing table includes 43 offense severity levels and six criminal history categories. Altogether, there are 258 possible positions into which a defendant can come on the grid, although some positions include the same range. Of the 258 positions, 160 or almost two thirds, have sentence ranges at 24 months or below. Because most defendants in federal cases fall within these 160 categories, it can be assumed that a substantially high number of defendants will now have a sentence imposed for which no reason for selecting the point within the range need be given.

The statute which authorizes imposition of a sentence without a statement of reasons has substantial effect on a defendant's ability to challenge, either before the district court or on appeal, a sentence that denies liberty for up to 24 months more than minimum under the appropriate guideline. Under amended guideline section 1B1.4, "the Court may consider, without limitation, any information concerning the background, character

and conduct of the defendant, unless otherwise prohibited by law." The broad power given is limited by a basic requirement that the information considered not be prohibited by law, which pre-existed the guidelines. Pursuant to 18 U.S.C. section 3742(a), the defendant can challenge on appeal not only the guideline selection (18 U.S.C. section 3742(a)(2)), but the legality of the sentence imposed. 18 U.S.C. section 3742(a)(1). The requirement that a sentence be imposed in conformity with the law is a safeguard for all defendants, whatever the length of their term of imprisonment. To protect this right a defendant must be given notice of the reason for sentence, In re Oliver, 333 U.S.C. 257, 273, 275 (1948), enabling him to respond by presenting to the trial judge claims that the period of confinement is not based on accurate and complete information or is based on irrational and unreasonable inferences. Due process requires no less. United States v. Tucker, 404 U.S. 443 (1972). The universal right to the process that is due under the Fifth Amendment is itself protected by the Sixth Amendment right to counsel both at sentencing, Strickland v. Washington, 466 U.S. 668, 686-87, (1984), and on appeal. Griffin v. Illinois, 372 U.S. 353 (1963).

The distinction in the statute denies to the class of defendants whose sentences can be enhanced by one to twenty-four months the due process protections given to other defendants. Possible legal challenges to the selection of the point in the guidelines may be based on the guidelines themselves or the

commentary. Presumptions or instructions included in the commentary may be facially or factually unsupportable and therefore unlawful as a basis for sentence. For example, the presumption that a defendant played a major role in a drug transaction because of the possession of drugs of a high purity (Commentary to section 2D1.1, Application Note 9) or using a "reasonable estimate of the range of the loss caused" by a fraud (Commentary to section 2F1.1, Application Note 8) may in a particular case be contrary to the facts. If, however, the defendant and counsel are unaware that the inference or estimate is being made, no response can be mounted.

The Commentary accompanying amended section 1B1.4 provides an excellent example of how the "silent" imposition of sentence under section 3553(c)(1) can deprive a defendant of his right to challenge a sentence illegally imposed. The Commentary suggests that "if the defendant committed two robberies but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range." The Commentary does not tell us how the court arrives at the conclusion that the defendant "committed" the second robbery. If it did so based on speculation and uncorroborated hearsay, the defendant's sentence would be illegal. But the defendant would have no remedy on appeal because the court did not state its reasons for placing the defendant at the top of the guideline.

At the sentencing proceeding, counsel may make challenges to factual allegations and inferences which might provide the basis for the selection of the point in the range if these items appear in the pre-sentence report or the prosecutor's memorandum. However, this is inadequate notice at the district court level and prevents review of the issues allowed by section 3742. Because the judge may consider any information in making the sentencing decision, the judge may be influenced by material from undisclosed or informal sources. Further, traditional practice has been for the judge and the probation officer to have ex parte conferences prior to sentencing. These conferences are for the purpose of discussing the case. They may yield information undisclosed in the report, but more frequently will produce subtle inferences from the information. If the judge gives no reason for the sentence, the inferences will remain unchallenged.

A judicial statement of reasons is also needed because the sentence recommendation and reasons for it contained in the presentence report is not ordinarily disclosed to the defense. Fed.R.Crim.P. 32(c)(3)(A). Donald L. Chamlee, director of the Division of Probation of the Administrative Office of the United States Courts stated at the annual meeting of Federal Defenders on January 12, 1988, that the probation officer will not disclose the precise sentence recommendation or its reasons. Both the policy of ex parte communications and the denial of disclosure of the presentence report are, under guideline sentencing, a denial

of due process for all defendants. However, defendants in the category of sentence ranges between one and 24 months are denied all notice because the judge need not make any statement of reasons.

Section 3El.1 Acceptance of Responsibility

By changing three words "offense of conviction" to two "criminal conduct," the January amendment of this adjustment has drastically curtailed one of the few mitigating sections of the guidelines. "Criminal conduct" is undefined in section 3El.1. One might argue by reference to section 1Bl.3 which defines relevant conduct that it includes common scheme/plan behavior if the offense of conviction is one requiring grouping under section 3D1.2(d). Thus, to qualify for this adjustment, a defendant who is charged with and has pled to a one ounce sale of cocaine would have to admit to numerous other uncharged sales of cocaine that were part of the same pattern of drug trafficking. In doing so, the defendant might gain a reduction of two levels by his candor, but earn an increase of many more levels by establishing that the quantity of drugs was of a far greater level than the offense of conviction. More importantly, the defendant exposes himself by his admissions to further federal and state prosecutions.

The Federal Defenders suggest that the October version of this adjustment be restored to avoid the conflict with the privilege against self-incrimination.

4Bl.3 Criminal Livelihood

While this guideline is not part of the January or proposed February amendments, it is having an impact on indigent defendants and on the criminal justice process such that the Defenders wish to bring it to the Commission's attention. The guideline adjusts the offense level upward to at least level 13 and makes probation unavailable where the offense is "part of a pattern of criminal conduct from which (the defendant) derived a substantial portion of his income." Neither the guideline nor the Commentary defines the type of offense to which the guideline is applicable or the term "substantial portion of income." As a consequence, the guideline threatens to unfairly burden indigent defendants simply because they are poor.

A. Type of Offense to Which Adjustment Is Applicable.

The Commentary to section 4B1.3 states that this guideline is "not intended to apply to minor or petty offenses." Therefore, infractions and Class B and C misdemeanors are excluded. See, Criminal Fine Improvements Act of 1987, Pub.L. 100-185 section 4 (December 11, 1987). The term "minor" appears not to be defined in the Guidelines or the enabling legislation. Whether the term "minor" refers to a misdemeanor other than a petty offense, i.e., a Class A misdemeanor, or only to a felony is unclear because neither the guidelines or the enabling legislation defines it.

There is considerable support in the legislative history that this adjustment was intended to apply only to felonies. As noted in the Commentary to section 4B1.3, the guideline implements 28 U.S.C. section 994(i)(2), which requires the

Sentencing Commission to specify a "substantial term of imprisonment" for defendants who "committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income." The legislative history, S. Rep. No. 225, 98th Cong.1st Sess., reprinted in 1984, U.S. Code Cong. & Admin. News, 3182, 3359, shows that the statute implemented by the guideline is derived from former 18 U.S.C. section 3575(e)(2). That statute allowed enhanced sentencing for "dangerous special offenders" who are being sentenced for a felony committed "as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income" See also United States v. Burt, 802 F.2d 330, 332 (9th Cir. 1986) (dangerous special offender category under 18 U.S.C. section 3575(e)(2) intended to apply to "professional offenders"). Thus, a misdemeanor is not the type of crime intended by the Congress, or, we hope, by the Sentencing Commission to justify enhanced treatment under the Criminal Livelihood adjustment.

There is strong policy argument to support this position as well. We represent numerous defendants in misdemeanor cases where the amount of money involved is not great but, as compared with the meager income of the defendant, is a substantial part of his livelihood. Typical are the bank tellers in districts around the country who are prosecuted under what is known as the "fast track system." To be placed on this track, the amount taken must be less than \$10,000 and the defendant have no prior

record. The government prosecutes these cases as misdemeanors and seeks only probation conditioned on restitution and a fine or community service. But if misdemeanors are subject to the Criminal Livelihood Adjustment, many of these tellers will be going to jail for the maximum term of one year because the embezzlement is usually accomplished through a planned pattern of small thefts over period of time and the total amount the teller takes is often equal to her salary for that period.

B. Substantial Portion of Income

Sentencing Guideline section 4B1.3 does not define "a substantial portion of his income." A definition is provided by the precursor statute, dealing with "dangerous special offenders," repealed 18 U.S.C. section 3575:

[A] substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, . . . and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income (emphasis added).

We do not necessarily support this particular definition but without some definition, defendants from a poverty or borderline economical background will find the probation alternative foreclosed. For example, assume a mother receiving \$400 a month from Aid to Dependent Children fraudulently endorsed five \$500 checks over a five month period. Her offense level including an increase for more than minimal planning would be 10. Because the checks represented more than half her income for the relevant

period, her offense level could be raised under the Criminal Livelihood Adjustment to 13. Such a result punishes poverty not criminality. It surely is not the result the Commission intended by adoption of this guideline.

The Criminal Livelihood guideline is already seriously impacting the indigent defendant's interaction with the criminal justice system. Because the information contained in financial affidavits used to establish qualification for appointed counsel can be used to establish this adjustment, magistrates in our district, in guidelines cases, are receiving the affidavits ex parte and sealing them until the end of the case. Clients generally are well advised not to discuss their income or employment history with the probation or pre-trial services officers² for the same reason. This occasions difficult dilemmas particularly on the issue of bail because employment history and financial resources are important factors in deciding whether the defendant should be released. See 18 U.S.C. section 3141(g)(3)(A). Financial information and employment history are also useful to the pre-sentence officer and the court in corroborating the defendant's minor or minimal role in the offense (section 3B1.2), establishing a basis for waiver of imposition of a fine (section 5E4.2), and qualifying the defendant for an alternative to imprisonment (section 5C2.1) as well as designing appropriate conditions of supervised release or

²Information given to a pre-trial services officer in the course of a "bail study" which is otherwise confidential is accessible to the probation officer for purpose of preparing the pre-sentence report. 18 U.S.C. section 3153(c)(2)(C)

period, her offense level could be raised under the Criminal Livelihood Adjustment to 13. Such a result punishes poverty not criminality. It surely is not the result the Commission intended by adoption of this guideline.

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²Information given to a pre-trial services officer in the course of a "bail study" which is otherwise confidential is accessible to the probation officer for purpose of preparing the pre-sentence report. 18 U.S.C. section 3153(c)(2)(C)

probation. But by disclosing such information, the defendant risks enhancement of the offense to a level 13. Thus, this guideline sets up an unfair dilemma for poor defendants and inhibits the flow of information in the justice process.

The Federal Defenders do not believe that the Commission intended this guideline to punish defendants merely because they are poor. That, however, is the effect of the Criminal Livelihood guideline as presently enacted. We urge the Commission either to eliminate it or clarify its terms so it will be applied even-handedly.

PROPOSED GUIDELINE AMENDMENTS - FEBRUARY 1988

A. PROPOSED ADDITIONAL OFFENSE GUIDELINE (section 2A2.4)

Application Note 3 says the base level "does not assume any significant disruption of governmental functions," and suggests the possibility of an upward departure under section 5K2.7. We would hope the qualifier "significant" is adequate to deter probation officers from advocating this departure in every case.

B. PROPOSED ADDITIONAL OFFENSE GUIDELINE (section 2A5.3)

This guideline would extend guideline coverage to violations of 49 U.S.C. section 1472(k)(1), acts committed in the special aircraft jurisdiction which, if committed within the special maritime and territorial jurisdiction, would be offenses under specified sections of Title 18. The guideline merely says the base level is the offense level applicable to the underlying offense.

Application Note 2 would say that if the conduct "endangered the safety of the aircraft or the passengers, an upward departure would be warranted." This note may be misinterpreted to suggest a departure in every case. Under existing guideline section 2A5.2, Interference, higher base levels apply if the defendant "intentionally" (level 30) or "recklessly" (level 18) endangered safety. The Application Note should include some qualifier such as "intentionally or recklessly", or "directly".

This Part B, unlike Part A, does not include proposed conforming amendments. If the guideline is promulgated, it should include:

PROPOSED CONFORMING AMENDMENT

"In Appendix A (Statutory Index), insert the following in the appropriate place:

"49 U.S.C. section 1472(k)(1) Section 2A5.3"

C. PROPOSED ADDITIONAL OFFENSE GUIDELINE (section 2A6.2)

This proposal would extend guideline coverage to offenses under 18 U.S.C. section 35(b), Imparting or Conveying False Information Regarding Attempt to Wreck or Destroy Aircraft or Aircraft Facility, Motor Vehicle or Motor Vehicle Facility, or Vessel.

At a base offense level of 12, almost all cases would be nonprobable, absent a departure. The Background note says the typical case involves a false report of a bomb aboard an aircraft, and the "NOTE" requests comments on whether specific

offense characteristics adjusting for lack of premeditation, the apparent credibility of the threat, or degree of disruption should be included.

The statute facially covers the de minimis violation of a wisecrack made by a traveler directly to security screening or airline personnel, where there is no apparent premeditation, the lack of credibility of the threat may be quickly determined, and the degree of disruption is minimal. Since the offense is strictly a felony, it would be hoped that prosecution in such cases would be rare, affording a suspect the benefit of the doubt as to whether the conduct was willful and malicious. The guideline, however, should include those specific offense characteristics, by adding:

"(b) Specific Offense Characteristic

"(1) If the conduct evidenced little or no deliberation, or the threat carried little or no apparent credibility, and the degree of disruption was minor, decrease by 4 levels."

As with the previous proposal, if the guideline is promulgated, there should be no addition to the Statutory Index:

"PROPOSED CONFORMING AMENDMENTS

"In Appendix A (Statutory Index), insert the following in the proper place:

"18 U.S.C. section 35(b) section 2A6.2

NACDL

National Association of
Criminal Defense Lawyers
Suite 1150
1110 Vermont Avenue, N.W.
Washington, D.C. 20005
(202) 372-8658

**STATEMENT OF
ALAN ELLIS
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

**BEFORE THE
UNITED STATES SENTENCING COMMISSION**

WASHINGTON, D.C.

MARCH 22, 1988

Mr. Chairman and distinguished members of the Commission, I very much appreciate again having the opportunity to appear on behalf of the National Association of Criminal Defense Lawyers to present our views on the Commission's emergency amendments, as promulgated on January 15, 1988, and on the four amendments to the guidelines proposed on or about February 16, 1988.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, voluntary bar association comprised of over 5,000 lawyers and law professors, most of whom are actively engaged in defending criminal prosecutions and individual rights. It was founded 27 years ago to promote study and research in the field of criminal defense law, and to encourage the integrity, independence and expertise of criminal defense lawyers. Throughout our history, we have worked to protect the rights and liberties of those accused of criminal offenses, and to promote the proper administration of justice. We have pursued these goals through a variety of educational and public service activities, including national training programs, publications, committee activities, legislative action, and by appearing as amicus curiae in significant criminal justice cases.

My name is Alan Ellis and I am both Vice President of the Association and Chairman of NACDL's Liaison Committee to the Sentencing Commission. Our committee has met and discussed both sets of amendments and has authorized me to provide the following remarks.

Permit me to begin by making a few general comments about the emergency amendments and to provide some context for those comments by sharing some impressions I have received from lawyers from both within and outside of the Association.

For the past several months, I have had the privilege of traveling throughout the country, participating in and attending numerous seminars and training sessions on the Sentencing Guidelines. Of all the descriptors that could be used to characterize the response of the bar to the guidelines and the procedures for their implementation, the most accurate term that one comes away with is "confusion." While a considerable amount of that perplexity relates to the newness of the guidelines and the dramatic changes they bring about for the practitioner, much of the problem can be explained by the fact that the average lawyer knows little more than the fact that a guideline system is now in place and that the rules governing that system have been issued. When one of the speakers at these sessions begins to list the various versions of the guidelines issued since April 13, 1987 and the amendments to the Act, the eyes begin to role and audible groans can be heard.

In all fairness, this demonstrable response is somewhat justified. In less than one year, we have seen the publication of the guidelines in mid-April followed almost immediately with the May 1, 1987 version incorporating technical, clarifying and conforming amendments. A Supplementary Report containing

significant material is put out in June 1987, followed by the October 1 "reformatting." Then we have the December 7, 1987 amendments to the Act and a set of emergency amendments issued in January 1988. In between, we have the Prosecutors Handbook published by the Department of Justice and various texts and "How-To" books prepared by a number of different authors. And, once you add in judicial pronouncements from San Diego and other jurisdictions, you can well understand the frustration and the quantum of confusion.

I have provided all of this as a preface to the principal comment that I wish to make: even though Section 21 of the Sentencing Act of 1987 authorized the Commission to issue emergency guidelines, I believe that it was terribly unwise for the Commission to use that discretion. Whether or not there were "urgent and compelling" reasons to promulgate these amendments (an issue which NACDL does not at this time wish to address but about which I, personally, have doubts), burdening the practitioner with them so soon after the "latest" edition was published negatively impacts upon the Commission's credibility. Forgetting for the moment the limitations on the dissemination of these changes (a not-so-trivial problem that begs for immediate solution and a subject about which I have some comments below), one can understand the plaintive question heard often throughout the country: "How do they expect us to learn these (expletive deleted) guidelines if they keep on changing them?"

In all seriousness, the success of the guidelines - and ultimately the success of the Commission - will depend on the ability of practitioners, judges and probation officers to make sense of them. It will further depend on their willingness to try to work with them rather than against or in spite of them. The Commission should be sensitive to that fact and should gauge the use of its discretion to amend the guidelines with that in mind. This hearing clearly represents a more reasoned and workable approach to the amendment process. NACDL believes that such a hearing should have proceeded the issuance of the emergency amendments; it would have served to encourage the view that the guidelines are workable and that the Commission is striving incrementally to make them more so.

Turning next to the emergency amendments themselves, permit to note just a few specific comments. Despite the explanatory note often included as the purpose for many of the changes, NACDL believes that several of the amendments did far more than merely "clarify" the guidelines. In a number of instances, as addressed by several of the speakers today, the changes appear to be substantive, making significant revisions to the guidelines and the ultimate sanctions imposed pursuant to them.

The prime example of the breadth of such changes can be found in the revisions to sections 1B1.2, 1B1.3, and 1B1.4. Although the introduction to the Guidelines Manual still states

Relevant Conduct

that the Commission had abandoned a "pure" real offense system in favor of a "charge offense" system with a number of real elements, the Commission has just about come full circle through the use of the Relevant Conduct vehicle. The principal thrust of these amendments - the impression that the reader comes away with - is that everything counts: every act, every ounce, every harm, and every dollar will be added into the total to determine the offense level whether or not the conduct was charged and whether or not it was proved beyond reasonable doubt. The Commission may have jettisoned the July 1986 draft as impractical and unworkable, but its basic concept is alive and well and living now under the name of relevant conduct.

NACDL has previously expressed its opposition to a real offense system and I will not burden you with a repetition of all those arguments. Suffice it to say that the emergency amendments here give increased power to the prosecution to pick and chose the strongest case while saving other offense level aggravators for introduction under a less stringent burden of proof: in a drug case, for instance, knowing that several additional trafficking quantities can be considered for sentencing purposes under a preponderance standard might well influence the government to dismiss some of the less easily provable counts or to not bring charges relating to them at all. Further, NACDL believes that these amendments have contributed more ambiguity to the system through the use of such concepts as "harm" and "risk of harm" (and here the Application Notes do very little, if

anything at all, to eliminate the confusion). The result will be more unfairness for the criminal defendant and, maybe more importantly for the drafters of the legislation, more unwarranted disparity in application.

Before leaving this issue, please permit me to pose a question of you as it relates to these new sections in order to test my limited understanding. A departure for substantial assistance per §5K1.1 must be initiated by the government. While that guideline appears to implement 28 U.S.C. §994(n), that code section (unlike 18 U.S.C. §3553(e) which deals specifically with imposing sentences below mandatory minimums) makes no reference to limiting its applicability only to where the prosecution so warrants. Per operation of §1B1.4, is the sentencing judge now permitted to consider a defendants cooperation even if the government makes no motion? If not, does not that amount to a violation of 18 U.S.C. §3661 by placing a limitation on what the sentencing court may consider and, further, leaving the decision to so limit the court solely in the hands of the prosecution?

cap

I will be brief as to our remaining comments pertaining to the emergency amendments:

1) The change to §2B1.2 Receiving Stolen Property effectively increases the length of the sentences imposable pursuant to it. This "clerical error" fix that somehow survived both the May 1 and October 1 revisions makes a substantive change in the guidelines for these offenses;

2) The amendment to the Application Notes to §2D1.1 through the insertion of new note 11 further exacerbates the relevant conduct problem discussed above: the prosecution is given more latitude to charge only the "good" counts or the "easily provable" ones, leaving the remaining types and quantities of drugs to enhance the sentence through a less burdensome standard of proof;

3) The amendments to §2L1.1 Smuggling, Transporting, or Harboring an Unlawful Alien effectively increase the sentences imposed per this guideline and shift the burden to the defendant to prove the negative in order to receive the reduction;

4) The amendment to §3E1.1 Acceptance of Responsibility places a defendant in a "Catch 22" situation: it may require him to incriminate himself by discussing and detailing conduct totally apart and distinct from the charges he is facing, thus enhancing his sentence, or forego the otherwise appropriate two-level reduction for his acceptance of responsibility. This clarification means that, even though a defendant is sincere and has done everything expected of him as listed in the application notes, the reduction will not be rewarded unless and until he exposes himself to even further jeopardy. Such a potential increase will more than likely vitiate any benefit that might have been derived from the original responsibility acceptance.

Moving next to the four new proposals, NACDL wishes to offer only one general comment at this time: we believe that the Commission should indeed attempt to develop specific offense

characteristics for §2A6.2 Imparting or Conveying False Information Regarding Attempt to Wreck or Destroy Aircraft or Aircraft Facility, Motor Vehicle or Motor Vehicle Facility, or Vessel. As already recognized by the Commission, these type offenses occur across a broad variety of fact patterns, often with significant mitigating circumstances present. The Commission should attempt to capture some of these potential mitigators and incorporate them within the guidelines. Frankly, we are troubled by the fact that the guidelines contain incredibly few instances where obvious mitigating factors are spelled out as offense characteristics. NACDL would be pleased to work with the Commission to develop such both in regard to this section as well as for others.

Permit me to raise an additional matter that I believe is consistent with the purposes of this hearing. When the Commission forwarded its emergency amendments to the governmental actors in the criminal justice family, it included a set of supplemental illustrations regarding multiple counts and criminal history. These incredibly useful materials should have been shared with everybody. If the guidelines are to work, all the players should be able to work with them; the successful implementation of the guidelines will depend on everyone's understanding of and facility with the system. Anything that the Commission can do or has done to facilitate that understanding and workability should be made available. The same is true with the "expert system," the computer program, currently being

developed. NACDL urges the Commission to make all the necessary tools available to all those involved in the process.

In summary, I thank the Commission again for this opportunity to express our views and to make our suggestions. With the sole exception of the promulgation of the emergency amendments, the Commission has been most open to the public to receive comment and input and has demonstrated an appreciation for the wisdom of that feedback by incorporating many of the remarks so provided. I believe that such interaction has in the past resulted in improvements to the guidelines and I trust that similar colloquies (both formal and informal) will continue in the future. We have now been permitted to express our views on the emergency amendments. NACDL's legitimate complaint in this regard is that we, and other groups and individuals, should have been provided such an opportunity before they went into effect. We believe that, if we had a chance to address some of the specific problems, the resulting amendments could have been better crafted in general and more even-handed in particular.

THE UNITED STATES SENTENCING COMMISSION

1331 PENNSYLVANIA AVENUE, NW

SUITE 1400

WASHINGTON, D.C. 20004

(202) 662-8800

William W. Wilkins, Jr. Chairman
Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
George E. MacKinnon
Ilene H. Nagel
Paul H. Robinson
Benjamin F. Baer (ex officio)
Ronald L. Gajner (ex officio)



March 23, 1988

MEMORANDUM:

TO: Commissioners
Staff Director
Legal, Research, Drafting & Hotline Staffs

FROM: Paul K. Martin *PKM*

SUBJECT: Written Testimony, Public Comment

Attached for your files is the written submission of Jeffrey Troutt, Director of the Judicial Reform Project of the Free Congress Foundation. Also, please note the comments of two U.S. Probation officers on the Commission's proposed amendments.

Attachments



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Patrick B. McGuigan
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TESTIMONY OF JEFFERY D. TROUTT, DIRECTOR OF THE

FREE CONGRESS FOUNDATION'S JUDICIAL REFORM PROJECT

before the

THE UNITED STATES SENTENCING COMMISSION

on

March 22, 1988

Jeffery D. Troutt
Director
Judicial Reform Project
The Free Congress Foundation
721 Second St., N.E.
Washington, D.C. 20002
(202)546-3004

Introduction

Thank you for the opportunity to speak to you today. My name is Jeffery Troutt. I am director of the Free Congress Foundation's Judicial Reform Project. It is a privilege to be here today to speak to you about the Commission's proposed revisions to its Guidelines.

As you know, I had mixed feelings about the Guidelines you passed last year. On the one hand, they provide meaningful sentences for the most egregious offenders. On the other hand, I believe that the Commission did not live up to its full potential, or the requirements of the Sentencing Reform Act.

Before I begin my comments on the revisions you are proposing, I would like to relate to you a conversation I had with a friend of mine who practices law on the West Coast. My friend's practice consists mainly of criminal defense. Many of his clients have been accused of drug-related crimes.

My friend is upset about the Sentencing Guidelines. He complained to me in a friendly way that the Guidelines are making his job difficult. His clients, and the clients of his colleagues, are facing what he called, "serious time." But he said something interesting to me. Referring to the types of criminal defendants most affected by the Guidelines, he said, "You know what, Jeff? A lot of these people deserve to be behind bars for a long, long time."

This comment is especially enlightening when you consider that my friend is a member of the American Civil Liberties Union and the National Lawyers Guild -- organizations which have been highly critical of this Commission's work.

My friend told me that one of his clients is facing about 20 years in prison for possession of a large amount of illegal drugs. His client told him that had he known about the new Sentencing Guidelines, he would not have committed the crime that he did. While this is only the story of one person, it is safe to assume that there are many like him all across the country.

It is also safe to assume that the word about the Sentencing Guidelines is getting out to the criminal community. The message is this -- the courts of the United States are giving "serious time" for serious crime.

As many of us people testified to this Commission, giving "serious time" for serious crime has a strong deterrent effect. As the message about the Guidelines gets out to the criminal community, we can safely assume that many of them will do what my friend's client now wishes he had done -- abandon criminal activity.

That is good news for all of us, and the Commission deserves the thanks and praise of all Americans for helping to get dangerous criminals off of the streets and into prison.

The Revisions to the Guidelines

In drafting revisions to the Guidelines, the Commission followed what the Chairman called a "cautious approach." I find that perfectly reasonable under the circumstances. You gave much thought and effort to your Final Guidelines, and are well advised not to tinker with them too much until you have

gathered information as to how they are working.

While you got off to a fairly good start, there were a couple of weaknesses in the Guidelines that I had hope you will address in the revisions.

Reduction in Disparity

One of the problems with the Second Draft Guidelines was that they provided overly-large ranges for aggravating and mitigating factors. These were clearly outside of the requirements of the Sentencing Reform Act, which states that the Guidelines should not provide sentences which vary between the greater of 6 months or 25%. The Act also allows judges to depart from the guidelines when aggravating or mitigating circumstances arise which were not contemplated by the Commission.

The Final Guidelines eliminated these wide ranges, but provided that judges may "depart" from the Guidelines if they finds that an aggravating or mitigating circumstance comes in between two levels. For example, if the Guidelines provided for an increase of 5 levels for serious bodily injury, and 2 levels for minor injuries, and the court found that an injury was in between serious and minor, it could depart from the guidelines and raise the levels between 2 and 5.

In essence, you have retained broad judicial discretion. You have eliminated ranges, but invite judges to depart from them. This is a change in form only -- the Commission is retaining judicial discretion, but calling it a "departure."

This encourages judges to depart from the Guidelines. At the hearings last year, one of the judges testified that he would find a way to circumvent the guidelines if he didn't like the sentence they required. This shows a lack of respect for the intention of Congress that the Commission should not encourage.

I urge you to eliminate this provision from the Guidelines.

The Death Penalty

Under 28 U.S.C. § 994, the Commission has the duty to "promulgate and distribute to all courts of the United States . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case." The Act makes it clear that the Commission's authority includes the entire range of federal criminal statutes.

Federal statutes call for the death penalty for several crimes, including murder, espionage, treason, hijacking, and assassination of the President. I urge you to promulgate guidelines to impose the death penalty for federal crimes for which the death penalty is prescribed. The Commission should no more forgo considering the death penalty for this reason than it should forgo considering any other sentence contemplated by the federal statutes.

When you voted against promulgating death penalty Guidelines last year, you were understandably concerned about the reaction from a small, but powerful, segment of Congress. The political situation has changed since then. The Guidelines survived challenges from both Houses of Congress. Assuming

they survive judicial review, they will become an unquestioned part of the criminal justice system. Now that the Guidelines are in place, it is clear that the Commission must continue to exist in order to monitor and alter the Guidelines where necessary. While the promulgation of death penalty Guidelines would still be controversial in some sectors, there are limits to what the opponents of those Guidelines could do.

Further, I submit to you that it highly improbable that in an election year the Congress would vote to rescind such Guidelines should you promulgate them.

I believe that there is still time for the Commission to promulgate death penalty Guidelines, and I urge you to hold hearings towards that end.

Conclusion

Given the high level of acrimony that accompanied every action which the Commission undertook last year, it is understandable that you chose to act cautiously in your first revisions. However, the problems in the Guidelines that remain are of such import that they need to be addressed.

Measured against the previous sentencing system, the Guidelines are a considerable improvement; measured against the Sentencing Reform Act, they perhaps fall short.

The ranges called for in aggravating or mitigating circumstances needs to be modified. I urge you to remove the provision allowing judges to depart from these ranges. By doing so, you will meet the letter and spirit of the Sentencing Reform Act.

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TO: Commissioners
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The ranges called for in aggravating or mitigating circumstances needs to be modified. I urge you to remove the provision allowing judges to depart from these ranges. By doing so, you will meet the letter and spirit of the Sentencing Reform Act.

The Commission has the authority to promulgate guidelines for the imposition of the death penalty. The intent of the Congress was to give the Commission such authority. The Commission should promulgate guidelines for its imposition for all crimes for which the Congress has prescribed it.

Thank you very much.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "Jeffery D. Troutt", is written over a horizontal line.

Jeffery D. Troutt

Director, Judicial

Reform Project

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PROBATION OFFICE

KENNETH B. ANDERSON

CHIEF PROBATION OFFICER
POST OFFICE BOX 1753
TALLAHASSEE 32302
904-681-7185
FTS: 965-7185

PLEASE REPLY TO: Pensacola

POST OFFICE BOX 12206
PENSACOLA 32590
904-438-8511

POST OFFICE BOX 980
PANAMA CITY 32402
904-769-8069

POST OFFICE BOX 589
GAINESVILLE 32602
904-377-1655

March 16, 1988

Honorable William W. Wilkins, Jr.
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Re: Public Comment for
March 22, 1988

Dear Judge Wilkins:

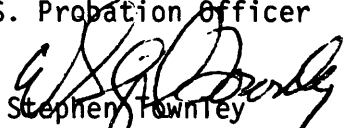
In response to your request for comment and input concerning the January 15 temporary amendments and the proposed additional changes, I do not have any specific comment.

Among the probation officers and other court family members in this district who are involved with guidelines, it would appear that the main concern at this time is finding direction on which guidelines apply to which offenses. As you mentioned in the letter of January 7, 1988, there are now several versions of the guidelines due to the President's action as well as the Commission's implementation of the emergency amendments. We are unsure as to which set of guidelines and amendments need to be applied to the cases as they come into court. It would be most helpful if the Commission could provide some clear and definitive instructions on which set of guidelines we should use.

Regrettably, the several changes via congressional action and Commission emergency action have resulted in some confusion and uncertainty on the part of the staff at a time when officers were just beginning to feel a little more on top of the situation. I recognize that changes are necessary in order to make the guidelines more complete and workable; however, the requested clarification on what to use and when would be most helpful.

Sincerely,

Kenneth B. Anderson, Chief
U.S. Probation Officer


W. Stephen Townley
U.S. Probation Officer

WST:dew

cc: Mr. Kenneth B. Anderson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
PROBATION OFFICE

DANIEL D. RECTOR
CHIEF PROBATION OFFICER
2003 U. S. COURTHOUSE
75 SPRING ST., S.W.
ATLANTA 30303

ROME 30161
331 FEDERAL BLDG.
P. O. BOX 49
GAINESVILLE 30501
126 U. S. COURTHOUSE

Atlanta, Georgia
March 18, 1988

The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D. C. 20004

Attention: Public Comment

Gentlemen:

A guideline application question recently arose in an arson case to be sentenced in our District.

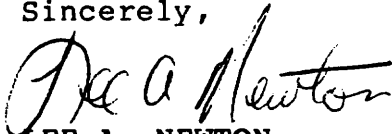
Arson guideline 2K1.4(b)(5) states "if the defendant endangers the safety of another person, increase by four levels".

This offense involved a small brush fire intentionally set by the defendant. The fire department responded shortly after the fire was set and extinguished the fire without incident. The question is whether endangerment of the safety of the firefighters should be considered under 2K1.4(b)5, therefore, resulting in a 4-level increase to the base offense level?

After a thorough review of the guideline manual, a call to the "hotline", and discussion with several other officers, this question remains unanswered. The intent of the Commission is paramount in interpreting this guideline application, therefore, we felt it would be appropriate to bring it to your attention for further discussion and review.

Thank you for all of your past and future assistance, and if we may be of service to you please let us know.

Sincerely,



LEE A. NEWTON
Deputy Chief
U. S. Probation Officer

LAN:ph

TESTIMONY
OF
THE HONORABLE EDWARD R. BECKER
UNITED STATES CIRCUIT JUDGE
CHAIRMAN
COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
BEFORE THE
UNITED STATES SENTENCING COMMISSION
MARCH 22, 1988

Chairman Wilkins, Commissioners of the United States Sentencing Commission, Ladies and Gentlemen, I am Edward R. Becker, Judge of the United States Court of Appeals for the Third Circuit. I appear today in my capacity as Chairman of the Committee on Criminal Law and Probation Administration of the Judicial Conference of the United States to provide comments on behalf of the Committee and the U.S. Probation System prior to the submission of your amendments to Congress on May 1st. As you are aware, I voiced my concern that public hearings were not held prior to the publication of the emergency amendments of January 15, 1988. I am gratified that this hearing has been convened. It augurs well as precedent for the future. Moreover, I take this opportunity to acknowledge publicly the cooperation of the Sentencing Commission and its staff which have worked with me and my committee in informal meetings along with the staffs of the Federal Judicial Center, Probation Division, and the Office of General Counsel of the Administrative Office in an effort to solve problems related to implementation of the Sentencing Reform Act of 1984 as amended.

As Chairman of the Criminal Law and Probation Administration Committee, I generally do not make normative judgments about the sentencing guidelines. Rather, what I prefer to do and will do today is identify some problems in guideline application that judges, magistrates, and probation officers in the field have encountered. I offer this information in order to assist the

Commission in its deliberations about modifications or amendments to the guidelines. I will comment upon five areas of the guidelines that pose application problems for the courts and probation officers.

We have reviewed the three new guidelines and one revised guideline under consideration for amendment and we have not identified any problems with them. I therefore take no position regarding their submission to Congress.

I

My first point concerns the effective date of amendments to the guidelines. Although 18 U.S.C. Section 3553(a)(4) provides that the sentencing judge shall consider the guideline in effect on the date the defendant is sentenced, the Supreme Court's holding in Miller v. Florida, 482 U.S. ____ , 107 S. Ct. 2446 (1987) requires that, where a substantive guideline has been changed to the disadvantage of a defendant, the sentencing judge must consider the guideline in effect on the date the offense occurred.

Thus, guideline users will need to be continually aware of the effective dates of each guideline, be able to compare any changes in the guidelines to determine whether they are to the advantage or disadvantage of the defendant, and, finally, be cautioned to use at sentencing the substantive guidelines that are most advantageous to the offender. As explained in Judge Wilkins' letter of January 7,

1988, you tried to address these needs by providing the amendments on replacement pages, reprinting the amendments with the Commission's stated reasons for the changes in Appendix C, and by recommending that users retain old pages. Your subsequent softcover reprinting of the guidelines includes Appendix C and a date at the bottom of each page of the guidelines. Although these methods are well intentioned, they do not show the user exactly which of the several guidelines on any given page has changed, nor do they indicate what the earlier guideline provided. To avoid confusion, and the inevitable litigation confusion brings, I urge you to address these concerns more effectively. One way to do this would be to reprint the guidelines showing the effective dates of each guideline and, where a guideline has changed, reproduce immediately after the amended guideline, the prior guideline. Additionally, I recommend that the Commission's guideline worksheet computer program provide the effective dates for each guideline used.

II

Another area of significant concern is the amount of time needed by the probation officer and the court to apply guidelines to petty offenses. A petty offense is defined at 18 U.S.C. Section 19 as a Class B misdemeanor, punishable by 31 days to 6 months in custody; a Class C misdemeanor, punishable by 6 days to 30 days; or an infraction, punishable by no imprisonment or up to 5 days of

incarceration. All petty offenses are subject to a \$5,000 fine for an individual. Guideline Section 2X5.1 provides that guidelines are to be applied to petty offenses only when a "specific" guideline has been promulgated for that petty offense. Otherwise, the court can exercise discretion and impose a sentence that is reasonable and consistent with the purposes of sentencing as provided in 18 U.S.C. Section 3553. Where a specific guideline does not exist, one is not required to look to an analogous guideline.

I recognize that the Commission has not promulgated guidelines for the majority of petty offenses. However, the guidelines for offense conduct such as theft, assault, trespass, wildlife and conservation offenses include petty offenses that are common to areas where national parks and military reservations are located. One example is the trespass guideline at 2B2.3. It applies to 18 U.S.C. Section 1382, Entering Military, Naval, or Coast Guard Property, which is punishable by 6 months in custody, and is an offense that would be common to districts that contain military bases. Similarly, 18 U.S.C. Section 1863, Trespass on National Forest Lands, punishable by 6 months in custody, is an offense that would be common to districts incorporating national parks.

A full presentence report is required to apply the guidelines reasonably. Since petty offenses are punishable by only 6 months custody or less and are not subject to the provisions of supervised release, it is unduly burdensome to the probation offices and the courts to apply the guideline procedures to such offenses. We

respectfully suggest that the U. S. Sentencing Commission consider exempting all petty offenses from application of the guidelines and allow the judges and magistrates to impose sentences in these cases that are reasonable and consistent with the purposes of sentencing.

Another problem is the interpretation of the language of Section 2X5.1. Most petty offense convictions for thefts and assaults in the Federal courts are prosecuted under the Assimilated Crimes Act (18 U.S.C. Section 13). There are vast numbers of these cases in districts where there are military reservations and national parks. Although there are guidelines for theft, other property offenses, and minor assault, it is unclear whether these guidelines constitute "specific" guidelines within the meaning of Section 2X5.1. We are aware that districts are interpreting this section differently. Some are interpreting the term "specific" very strictly, and do not apply the guidelines to assimilated offenses because the assimilated state statutes do not appear in the statutory index of the guidelines. By this interpretation, unless the offense of conviction is listed in the statutory index, there is no specific guideline. Other districts interpret the term more broadly and apply a guideline that pertains to the offense behavior. This problem could also be eliminated with the exemption of petty offenses from the guidelines.

III

Probation Officers in the field have identified three guidelines that have caused great difficulty in application and which therefore warrant further study. The Criminal Livelihood provision located at Section 4B1.3 requires a minimum offense level of 13 "if the defendant committed an offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income." The commentary at page 4.13 defines "pattern of criminal conduct" as "planned criminal acts occurring over a substantial period of time" that may include a series of independent offenses as a single course of conduct. The definition, unfortunately, raises additional questions. For example, what is a "substantial" period of time? In addition, the provision that the conduct yield a "substantial portion" of the defendant's income could result in discriminatory application of this provision. Clearly, the lower the income of the defendant, the more likely his criminal activity will constitute a "substantial portion" of his income. Title 28 U.S.C. Section 994(d)(11) provides that the Commission shall assure that the guidelines and policy statements are entirely neutral as to the socioeconomic status of offenders.

Section 3B1.2 provides a downward adjustment for defendants who are found to have a minimal or minor role in the offense. The adjustment is four levels for minimal, two levels for minor, and three levels for cases falling between these two categories.

Again, although the commentary provides guidance as to the application of these adjustments, it is couched in terms such as "culpability," that leave so much room for subjective judgment that probation officers find it difficult to recommend the appropriate adjustment as they are required to do under Rule 32 (c)(2)(B).

Section 3B1.3 provides for an upward adjustment of two levels if the defendant abused a position of public or private trust or used a special skill to facilitate the commission of the offense. There is confusion and misunderstanding as to the meaning of "abuse of trust". Some believe that the adjustment should be applied anytime a defendant was entrusted with responsibility over funds by an employer and abused that trust. The example in the commentary, however, which states that the adjustment does not apply to embezzlement by a bank teller, suggests that interpretation is overly broad. Even with the explanation given in the commentary, the meaning of the guideline is unclear.

Where there is widespread lack of understanding of the guidelines, as we have observed with these three, there is a danger that the guidelines will be applied inconsistently and result in unreasonable disparity. The Commission should consider clarifying these guidelines or the commentary to these guidelines.

IV

Section 5E4.2(i) of the guidelines requires that, "...the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release." Based upon this provision, the Bureau of Prisons has calculated the average cost of imprisonment to be \$40.14 daily, \$1,221 monthly, and \$14,652 yearly. Halfway house costs currently are calculated at \$30.24 daily, \$920 monthly, and \$11,028 yearly. The Probation Division has calculated the cost of supervision to be \$2.74 daily, \$83.33 monthly, and \$1,000 yearly. These calculations have been developed in order to meet the requirements of 5E4.1(i).

I anticipate that few defendants will be able to remit the full cost of incarceration and supervision. The Criminal Fines Improvement Act of 1987, Public Law 100-185, creates larger fines as punishment for a broad range of crimes. In sentencing under the guidelines, judges are obliged to impose fines commensurate with the level of the offense. Courts must also make a determination of the defendant's ability to pay a fine. In most instances, defendants will not have the resources to pay beyond the guideline fine range. This additional fine for costs of imprisonment, probation or supervised release, therefore, appears to be of highly doubtful collectability. With the current requirements of 5E4.2(i), every presentence report will have to contain calculations of these costs. The guideline requires an

extraordinary amount of work by probation officers for what appears to be information that will be of little relevance in most cases. This will also further complicate the sentencing hearing. The prison sentence and term of supervised release will have to be imposed before the final costs of this provision can be fixed.

Because of the practical considerations, I recommend abolition of the additional fine guideline located at Section 5E4.2(i). In unusual cases the need for a fine above the guideline range can be met by a departure.

V

Finally, I offer an observation regarding community confinement. Chapter 5 of the guidelines provides alternatives to regular incarceration that require either community confinement or intermittent confinement. Defendants whose guideline range provides for a minimum term of imprisonment of at least one but not more than 6 months are eligible for probation, but must serve at least the minimum term of imprisonment in community confinement or intermittent confinement (5C2.1(c)(2)). Additionally, Section 5C2.1(d) provides that individuals having a guideline range that requires a minimum term of imprisonment from 6 to 10 months may be sentenced to a term of imprisonment of at least half of the minimum with the balance to be served in community confinement as a condition of supervised release. According to the guidelines commentary, community confinement is defined as residence in a

community treatment center, halfway house, mental health facility, alcohol or drug rehabilitation center or other community facility (5F5.1). A concern of the Probation Division and also, I am informed, of the Bureau of Prisons, is that facilities for community confinement and intermittent confinement are not available everywhere, particularly in rural areas. The fact that facilities are not available for the community confinement/intermittent confinement sentencing options may create sentencing disparity. When facilities do not exist, the court is limited to the options of confining an eligible defendant to custody, a more punitive sanction, or departing from the guidelines and releasing the defendant to supervision early, a more lenient sanction.

One solution to this dilemma would be the use of home detention. We are aware of the fact that the Commission considered and rejected the option of home detention as a means of satisfying any community confinement requirement. This decision was part of a compromise that resulted in the greater availability of the community confinement option. Nonetheless, the unavailability of community correction facilities in some areas and the potential for that unavailability to create disparity may warrant reconsideration of the problem.

Mr. Chairman, this concludes my prepared remarks. Thank you for the invitation to appear today. I will be happy to answer questions.

WILLIAM D. GRAVES
CHIEF PROBATION OFFICER
C-122 U.S. COURT HOUSE
DENVER 80294
303-844-4185
SOUTHEAST DENVER OFFICE
GALLERIA BUILDING
SUITE 130, ATRIUM
720 S. COLORADO BLVD.
DENVER 80222

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
PROBATION DEPARTMENT

March 11, 1988

P.O. BOX 17160
BOULDER 80308-7160
303-497-8371
2040C N. ACADEMY BLVD.
COLORADO SPRINGS 80909
303-574-8615
P.O. BOX 3508
GRAND JUNCTION 81502
303-245-5396

U. S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D. C. 20004

Re: Comments on temporary amendments/proposed guideline/other matters

Dear Sirs:

We appreciate the continued opportunity to correspond with the Commission on matters of mutual interest. I have reviewed the temporary amendments and proposed guidelines and have no specific comments on those. The requested comments for the proposed additional offense guidelines lend themselves more to comment from the prosecution or defense bar. I do, however, have some other comments on related matters that I would like to bring to the Commission's attention.

The first item is strictly a housekeeping matter that has been brought to my attention by several staff members. Chapter 4 of the Guidelines Manual deals with criminal history and criminal livelihood, yet in no place in that chapter does the Commission incorporate the table provided on the worksheets to convert criminal history points into criminal history category. The Commission apparently intends for the Probation Officer to make the conversion from points to category by using the sentencing table on Page 5.2. As a practical matter, we found that officers are spending time in the manual looking for that conversion table and then are retreating to the worksheet to find the category for dictation into their presentence reports. I bring it to the Commission's attention here with the simple recommendation that that table be included at the end of the section on Criminal History Category, 4A1.1.

The other item that has created some concern here involves the very minor thefts that our part-time Magistrates are seeing from adjacent military bases or other Government reservations. We had written to General Counsel earlier on this but think it might be a matter worthy of the Commission's consideration for possible amendment in the future. The brunt of the problem is seen in filing misdemeanor charges under the Assimilative Crimes Act, 18 USC 13. Individuals are given summons or arrested by military police at commissaries, etc. for very minor shoplifts (generally well under \$100 loss). We understand that the Guidelines do apply to those cases, however, both the Magistrates and our Probation Officers in those remote field areas lack the resources to provide full guideline reports on those offenses. The feedback that we are getting from our

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Magistrates is that it is not an effective use of the Court's resources to do a complete investigation for sentencing under the guidelines. The majority of these cases have been assessed fines in the past and most proceed pro se to some sort of immediate sentencing. Magistrates have considered exercising the discretion provided by Rule 32 to go to an immediate sentencing, however, it would involve the Court making sufficient inquiry from the bench to compute the guidelines itself or having a Probation Officer on call to do that the same day that a plea might be entered. It is presently an unmanageable task because of the numbers of defendants involved (ten or so a month for one Magistrate adjacent to a military reservation.) Is it possible to delete the very minor theft cases from the guidelines, for example, setting an arbitrary limit of \$50 in stolen property as the cutoff?

We do appreciate the Commission's willingness to entertain this type of comment and inquiry.

Sincerely,



William D. Graves
Chief U. S. Probation Officer

WDG:bg



U. S. Department of Justice

United States Attorney

Middle District of Tennessee

879 United States Courthouse
Nashville, Tennessee 37203-3870

615/736-5151
FTS/852-5151

March 11, 1988

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

To Whom it May Concern:

After reviewing the Commission's letter of February 16, 1988, with the proposed guideline amendments, I am pleased to furnish the following observation:

Guideline 2A2.4 - This guideline appears to be reasonable under the circumstances and I would recommend its adoption as drafted.

Guideline 2A5.3 - There does not appear to be much reason for adopting this guideline since it simply refers you back to the offense level for underlying offenses. Inasmuch as the underlying offenses are set out and there are guidelines for those offenses, their appears to be no real reason to add a specific guideline for this violation. An upward departure could be warranted under any of the underlying offenses if it endangers the safety of the aircraft or passengers.

Guideline 2A6.2 - The base level offense for this guideline appears to be generally correct. I would recommend under specific offense characteristics an upward increase of two levels if there were serious disruption of service and a downward adjustment of two levels if there were either a lack of premeditation or the threat did not carry any reasonable indicia of credibility.

Guideline 2D1.5 - Addressing the questions the Commission posed:

(1) If the defendant caused injury to a person or used or sanctioned the use of violence, the base level should be increased to the same extent that we use specific offense characteristics under 2A2.2, that is, for bodily injuries two levels, serious bodily injuries four levels, permanent or life threatening bodily injuries six levels. It would appear

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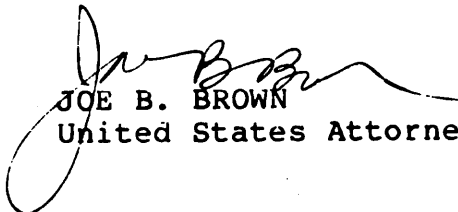
to me to be appropriate to be consistent in increasing the offense level based on the degree or injury caused or contemplated.

(2) It would seem to be reasonable that an individual who manages an organization of substantial size should be treated more severely than an individual who manages a smaller organization. The proposal for twenty and ten would seem reasonable and consistent with the adjustments under 3B1.1, since that would in effect increase the defendant's level by six, if he was involved with supervising, etc., more than twenty people and five if he was involved with supervising more than ten.

(3) The base offense of thirty-two seems generally appropriate given the fact that most of the cases will involve substantial additional levels under the specific offense category.

(4) From a standpoint of relative simplicity, it appears to me that the prior drug convictions should be treated as prior convictions and used in calculating the defendant's criminal history rather than being incorporated into the criminal enterprise itself. It would appear to me that this would be an easier way to calculate the sentencing grid and would insure that prior convictions would adequately enhance the defendant's punishment. I believe that these proposals would be more satisfactory than the guidelines and specific offense characteristics presently suggested in the commentary.

Sincerely,



JOE B. BROWN

United States Attorney

JBB/pww

MARCELLA COHEN

Marcella Cohen is a Special Attorney in the Criminal Division of the United States Department of Justice, Organized Crime and Racketeering Section assigned to the Miami Strike Force Office in Miami, Florida.

Testimony before the
Attorney General's Commission on Pornography
U.S. Department of Justice
Hearing on Organized Crime and Pornography
January 22, 1986, New York City

Ladies and Gentlemen of the Commission. My name is Marcella Cohen and I am a Special Attorney in the Criminal Division of the United States Department of Justice Organized Crime and Racketeering Section assigned to the Miami Strike Force Office located in Miami, Florida.

On July 29, 1979, my first day of work at the Miami Strike Force, six and one half years ago, I was assigned to my first case which at that time was still in the investigative stage. I was to work with another attorney, who had worked on the investigation from near its inception. The undercover FBI investigation was referred to as MIPORN, an acronym, which stood for Miami Pornography. MIPORN was a two and a half year undercover investigation into organized crime influence in the pornography industry. This investigation resulted in many indictments for interstate transportation of obscene materials and revealed other criminal activities resulting in indictments and forfeitures including but not limited to racketeering, possession and transfer of machine guns and silencers (a copy of the indictment involving machine guns and silencers is submitted to this Commission as Exhibit 1), child pornography, interstate transportation of stolen property and copyright violations.

Bruce Ellavsky and Patrick Livingston were two agents of the Federal Bureau of Investigation who were assigned to the Miami Office of the FBI in September/October 1977. They were to investigate large scale producers and distributors of

pornography throughout the United States. In October of 1977 an undercover company was established in South Florida which was to be the basis of the operation. The name Golde Coaste Specialties, Inc. was chosen as the name of the company and was incorporated in the State of Florida. There were a number of companies with variations of the name Gold Coast so it was necessary to put an "e" on the end of gold and an "e" on the end of coast in order to incorporate in Florida. Special Agent Bruce Ellavsky used the undercover name Bruce Wakerly and Patrick Livingston used the name Pat Salamone. Additionally, an office warehouse was rented where meetings were conducted. The "front" business of the warehouse was a blue jeans store while the back of the warehouse was where the pornography business was located. At a later time, G&C Sales, Ltd. was established in the Grand Cayman Islands to lend credibility to the operation.

When the agents spoke to individuals who were involved in the distribution of pornography throughout the industry, the agents would inform them that they had a mail order operation involved in the distribution of "hard" or hard core pornographic 8 millimeter films, magazines and videotape cassettes. In reality there was of course no such mail order business.

For the purpose of the undercover operation the agents altered the manner in which they dressed. They dressed more

casually and wore gold necklaces, diamond rings, gold bracelets, expensive watches, and things of that nature.

During the course of the undercover investigation the agents travelled and met with pornographers throughout the United States to virtually every major city including New York, Los Angeles, San Francisco, Las Vegas, Chicago, Pittsburgh, Minneapolis, Providence and others.

The agents found that major producers and distributors of 8 millimeter films, magazines and videotape cassettes would meet together every six months in various cities throughout the United States. In many cases these were not conventions with meeting rooms, planned agendas, dinners and speeches. The meetings would usually take place in a major hotel within the city. Meetings and conversations would take place in the lobby areas of the hotel, in lounges or restaurants located off the lobbies. The agents on occasion would set up or attend a meeting which would take place in the room of whichever distributor or producer of pornography they wanted to meet with, see their products or further discuss potential orders. At other times, booths would be set up at a consumer electronics show.

The following are some of the individuals and companies investigated during the course of the two and a half year undercover MIPORN investigation:

1. Star Distributors Inc. - Robert "Debe" DiBernardo, Theodore "Teddy" Rothstein, and Andrew "Andre" D'Apice, New York, New York.

Star Distributors is a group of companies headquartered in New York City, New York and controlled by Robert "Debe" DiBernardo. DiBernardo's close business associates at Star Distributors were Theodore "Teddy" Rothstein and Andrew "Andre" D'Apice.

In April 1978, the agents attended a pornography convention at the Fairmont Hotel in New Orleans, Louisiana. In a restaurant in that hotel, the agents were introduced to Teddy Rothstein by Rubin Gottesman of National Film Company, Los Angeles, California. Mr. Rothstein agreed to supply Golde Coaste Specialties with hardcore pornographic 8 millimeter films, magazines and videotape cassettes. Rothstein said he would introduce the agents to Andre D'Apice, his 8 millimeter man. Later on that same date in a hotel room at the Fairmont Hotel, the agents were involved in conversations involving the sale of films with Roger Summers and Joe Mallen of California International Distributors. Present at that meeting were Rothstein and D'Apice. D'Apice said he was a partner of Rothstein's and that they produced the film series entitled "Super Sound" and "Mustang". D'Apice stated they supplied distributors throughout the United States with these series and would also supply them to the agents.

On April 21 and April 22, 1978 the agents had a series of meetings at Star Distributors, 150 Lafayette Street, New York City. They first met with D'Apice who informed them that there had been some concern as to whether Golde Coaste was a front for law enforcement; however Rothstein and Robert "Debe" DiBernardo had checked Golde Coaste amongst their national associates. Rothstein had confirmed from Al Tapper (now deceased) of California Publishers Liquidating Corporation that the agents were "good people" and that Tapper had dealt with them for a substantial period and not been arrested.

During the meetings D'Apice stated that the agents "would have no problem whatsoever dealing with Mr. Rothstein or 'Debe' as long as you are one hundred per cent good people . . . but if you should cross 'Debe' there are plenty of people who would kill for him."

Between April 24, 1978 and April 27, 1978 the agents recorded a number of telephone conversations between themselves and the principals at Star Distributors concerning the shipping arrangements as to the films which had been ordered. The agents were informed by D'Apice which false names would be utilized as shipper and consignee.

During the sentencing hearing on this case, November 20, 1981, the following pertinent information was provided to the Court (the transcripts of this hearing are submitted to this Commission as Exhibit 2):

Jimmy "the Weasel" Fratianno at the time of the hearing was in the Witness Protection Program and guarded on a 24 hour basis by the U.S. Marshal Services. Jimmy Fratianno told Special Agent Bruce Ellavsky in his conversations with the agent in May 1980 and May 1981, that he, Fratianno, was a member and one time acting boss of the Los Angeles family of what he called La Cosa Nostra, an organized crime group in Los Angeles. During 1975, Jimmy Fratianno was partners with Mickey Fine in a pornography operation located in Los Angeles. Initially, in 1975, when Fratianno was dealing with Mickey Fine, he wanted to obtain some monies from some of the pornographers who were operating in the Los Angeles area over which he had no control. Fratianno later learned that Reuben Sturman, a major distributor of sexually explicit material located in Cleveland, had some interest in the Los Angeles area. At that time Jimmy Fratianno spoke to Pete Milano, a capo in the Los Angeles crime family who informed him that previously he and some individuals from the Cleveland organized crime family with Ettore "Terry" Zappi, had put pressure on Reuben Sturman for money and obtained \$200,000 from Sturman due to Sturman's association with various families in New York. During this conversation with Pete Milano, Fratianno told Milano that he wanted to do the same thing. Milano said in order for him to do that he would have to see Ettore "Terry" Zappi. At that point Fratianno made arrangements through Tony Randazzo, a member of the Cleveland

organized crime family to make an introduction to Zappi which he did, in Florida. During their association together as partners, Fine on several occasions had mentioned the name "Debe" to Fratianno. Fratianno asked Mickey Fine who "Debe" was. Fine told him that as far as pornography goes, "Debe" is the main man in the country.

During April, 1976 Fratianno went to the Westchester Premier Theater in New York to see one of the Frank Sinatra concerts. While at the Westchester Premier Theater he met with Ettore "Terry" Zappi, who Jimmy Fratianno knew as a capo in the Gambino organized crime family in New York. When Fratianno saw Zappi there were two other people with him, one of whom was Frankie Duff, also known as Frankie D'Appolino, a Gambino member. The other person at that time was at first unknown to him. Fratianno spoke with Zappi concerning pornography and the fact he wanted to get into the pornography business to a greater extent in the Los Angeles area. During this conversation, Fratianno said to Zappi that every time he talks about pornography in the Los Angeles area, the name "Debe" comes up, he hears the name Debe constantly and Fratianno asked Zappi who "Debe" was. Zappi laughed and said "Debe" was sitting right next to him and then he introduced Fratianno to Robert DiBernardo. Fratianno proceeded to talk to DiBernardo concerning the pornography.

business particularly in the Los Angeles area. DiBernardo told him that if he wanted to get in the business he should have done it four or five years ago, that now it was all locked up. Fratianno said that when he was introduced to DiBernardo by Zappi at that time he knew from the way he was introduced at that time DiBernardo was not a member. Zappi said that he and DiBernardo were partners in the pornography business.

Fratianno said that during 1977 he heard from several sources that DiBernardo had been made as a member of the Gambino family. There was testimony at the sentencing hearing in United States v. DiBernardo, that in November 1981, Mr. DiBernardo's car was parked in front of Paul Castellano's home in Staten Island. Several reliable sources supplied information to the Federal Bureau of Investigation that DiBernardo is a made member of the Carlo Gambino organized crime family. A source advised that DiBernardo is a big money earner in pornography in New York, Miami and other places throughout the United States and he enjoyed the privilege of reporting directly to Paul Castellano, now deceased, who was allegedly the boss of the Carlo Gambino organized crime family.

United States v. Ralph Borello, was a federal customs case, involving the smuggling of 771 eight millimeter films by means of false invoices. Borello allowed someone else to use his name in importing shipments of 8 millimeter films.

Informant information revealed that in 1981 Borello was an employee of Robert DiBernardo. Show World, a multifaceted pornography outlet on 8th Avenue, New York City is controlled by Robert DiBernardo. Borello himself has been involved in the pornography industry since the 1960's and maintains the machines at Show World. Borello had 22 prior convictions mostly stemming from obscenity related arrests. One was for bribery of a police officer in order to find out information regarding impending searches.

2. A & A News Anthony DeFalco and Paul Gorman, Chicago, Illinois.

During a meeting at A & A News in March 1978, an agent was taken to an area in the warehouse behind a "fake" brick wall. Behind the brick wall were the eight millimeter films. In a metal cabinet behind the fake brick wall were the "animal" films.

Gorman said he could possibly obtain sound projectors for Golde Coaste Specialties at a very good price. He said that these projectors were often "too hot to touch" and that there might be a truck having an accident in the near future, at which time he would have several hundred projectors available.

On March 15, 1978 in a tape recorded conversation Gorman said that DeFalco was in court today because one of the stores had been hit that is, searched by police. Gorman said that in the past they had almost been "hit" while a load of

child pornography was still on the premises but that the police had gotten to the film room one day late. Gorman said they had shipped the child pornography the previous day and that the police were jerks for not grabbing the stuff earlier.

In October 1978, the agents met with Tony DeFalco and Paul Gorman. DeFalco mentioned the fact that he had received numerous inquiries in the past several months regarding the agents and that there were rumors around the industry that the agents were "the heat". DeFalco said that the pornography business was a close knit group of individuals, virtually everyone in the industry has known each other for many years and that therefore it is almost impossible for someone new to break into the business.

DeFalco said that the hard core market was shifting from 8 millimeter film to videotape cassettes. The agents told DeFalco that they had conversations with California International Distributors (CID) regarding the shipment of 8 millimeter films to Miami, Florida. DeFalco was told that CID said they were on probation in Florida and would not ship hard core to Florida. DeFalco said he would handle the shipment of 8 millimeter hard core film and videotape cassettes to Golde Coaste Specialties in Miami from CID in Los Angeles, California. DeFalco said the agents should contact CID, place an order and it would be shipped directly to him in Chicago, Illinois. DeFalco said that upon

receiving the shipment he would immediately reship it from Chicago to Miami, Florida. DeFalco said he would want to make a few dollars on the transaction for his trouble, but would be happy to enter into this arrangement with the agents and CID of Los Angeles, California.

DeFalco said he had received a letter from a person "established" in the pornography business which stated in effect that anyone dealing with the agents should be wary of them being cops.

DeFalco and the agents discussed Golde Coaste Specialties' interest in the purchase of L.W. Sales, Chicago, Illinois. DeFalco said he had never been able to get along with Leo Weintraub in the past and would prefer to have the agents running Weintraub's operation in Chicago. DeFalco said Weintraub continues to run his wholesale operation out of his warehouse on Milwaukee Avenue but that he sold all five of his bookstores. DeFalco would not identify the individual to whom these stores were sold. DeFalco said that the peep machines were owned by another individual and said that the new owner of the stores would receive only a percentage of the monies made from the peep show operation.

3. Imperial News - Kenneth Guarino, Anthony "Butch" DiBora and Joseph Renzi, Jr., Providence, Rhode Island.

In November 1977, an undercover agent had a discussion with Guarino concerning the fact that Guarino felt that the

Federal Bureau of Investigation viewed him as the kingpin of hard-core pornography. Guarino then took the agent to a "secret" room in his warehouse which he stated contained his hard-core film.

In November 1977, the agents met with DiBona who said that he, Guarino and Renzi had to be careful of shipping to South Florida because of the "heat" from local and federal authorities. However he said that they had "checked out" the agents and they were good people. Two shipments to Golde Coaste Specialties in Miami, Florida from Imperial News contained fictitious names in the return address.

4. S & L Distributors - Norman Arno, Thomas Sinopoli, Marty Bernback, Sandy Sarnblad, Timothy "Tim Simpson" Burns, Los Angeles, California.

In May 1978, the agents met with Norman Arno, owner of S & L Distributors. Arno said he was willing to meet the agents since they had been dealing with his employee Tim Burns for over eight months and no one had been arrested. Arno said he was dealing with Rubin Gottesman (National Film Company, Los Angeles, California) regarding purchase and sale of videotape cassettes of major motion pictures. After a \$3,000 check was given to Arno by Agent Ellavsky, Arno said he would send Ellavsky a "phony" invoice reflecting payment of \$3,000 and would label the invoice as being for magazines or periodicals. Arno said he wanted to obtain the remaining \$3200 in cash so he would not have to report it as income.

In July 1978, Arno told the agents that there were rumors that they were "the heat." Arno alluded to the fact that there was a suspicion on his part that the agents were cops. Arno said the pornography industry was a close knit organization and that most individuals have been in the business several years and no one seems to know where the agents came from.

Arno said he did not want to take any calls concerning legitimate or "straight" videotape cassettes over his telephone at his residence or his office. He stated that arrangements could be worked out whereby he would call from a pay telephone to obtain the orders desired by Golde Coaste Specialties. Arno said he had previously been somewhat reluctant to inform the agents that he was involved in the reproduction of pirated motion pictures as this was a violation of federal copyright statutes. Arno said there were several problems connected with the production of these videotape cassettes because there was a lot of pressure from the FBI recently in this area and that several producers of pirated films had been "busted" in the recent past and were now working for the FBI.

In January 1979, Arno said he had first heard problems about the agents from Ron Selinger (Bon Jay Sales, Baltimore, Maryland) and that Selinger said he was going to meet with the agents in Miami, Florida until he received a telephone call from a friend of his saying not to deal with the agents.

Arno said Chicago was a rough town and that a former employee of Leo Weintraub by the name of Rene had had his operation blown up in Chicago reportedly by Weintraub.

In January 1980, the agents met with Norman Arno at his Video Cassettes X rated (VCX) display at the Consumer Electronics Show held at the Hilton Hotel, Las Vegas, Nevada. The agents told Arno they brought with them a check to give to Arno as payment on a debt. The agents and Arno went inside the VCX display. At that time Arno said that Special Agent William Kelly of the Miami FBI Office was behind them and was about to photograph them. Arno told Ellavsky not to turn around and not to write the check at that time and to come to his hospitality suite at Ceasar's Palace where he (Arno) would receive payment.

5. Sovereign News Company - Reuben Sturman, Joe Zernic, Al Bloom, Steve Martin Assid, Cleveland, Ohio.

In October 1978, the agents met with Joe Zernic in the lobby of the Olympic Hotel in Seattle, Washington at one of the semi-annual pornographic conventions discussed earlier. Zernic said he had heard rumors concerning the agents being cops. Zernic said he had tried to contact the person who had introduced the agents to him without success. On January 5, 1980, the agents met with Reuben Sturman, owner of Sovereign News Company, Cleveland, Ohio. They discussed past dealings the agents had with Sovereign News. The agents mentioned they had previously dealt with Joe Zernic and had purchased 8

millimeter film and magazines from him. Sturman said that Zernic was one of his key employees.

Sturman has since been indicted on other charges relating to tax evasion. (A copy of the indictment is submitted to this Commission as Exhibit 3).

6. California International Distributors (CID) - Noel Bloom, Roger Summers, Joe Mallen, Roger Chan, Al Bloom, Los Angeles, California.

In March 1978, Summers stated that his boss, Noel Bloom had problems in Florida approximately 7 years ago and that he was somewhat reluctant to ship to Florida because he was under probation in that state. Summers discussed with the agents the possibility of contacting Reuben Sturman at Sovereign News, Cleveland, Ohio, to assure prompt shipment of the "Swedish Erotica" series through Sturman to the agents in Miami, Florida. Between August 1978 and March 1979, the agents had conversations with Summers and Mallen regarding the scheme of shipping "Swedish Erotica" through a third party.

7. L and W Sales - Leo Weintraub, Chicago, Illinois.

In March 1978, the agents dealt with Leo Weintraub, owner of L and W sales who agreed to ship hardcore films to Miami, Florida.

8. Le Salon Distributors - Roland Bouldreault and Larry Nelson, San Francisco, California.

Nelson told the agents in March 1978, that he would have to check out the agents prior to shipping to Miami, Florida. Nelson asked who the agents had dealt with and the agents said A and A Distributors of Chicago, Illinois. Thereafter, Nelson placed a long distance telephone call to Tony DeFalco, main owner of A & A Distributors. After talking to DeFalco, Nelson said he would ship hard core material to Golde Coaste. Nelson said DeFalco stated that the agents were "good people" and that he (Nelson) trusted DeFalco completely, having dealt with him for a long period of time. The shipments were sent from Foxx Distributors, 47 Minna Place, San Francisco, California, which was a fictitious name and address.

In July 1978, the agents discussed with Bouldreault the possibility of distributing bondage film. Bouldreault said he was very interested and that he could possibly distribute several hundred copies of this film to his outlets in Amsterdam.

During the sentencing hearing on June 28, 1984 (A transcript of this testimony is submitted to this Commission as Exhibit 4), the Government submitted invoices demonstrating that from 1976 through mid 1978 child pornography materials were shipped between Le Salon and a company by the name of All American Studios, San Francisco, California. Amongst the titles was the magazine "Bare Boys", a sexually explicit magazine depicting boys under the age of 14. There was testimony by Bill Dworin, of the Los Angeles

Police Department, who stated that he knew one of the boys depicted in the magazine and that he was 8 or 9 years old when the picture was taken.

9. Walter Frenchy Bagnell - leased office space at M & M Sales Distributing Corporation, Los Angeles, California.

Bagnell stated in September 1977, that he was one of the largest distributors and producers of hard core pornography and that he specialized in boy- boy (homosexual) film.

Bagnell said he had organized crime connections in Chicago and New York. Bagnell said he was having problems with Bon Jay Sales in Baltimore, Maryland and that he was traveling to New York in a few days to meet with his "connection" people. They would then take a trip to Bon Jay to collect a \$34,000 debt that Bon Jay owed to Bagnell for hard-core pornography that Bagnell had previously shipped to them.

Bagnell said he was leaving Los Angeles to travel to Tulsa, Oklahoma to drop off a large shipment of hard-core boy boy film. Bagnell said Oklahoma was one of the few states to which he was reluctant to ship hard-core pornography by normal means and that he intended to deliver the film to Tulsa himself. Bagnell said that he accomplished this by placing the shipment of films on a flight which would be leaving within an hour of his own personal flight to Tulsa, thereby having the film shipped as luggage via the airlines in a flight other than the flight he was taking. Bagnell

said that using this method made it impossible for law enforcement authorities to link the film to him.

10. Wonderful World of Video - Harry Mohney and Jerry Wade, Los Angeles, California.

This indictment case which charged Mohney and Wade with various violations of federal obscenity laws is set for trial on February 3, 1986.

11. T.G.A. Associates - Theodore "Teddy" Gaswirth, Los Angeles, California.

In September 1978, Gaswirth mentioned to the agents that there had been rumors that they were FBI agents and if they were, he would be busted sometime in the future. Gaswirth said that the rumors were diminishing inasmuch as various individuals in the pornography industry felt that if they were in fact agents there would have been some arrests made by this time.

12. Arrow Film and Video Co. (Arrow) - Louis "Butchie" Peraino, Joseph Peraino, Michael Balsamo, Vince DiStephano, and Arnie Himmelstein, New York, New York and Los Angeles, California.

Information at the sentencing hearing on January 29, 1982 and the sentencing memorandum (The transcript and memorandum are submitted to this Commission as Exhibit 5) filed in this case revealed the following:

Joseph Peraino and Louis "Butchie" Peraino are non member associates of the LCN organized crime family in

New York City. Louis "Butchie" Peraino, assisted by Joseph Peraino and Vincent DeStefano are reputed to run Arrow Film and Video through the use of extortionate and strong arm methods of business. They have enforced their desires in business through threats and violence on number of occasions. DeStefano has claimed to represent the interests of several LCN family members in investments in pornographic films in Los Angeles and has claimed to have made "big money" for his New York City organized crime connections. The activities of Louis and Joseph Peraino in the pornography business were financed by the LCN organized crime family and that Louis and Joseph Peraino contribute large sums of money from their business to the LCN organized crime family.

In September 1980, Steve Ramirez operated a video lab, a facility in which he transferred films onto videotape as well as duplicated and distributed videotape cassettes. Ramirez said he was duplicating copies of the film "Deep Throat". Ramirez was approached by Louis Peraino and Vincent DiStephano who threatened him with physical harm and informed him that he was duplicating the film "Deep Throat" without their authorization. Fearful, Ramirez closed his business. The substantial part of his business had been duplicating the films "Deep Throat" and "Devil in Miss Jones" for Norman Arno (S & L Distributors, Los Angeles, California). Peraino came

to Ramirez because Arno had told him that Ramirez was doing the duplication.

13. J & G Sales - Michael Zaffarano, Joseph Arieno, Bobby Zeichick and Larry Mathas, Los Angeles, California.

In September 1979, the agents and Arieno discussed an order for the film "Debbie Does Dallas". Arieno said that the film was owned by Michael Zaffarano (now deceased and alleged to have been a member of an LCN organized crime family) but stated that Zaffarano had given Arieno permission to distribute it. When the agent expressed doubt, Arieno said that he could call Zaffarano and verify the fact.

(A transcript of a telephone conversation between one of the agents and Joe Arieno is submitted to this Commission as Exhibit 6).

14. California Publishers Liquidating Corporation - Al Tapper and Ray Hind, Los Angeles, California.

In April 1978, during a videotaped meeting with Ray Hind, Hind discussed the pornography industry and the fact that during the previous week he had 3 telephone calls from "people within the industry" checking on the "legitimacy" of the agents. Hind said that his boss, Al Tapper, had personally contacted him from New Orleans, Louisiana, to inquire how long Hind had known the agents. Hind said he gave the agents a good recommendation and that everything was okay.

Hind said he is well known within the industry and that he is personally acquainted with Teddy Rothstein and Robert DiBernardo of Star Distributors, New York City. Hind said he had received calls from "their people" also checking on the agents.

15. Discount Distributors, TVX Distributors and Atlantic Video Phillip "Chuck" Bernstene, Anthony "Tony" Arnone, Bill Jackmore, Los Angeles, California, Fort Lauderdale, Florida.

In May 1979, in a tape recorded conversation Bernstene said he spoke to Mickey Zaffarano regarding "Debbie Does Dallas." Bernstene said that through Zaffarano and Joe "Black" Arieno he would be in a position to distribute "Debbie Does Dallas." Bernstene said that 3 or 4 years ago, Zaffarano had placed him (Bernstene) with S & L Distributors, Norm Arno and Tommy Sinopoli to insure that Sinopoli and Arno made payments to Zaffarano. Bernstene said that Sinopoli, Arno and S & L Distributors were tied directly to Zaffarano. Bernstene said that during the time he was with S & L Distributors he made weekly payments to Zaffarano from Arno and S & L Distributors.

In October 1979, Bernstene described Zeichick (J & G Sales, Los Angeles, California), as a "no good guy" who had messed up people in the past in some of his business dealings. Bernstene said Zeichick and Black were doing a good business and they were cutting into some of the

customers of TVX Distributors. Bernstene said that this was hurting TVX and other distributors but he could not put pressure on Zeichick or Black due to their close relationship with Zaffarano.

Bernstene said Zaffarano had just recently given the movie "Autobiography of a Flea" to Andre D'Apice (Star Distributors/KED New York City) to have as his movie. Bernstene said that if law enforcement officials and the IRS became aware of how much money Zaffarano made off his hard core movies, they could blow the lid off his operation.

Bernstene said it was like when "Deep Throat" and "The Devil in Miss Jones" were playing all around the country in 1972 that if it were known how much money was actually made on these movies, a lot of people would have problems.

In October 1979, Bernstene said that Walter Gernert would be coming to Las Vegas. Bernstene said that he was going to Vegas to "pay the juice". Bernstene said the loan was for 8 millimeter films which Walter Gernert was now into.

Bernstene said that Angelo and Tony Farese recently came into the offices of TVX Distributors and advised him and his partner, Dave Friedman that they now controlled the movies "Deep Throat" and "Devil in Miss Jones" and that a fee of \$10.00 per video tape cassette of these movies should be paid directly to the Fareses. Bernstene said that the Fareses advised him and Friedman that the Perainos no longer control

the movies "Deep Throat" and "Devil in Miss Jones" and that the Fareses now control these movies.

On November 6, 1979, Bernstene said that when Michael Wisotsky was dealing with Arno, Wisotsky was doing business in the range of \$15,000 to \$20,000 a month. During that time Wisotsky told Bernstene that the agents were working for the Feds. Wisotsky told him that he had gotten this information from Andre D'Apice (New York City). (The Government's Sentencing memorandum in the case of United States v. Michael Wisotsky, Myron Wisotsky, Robert Barkow, and Donald Work is submitted to the Commission as Exhibit 7).

16. Central Sales - Lou Guglielmi, Baltimore, Maryland.

On December 20, 1978, the agents met Guglielmi, owner of Central Sales. Guglielmi said he had over one million dollars in projectors in the basement of Central Sales and said this was a large part of his business. Guglielmi told the agents he was part owner of Miami Books in Miami, Florida with Star Distributors of New York City.

Guglielmi said he had a lot of heavy contacts in the Miami, Florida area and said that Bob Inman had sold out to him and tried to steal some of his customers away. Guglielmi said that he does not take an individual like this to court to settle the matter. He said he takes it into his own hands and makes one phone call to Florida and "within ten minutes, turns a boy into a man."

17. National Film Company - Rubin Gottesman, Barbara Gottesman, Los Angeles, California.

In February 1979, the agents met with Rubin Gottesman and his wife Barbara Gottesman. Rubin Gottesman said he had been with Norman Arno (S & L Distributors) the previous evening and that Arno had showed him a videotape of the movie "Debbie Does Dallas". Gottesman said Arno told him that he had received the video rights to that movie from Mickey Zaffarano, the owner of the movie. Gottesman said Zaffarano had given Arno the national distribution rights for this movie and that Arno now had it available on video. When the agents asked to obtain a print of this movie for themselves Gottesman said he would not even consider doing this because he wanted to remain healthy. Gottesman said Zaffarano would not hesitate to use muscle if someone was bootlegging his movies.

On March 23, 1978 Rubin Gottesman told the agents that in the past an individual was believed to be duping and distributing various hard core movies. He said organized crime people had put money into these films and that this individual was "hit in the head." Gottesman said that should the agents begin duping pictures such as "Deep Throat" and "The Devil in Miss Jones" that they would have to be prepared to take the heat.

In June 1979, Gottesman said he had gotten 2 movies from Joe Peraino (Arrow Films, New York and California), one was "Johanna" and the other was "The Devil Inside of Me."

Gottesman said both of these were Joe Peraino's movies and that he was paying Joe Peraino \$300 each for the prints.

(A transcript of a tape recorded conversation is submitted to this Commission as Exhibit 8).

18. Bon Jay Sales, Inc. Jack Gresser, Ron Selinger, John Moon, Alan Swartz, Baltimore, Maryland.

On May 17, 1978, the agents went to Bon Jay Sales, Inc. There was a discussion about two pimps who worked the east coast for Jack Gresser. These pimps obtained the girls for Gresser's book stores and massage parlor operations in the Baltimore and Washington, D.C. areas. On May 24, 1978, an employee of Bon Jay Sales, Alan Swartz, said girls could be provided to the agents on their next trip to Bon Jay Sales and that another individual at Bon Jay Sales handled the procurement of girls for customers.

On August 10, 1978, in a telephone conversation with Jack Gresser, Gresser said that there had been rumors about the agents and that he had been advised to stay away from them.

19. M & M Video Svstems, Inc., Mickey Manos, Houston, Texas.

In July, 1979, Special Agent Bruce Ellavsky spoke to Manos and discussed "boy-boy" (homosexual films). Manos said that most of his business was in Tennessee and Alabama. Manos said he had a \$300,000 lab in which he does a lot of reproduction. Manos said he was the biggest in the videotape

business other than those in California, Chicago and New York.

20. Alvin Nunes, Honolulu, Hawaii.

On December 1, 1978, Chuck Bernstene told an agent that he had access to pirated major motion pictures through a contact of his in Honolulu, Hawaii by the name of Al Nunes. Bernstene then called Nunez and made arrangements with him to meet the agent in Hawaii. Bob Courchese told the agent he had difficulties with the bookstore he had recently opened. He said he had pinball machines in the store and he had gotten pressure and muscle from the "boys" on the island. He said they had demanded a split of 20/30% with 70% going to them. Courchese said he could not live with the split and gave up the store. Courchese said he was still employed by Nunez, both working at Nunez's bar and doing whatever else Nunes requested of him. Nunes gave the agent animal film and said he would ship child pornography to Miami, which he did.

In addition, he shipped pirated major motion pictures to the agents in Miami, Florida.

United States v. Michael Wisotsky, Myron Wisotsky

Robert Barkow and Donald Work -

Dade, Broward, Palm Beach Counties, Florida

The pornography business run by Michael and Myron Wisotsky (his uncle), is the most significant south of Atlanta, Georgia. They are considered to be key figures and

upper echelon distributors of hard core pornography. At the time of the indictment in this case, 1983, Michael and Myron Wisotsky (referred to hereafter as the Wisotskys) controlled between 500 to 700 peep show machines in Southeast Florida. These machines were located in adult bookstores owned by corporations the Wisotskys controlled, as well as independently owned bookstores. In 1983, the Wisotskys owned and controlled approximately \$2 million worth of assets through the use of nominees and sham corporations. The true ownership of these corporations was hidden to avoid the possibility of criminal prosecution under the pornography laws. Documents show over the course of 10 years, the Wisotskys used the names of unknowing nominees to register their corporations and caused their accountants and others to falsely subscribe these names to documents which were then mailed to state and federal governments. The investigation in this case revealed the Wisotskys owned or controlled over 40 corporations. Of these, the 15 most actively involved in the adult bookstore business were not registered under the name of Michael or Myron Wisotsky.

When the investigation of the Wisotskys commenced, the Wisotskys were not content to allow themselves to be investigated. They immediately took an active role in attempting to thwart the Grand Jury investigation being conducted by the Internal Revenue Service and the Miami Strike Force.

Unbeknownst to the Internal Revenue Service and the Miami Strike Force, the Fort Lauderdale Police Department was engaged in an undercover operation involving the Wisotskys during this same period of time. The Fort Lauderdale Police Department had placed an undercover detective in the Wisotsky organization. The prospect that the detective would be served with a federal grand jury subpoena caused the Fort Lauderdale Police Department to reveal his identity to the Government and cooperation began between the two agencies.

Donald Work had been and continued to be the Wisotskys key man for a number of years. One of Work's duties was to oversee and manage the peep machine operation for the Wisotksys.

Numerous other bookstore owners and clerks were subpoenaed to the Grand Jury and each of them asserted their Fifth Amendment privilege regarding the Wisotkys' operation.

For a number of years, law enforcement agents attempted to locate the Braccos - a couple whose name appeared on many of the Wisotsky corporations. In March 1981, Special Agent Donald Burde of the Internal Revenue Service located them -- he visited them rather than calling them because their telephone had been disconnected for nonpayment. They never had any business connections with the Wisotskys and never heard of the corporations on whose papers their names appeared. They were unknowing nominees whose names were used by the Wisotskys. After they were subpoenaed to the federal

grand jury, Robert Barkow called Mrs. Bracco and said, "my people know they have wronged you; they're sorry about it. They want to make up for it. Contact any of these 3 attorneys, they're waiting for you to call. I'll give you their names. We'll put you up in the best hotels consider it a vacation. My people have been wrong -- they know they've wronged. You'll be well compensated for it. Take the corporations you're a rich person."

The Wisotskys were not content with attempting to prevent people subpoenaed before the Grand Jury from testifying against them. On August 25, 1981, Special Agent Donald Burde received a telephone call from the Wisotsky's accountant who requested Burde come to his office, "alone and unwired." During that one-on-one meeting, the accountant offered Burde at the direction of the Wisotskys, a \$25,000 bribe to kill the criminal tax investigation he was conducting regarding the Wisotskys.

The evidence in this investigation established the Wisotskys omitted substantial amounts of income as they skimmed a great deal of income from the vast peep machine operation they controlled since April 1976.

The 68 page sentencing memorandum submitted by the Government in this case outlines the history and background of the Wisotsky empire, including the numerous criminal activities which occurred at the Wisotsky bookstores. A copy

of the indictment in this case is submitted to this Commission as Exhibit 9.

I appreciate the opportunity to appear before this Commission and hope that this presentation and the supporting documents have been of assistance to you.

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 MIAMI DIVISION

4 UNITED STATES OF AMERICA,) NO. 80-56-Cr-ZPS(S-3)

5 Plaintiff,)

6 vs.)

7 LOUIS PERAINO) Miami, Florida

8 JOSEPH PERAINO) January 29, 1982

9 VINCE DISTEPHANO) 1:40 p.m.

10 ARNIE HIMMELSTEIN)

11 MICHAEL BALSAMO,)

12 Defendants.)

13 VOLUME I

14 TRANSCRIPT OF SENTENCINGS

15 BEFORE THE HONORABLE EUGENE P. SPELLMAN

16 APPEARANCES:

17 For the Government:

FRED SCHWARTZ,
Assistant U. S. Attorney

18 For the Defendants
19 Louis Peraino and
Joseph Peraino:

HENRY J. BOITEL, ESQ.

20 For the Defendants
21 Vince DeStephano
22 Arnie Himmelstein
Michael Balsamo:

PHILIP KUHN, ESQ.

23 Court Reporter:

MARIO J. CONTILLO
301 North Miami Avenue
Miami, Florida 33128

25 EXHIBIT 6

1 happened.

2 Thank you.

3 THE COURT: The Court is going to recess for
4 approximately ten minutes.

5 (Recess taken.)

6 THE COURT: The defendants will stand and be
7 sentenced, please.

8 Each of the defendants, having been duly
9 tried and convicted of the respective counts of the
10 indictment as reflected by the jury verdict in this
11 case, the Court having adjudicated them guilty of said
12 offenses, Mr. Arnold Himmelstein, you, having been
13 found guilty of Counts 1 and 3 of the indictment in
14 this case, the Court does herewith sentence you on
15 Count 1 of the indictment in this case to the custody
16 of the Attorney General, or his duly authorized repre-
17 sentative, for a period of nine months.

18 As to Count 3 of the indictment in this case,
19 the Court does hereby place you on probation for a
20 period of five years, said probation to commence upon
21 the termination of your sentence under Count 1 of the
22 indictment in this case; that as a special condition of
23 that probation, you are not to participate in any form
24 or fashion which could be determined by this Court to
25 constitute a violation of your probation by using any

1 type of carrier for interstate transportation of
2 material deemed obscene, or to aid or abet in the
3 transportation of such material for any purpose to the
4 State of Florida.

5 Mr. DiStephano and Mr. Balsamo, you, having
6 been found guilty of Counts 1, 3, 5 and 7 of the
7 indictment heretofore filed in this case, the Court
8 does hereby impose a sentence as to Count 1 of the
9 indictment in this case, that each of you are remanded
10 to the custody of the Attorney General, or his duly
11 authorized representative, for a period of nine months.

12 That as to Count 3 of the indictment in this
13 case, each of you are remanded to the custody of the
14 Attorney General, or his duly authorized representative,
15 for a period of nine months, said sentence is to run
16 consecutive to Count 1 of the indictment in this case.

17 With regards to Counts 5 and 7 of the indict-
18 ment, you are hereby placed on probation for a period
19 of five years; said probation sentences to run con-
20 current with each other. Likewise, as a special condi-
21 tion of probation, neither of you are to participate
22 in any form or fashion which could be determined by
23 this Court to constitute a violation of your probation
24 by using any type of carrier for interstate transporta-
25 tion of material deemed to be obscene or to aid or abet

1 in the transportation of such material for any purpose
2 to the State of Florida. That probation will commence
3 upon release from their sentence which they will serve
4 under Count 3 of the indictment in this case.

5 In regard to the defendant Joseph Peraino,
6 you, having been found guilty of Counts 1, 3, 5 and 7
7 by the jury in this case, as to Count 1 of the indict-
8 ment, this Court does hereby remand you to the custody
9 of the Attorney General, or his duly authorized repre-
10 sentative, for a period of one year.

11 In addition thereto, you will pay a fine of
12 \$2500 and you will remain in custody until that fine is
13 either paid or you are duly discharged as a matter of
14 law.

15 As to Count 3 of the indictment, this Court
16 does hereby impose a sentence by remanding you to the
17 custody of the Attorney General, or his duly authorized
18 representative, for a period of one year.

19 As to Count 5 of the indictment, the Court
20 does hereby remand you to the custody of the Attorney
21 General, or his duly authorized representative, for a
22 period of one year, said sentences on Count 3 and 5 to
23 run consecutive with the sentence under Count 1 and
24 consecutive with each other.

25 As to Count 7, in addition to the sentences

1 imposed, you are likewise ordered to pay a fine of
2 \$2500 with regard to Count 3, \$2500 with regards to
3 Count 5, said fines to be consecutive.

4 With regard to Count 7, you are placed on
5 probation for a period of five years, said probation
6 to commence upon the termination of your last sentence;
7 that as a special condition of that probation, you are
8 ordered to pay a fine of \$2500 within the first year of
9 probation, or any time prior to the commencement of
10 probation, and you are not to participate in any form
11 or fashion which could be determined by this Court to
12 constitute a violation of your probation by using any
13 type of carrier for interstate transportation of any
14 material deemed obscene or to aid or abet in the
15 transportation of such material for any purpose to the
16 State of Florida.

17 In regard to the defendant Louis Peraino,
18 you, having been found guilty of Counts 1, 3, 5 and 7
19 by the jury, the Court does hereby impose sentence as
20 follows:

21 With regard to Count 1 of the indictment, you
22 are hereby remanded to the custody of the Attorney
23 General, or his duly authorized representative, for a
24 period of two years. You are ordered to pay a fine of
25 \$5,000. You are to remain in custody with regard to

1 that fine until such time as it is paid or you are duly
2 discharged as a matter of law.

3 As to Count 3 and Count 5, you are likewise
4 remanded to the custody of the Attorney General, or his
5 authorized representative, for a period of two years;
6 and as to each of said counts ordered to pay a fine of
7 \$5,000, as to each of said counts, said sentences, both
8 by way of imprisonment and fine, to run consecutive
9 with Count 1 of the indictment and consecutive to each
10 other.

11 As to Count 7 of the indictment, you are
12 hereby placed on probation for a period of five years,
13 said probation to commence upon the termination of your
14 sentence, and as a special condition of probation, you
15 are ordered to pay a fine of \$5,000 within the first
16 year of probation or any time prior to the commencement
17 of probation, and the defendant is not to participate
18 in any form or fashion what could be determined by this
19 Court to constitute a violation of his probation by
20 using any type of carrier for interstate transportation
21 of material deemed to be obscene, or to aid or abet in
22 the transportation of such material for any purpose to
23 the State of Florida.

24 With regard to Count 2 of the indictment, as
25 pertains to Mr. Himmelstein, and with regard to Counts

1 2, 4 and 6 as it pertains to all other defendants, it is
2 the view of the Court that no sentence would properly
3 be entered with regard to those matters since
4 sentences are being entered with regard to Counts 3, 5
5 and 7.

6 If, in fact, sentences can be imposed, it
7 would be the sentence of this Court to suspend the
8 entry of sentence as to each of those counts and place
9 the defendants on probation for a period of five years
10 as to each of those counts, said probation to run
11 concurrent with each other and concurrent with the
12 sentences imposed as to Mr. Himmelstein on Count 3 of
13 the indictment; with Mr. DiStephano and Mr. Balsamo,
14 with Counts 5 and 7 of the indictment; and with regard
15 to Mr. Peraino, Joseph and Louis, with regard to
16 Count 7 of the indictment in this case.

17 Mr. Schwartz, I would assume there is no
18 objection on your part to the defendants remaining out
19 on bond pending their appeal?

20 MR. SCHWARTZ: There is none, but prior to
21 that I assume that the sentence of Louis Peraino is to
22 be considered consecutive and not concurrent with---

23 THE COURT: That is correct. The sentence
24 of the Court is intended to be consecutive to whatever
25 pending sentences he has at the present time and not

1 concurrent therewith.

2 With regard to the defendants remaining out
3 on bond---

4 MR. SCHWARTZ: As I said, I have no objection.

5 THE COURT: Obviously, the appeal time in
6 this matter will not commence to run until the motions
7 which have been filed with the Court, and specifically
8 the motion for a new trial which has been filed with
9 this Court on February 25th, is, in fact, ruled upon.

10 I assume, Mr. Boitel, Mr. Kuhn, you have
11 discussed with your respective clients their rights to
12 appeal, and that has been arrived at?

13 MR. KUHN: Yes.

14 I have two further things for the record as
15 to the sentence, first.

16 For the benefit of the record in case it
17 comes up on appeal, even though I think the defendants
18 ever want to come back to this community directly or
19 indirectly, I would voice an objection as to the condi-
20 tions of probation as to their free exercise of their
21 First Amendment rights as being pre-censorship in
22 curtailment of the First Amendment rights without
23 adequate jurisdiction of the Court as a condition of
24 their probation---

25 THE COURT: So you don't misunderstand the

1 conditions of probation, it does not provide that they
2 cannot engage in transportation of sexually-explicit
3 material.

4 But if this Court--this Court finds that that
5 material is, in fact, obscene and makes a determination
6 of that fact, then, in fact, they would be considered
7 in violation---

8 MR. KUHN: I understood that to be the
9 effect rather than if a jury finds under proper indict-
10 ment those materials to be obscene.

11 THE COURT: That is correct.

12 MR. KUHN: Well, that is one of the bases of
13 my objection.

14 Even though I know the law is contrary to me
15 at this time, I think it should be preserved on appeal
16 that as to the consecutive sentences as to all the
17 counts named, as to all three of my clients, I would
18 object to as being in violation of double jeopardy
19 provisions of the United States Constitution in that
20 the facts constituting an overt act in a conspiracy and
21 the substantive act charged in Count 3 are identical.
22 Their involvement in each of those acts are identical,
23 and I think I would move that those sentences, and if
24 they remain consecutive, I would object to that as
25 being violative of my clients' due process under double

1 jeopardy.

2 THE COURT: All right. The motion will be
3 denied.

4 So the record is clear with regard to the
5 sentences imposed, Mr. Himmelstein has been sentenced
6 to nine months; Mr. DiStephano, Mr. Balsamo, eighteen
7 months; Mr. Joseph Peraino, three years, and a total
8 fine of \$10,000; and Mr. Louis Peraino, six years,
9 total fine of \$20,000.

10 If there be nothing further, this court will
11 be in recess.

12 MR. BOITEL: Your Honor, may I adopt Mr.
13 Kuhn's objections?

14 THE COURT: No question about that, Mr.
15 Boitel.

16 MR. BOITEL: Can I ask for one point of
17 clarification?

18 THE COURT: Yes.

19 MR. BOITEL: On the conditions of probation,
20 I believe since there have been a number of phrases
21 and modifiers, my understanding is, that Your Honor's
22 condition of probation is in reference to the State of
23 Florida---

24 THE COURT: To the State of Florida.

25 MR. BOITEL: To the State of Florida?

1 THE COURT: Yes, sir.

2 MR. BOITEL: Our objection to that would be
3 in addition to what Mr. Kuhn noted to the Court going
4 outside the jurisdiction of this Court, the Southern
5 District of Florida, and outside the jurisdiction as
6 to where this case was tried; that is, Dade County---

7 THE COURT: I understand.

8 The court will be in recess with regard to
9 the matter before it at the present time.

10 (Hearing concluded.)

11 - - - -

12
13 I certify that the foregoing is a correct
14 transcript from the record of proceedings
15 in the above-entitled matter.

16
17
18 _____
Date

Official Court Reporter

19
20 - - - -

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
PROBATION OFFICE

JERONE A. SAVAGE
CHIEF PROBATION OFFICER

UNITED STATES COURTHOUSE
1729 FIFTH AVENUE, NORTH
BIRMINGHAM, ALABAMA 35203
COM. (205) 731-1746
FTS 229-1746

POST OFFICE AND FEDERAL BUILDING
P.O. BOX 38, TALLADEGA 35160
COM. 362-3892

U.S. POST OFFICE AND COURTHOUSE
P.O. BOX 69, FLORENCE 35631
(205) 766-2566

FEDERAL BUILDING AND COURTHOUSE
P.O. BOX 1097 GADSDEN 35902
COM. (205) 547-5722

FEDERAL BUILDING AND COURTHOUSE
P.O. BOX 2629, TUSCALOOSA 35403
COM. (205) 758-6621

P O BOX 368, HUNTSVILLE 35804
COM (205) 534-2454 - FTS 871-1360

February 26, 1988

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Attention: Public Hearing Comment

Dear Commissioners:

I have studied the January 15 Temporary Amendments, and would recommend a permanent adoption of these amendments for submission to the Congress. The supplementary illustrations regarding multiple counts and criminal history computation were very thorough and particularly helpful in understanding these two aspects of the guidelines.

I believe that the proposed additional offense guideline 2A2.4 (Obstructing or Impeding Officers) is a very appropriate addition to the guidelines. In a recent case in our district, USA vs. Orbie Sellers, CR-87-P-321-S, a postal employee was charged with assaulting his supervisor. The appropriate guideline in this case was deemed to be 2A2.3 (minor assault), but an issue arose as to whether or not official victim would also be considered. After consulting with a commission staff member, the advisory opinion was that official victim would not apply since this was considered an employee/employer relationship. Therefore, I welcome the clarification of the new proposed guideline 2A2.4, which clearly states that 3A1.2 (official victim) does not apply under this guideline. I also agree that the specific offense characteristic 2A2.4(b)(1) should be added to sanction conduct that involved striking, beating, or wounding, which is what happened in the Sellers case in this district.

In another recent case in this district, USA vs. McCoy, CR-87-P-317-S, the defendant was charged with a violation of 49 USC 1472(m)(2), which involved making a false statement aboard an

aircraft that he possessed a bomb and gun. Since there was not a specific guideline for this offense, there was a great deal of discussion as to whether or not guideline 2A5.2 (Interference with Flight Crew Member or Flight Attendant) or guideline 2A6.1 (Threatening Communication) would apply. After consultation with the Commission, it was decided that guideline 2A5.2 would probably be the most analagous. Therefore, I welcome the proposed guideline 2A5.3 (Committing Certain Crimes Aboard Aircraft) as an addition to the guidelines regarding offenses aboard an aircraft. Although this guideline does not address 49 USC 1472(m)(2), it does broaden the available guidelines for consideration. In the same manner, proposed guideline 2A6.2 is also a welcome addition. Since this guideline is very similar to 2A6.1 (Threatening Communication), I believe it would be appropriate to add the specific offense characteristics to this new guideline that now apply to the Threatening Communications guideline. I would also recommend that the Commission consider adding 18 USC 32(c) to the statutory provisions listed under guideline 2A6.1 because this is specifically referenced in Appendix A, and because it is also very similar to the entire discussion about threats or false statements aboard an aircraft.

I have not had an opportunity to be involved with a CCE case since the guidelines became effective. However, based on my review of the proposed amendments to guideline 2D1.5, I believe that the guidelines should take into account whether during the course of and in furtherance of the enterprise the defendant caused injury to any person or used or sanctioned the use of violence. I would not favor the guideline taking into account the size of the enterprise and defendant's role in its operation. I believe the base offense level should remain at 32, and that prior drug convictions for which the defendant was sentenced prior to the time of indictment under 21 USC 848 should be part of the record and not part of the instant offense. As a side note to the commentary under this proposed guideline, it appears that under application note number 3, a typographical error was made in the first sentence where 18 USC 848 is quoted rather than 21 USC 848.

I appreciate the Commission giving those of us in the field an opportunity to be a part of the decision making process.

Sincerely,



Oscar J. Stephenson, Jr.
Supervising U.S. Probation Officer

OJS/mb

JOHN E. ACKERMAN

ATTORNEY AT LAW

808 Winbern
Houston, Texas 77002

ABANET - ABA 1310

(713) 237-9100
MCI Mail 204-9478

March 3, 1988

United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, DC 20004

Attn: Public Hearing Comment

Dear Folks:

This letter is in response to your February 16 invitation for comment about certain proposed changes and additions in the sentencing guidelines. I am primarily concerned about the proposed changes to section 2D1.5 (Continuing Criminal Enterprise).

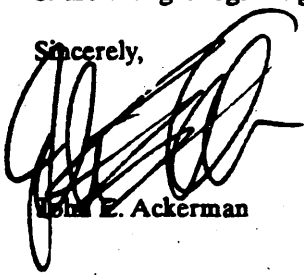
First of all, I believe the current base of 32 is sufficient for the behavior contemplated by the guidelines. The number of months can escalate rapidly if there is any significant criminal history.

Three questions are asked with regard to possible additional increments if certain facts are established. The first question deals with violence and injury. It has been my experience that if any violence or injury occurs it will become the subject of its own indictment or count thereof. It should not be counted against a defendant twice.

Taking into account the size of the enterprise creates the problem the guidelines are trying to solve. Twenty-five persons could be involved in a relatively small enterprise, typical, for instance, of amphetamine labs, where six persons could be involved in a huge continuing enterprise involving cocaine. Conceivable the leader of the cocaine enterprise would get a smaller sentence than the leader of the much smaller amphetamine enterprise. The number of persons involved bears little relationship to the size or nature of the enterprise. This kind of an approach could cause huge disparity.

For the record I oppose any of the suggested changes. The current numbers are more than adequate in view of the changes regarding parole.

Sincerely,



John E. Ackerman

UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND
PROBATION OFFICE

DAVID E. JOHNSON
CHIEF U.S. PROBATION OFFICER
CEDRIC C. EASTER
DEPUTY CHIEF U.S. PROBATION OFFICER
ROOM 8-100, U.S. COURTHOUSE
101 W. LOMBARD STREET
BALTIMORE 21201-2669

March 10, 1988

PRESIDENTIAL BUILDING
SUITE 700
6825 BELCREST ROAD
HYATTSVILLE 20782

PLEASE REPLY TO:
BALTIMORE OFFICE
962-4741

The Honorable William W. Wilkins, Jr., Chairman
The U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Re: Public Comment

Dear Chairman Wilkins:

I have been following the development of the Sentencing Guidelines since the first draft was published in September, 1986. I think that the October, 1987, revisions and commentary substantially improved the clarity of the guidelines as did the most recent January, 1988, amendments. However, I believe that some areas of the guidelines still appear inconsistent and some of the language in the manual needs clarity to make it possible to properly implement the guidelines in the Courts.

I strongly urge the Sentencing Commission to use its emergency amendment powers immediately to address the issues I have listed below that appear to be the most troubling. Action now will save District Court Judges and Probation Officers myriad hours of time and frustration spent trying to resolve an inconsistency or a lack of clarity each time it appears in a live case. Action now will enable those problems to be resolved quickly and efficiently by inserting some corrective pages into the Guidelines Manual.

I think that there is an inconsistency of language which occurs in the second chapter pertaining to guidelines for offenses where a determination of loss has to be made. Some guidelines pertaining to fraud and forgery refer to estimated or intended loss, while the guidelines under theft and robbery refer to property taken. I find this somewhat confusing since all of the tables for specific offense characteristics refer to loss. I hope that some language could be used that would be consistent throughout the property related guidelines. This change would make it easier to do computations and to know what needs to be taken into account among the various property related guidelines.

I also noted in Chapter 2, Section 2B3.1(b)(1), involving robbery, that the robbery of a financial institution or post

office is to be treated as if the loss is at least \$5,000. However, there could be a problem, as I see it, where no money is actually taken. Perhaps something can be done to clarify the guideline to provide that a one level increase be applied to any robbery of a financial institution or post office, unless there is a loss of a greater amount which could be used to increase the level using the actual dollar value if that is greater.

I noted when studying Part K of Chapter 2 that in 2K1.3, which pertains to transporting explosive devices, there appears to be an inconsistency of language. 2K1.3(b)(5) deviates from the language in the rest of the guideline and uses the term "firearm offense" where the other sections of this particular guideline consistently refer to offenses involving explosives.

In another guideline in Part K dealing with receipt, possession or transportation of firearms and other weapons, 2K2.3, there appears to be some problem with the language. The first specific offense characteristic increases the number of levels if firearms are actually distributed. However, I am not sure how this relates to a situation where firearms are transported but the sale is not consummated.

In Chapter 2, Guideline 2J1.4, Impersonation of a Federal Officer, I believe that some provision should be made to put additional gradations of the offense level into the guideline. Impersonation of a Federal Officer or Use of False Government Identification is most often an enabling offense for committing forgery or fraud. If some provision could be made to tie the offense level to the amount of loss, I believe a more accurate offense level could be attached to the individual act.

When I read Chapter 2, Part T involving income tax offenses, I was appalled to see that the guideline for Tax Evasion, 2T1.1, requires the computation of not only the amount of tax evaded, but also of the interest to the date of filing of an indictment or information. I think that it would be virtually impossible for a Probation Officer or for a Judge on the Bench to get an accurate accounting of the full tax loss using this method. It has been my experience that the Internal Revenue Service Agents have trouble deciding on the exact amounts of tax loss. I foresee that this guideline could cause a lot of dispute especially on cases that involve several years of tax evasion.

I have a great deal of concern about the lack of clarity and inconsistencies in Chapter 3 of the Guidelines Manual concerning adjustments. There are some real problems, as I see it, in

applying the adjustments unless some changes can be made to simplify the determination of a defendant's role in a conspiratorial case. These cases are complex at best. However, I think that the present scheme for determining whether somebody had an aggravating or mitigating role in an offense contains enough ambiguity to drag this determination on for hours without any possibility of real resolution. As I see it, it would be very easy to have a single defendant classified as having both an aggravating and a mitigating role in a given conspiracy depending on how a Probation Officer first looks at the case.

I think that the role in the offense adjustment in Chapter 3, 3B1.1, is, in a word, unworkable. I would suggest that some gradient of roles be worked out taking into account the number of persons involved in the conspiracy, and consolidating what may be ambiguous roles in the conspiracy into a graduated scale. I also think that more care needs to be given to defining the terms that are used to define the role in the offense. For instance, what determines whether a courier has a small amount of drugs? What constitutes a small amount? How will the courier know whether he has a small amount of drugs? Is it reasonable to expect that couriers will even know the amount?

Chapter 4, Part B, concerning career offenders and criminal livelihood is problematic in that the Criminal Livelihood Section, 4B1.3, does not seem specific enough in defining the target population. I believe that this section is probably intended to penalize someone who makes a great deal of money over a long period of time and is able to live well because of the income gained from criminal enterprise. However, I believe that the way the guideline is written, it provides a substantially wider net taking in those who happen to have no other source of income while engaged in a pattern of criminal conduct from which they derived very little money. I would urge that something be done to revise the language of this section to set a specific minimum dollar amount for having the criminal livelihood adjustment imposed.

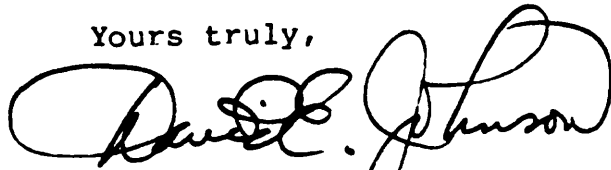
The section in Chapter 5 of the manual dealing with fines for individual defendants provides that the Court shall impose an additional fine amount that is at least sufficient to pay the cost to the Government of any imprisonment, probation or supervised release ordered. The present estimates are that the cost of probation is about \$1,000 per year and the cost of confinement is considerably higher. I am especially concerned about what this means for a working person who is only able to pay a small amount on his fine each month. Given that the fine and the additional cost of supervision will accrue interest, many people

will end up being under supervision for a full five years because they will never be able to pay off the balance due for supervision and their fine fast enough to retire the entire amount. I recommend that the Sentencing Commission consider making the provision for imposing the cost of supervision discretionary rather than mandatory so the sentencing judge can decide whether it is appropriate to impose these costs on the individual being sentenced.

I also urge the Sentencing Commission to promulgate guidelines for probation revocation or revocation of supervised release to give additional guidance to the Courts and to Probation Officers. I believe that more specific instruction would mean smoother administration of these proceedings.

I sincerely hope that the Sentencing Commission will be able to use its emergency powers to address these issues at the earliest possible time. The amount of time and effort that will be consumed by the Courts and the Probation Service attempting to resolve what appear to be inconsistencies or lack of clarity in the guidelines will be enormous compared to the time spent inserting the corrective pages.

Yours truly,

A handwritten signature in black ink, appearing to read "David E. Johnson". The signature is fluid and cursive, with a large loop at the end.

David E. Johnson
Chief U.S. Probation Officer

DEJ:pms

cc: The Honorable Alexander Harvey, II
Chief U.S. District Judge



U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director

Washington, DC 20534

March 8, 1988

Mr. William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Attention: Public Hearing Comment

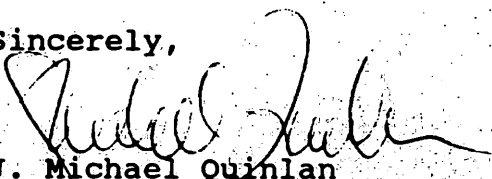
Dear Chairman Wilkins:

I am responding to your February 16, 1988, invitation for public comment on the January 15 temporary amendments to the sentencing guidelines.

The Bureau of Prisons wishes to make no comment on the temporary amendments. Most involve changes in the offense guidelines and we believe this is an area best left to those more directly involved in the sentencing process.

The Bureau is closely following guidelines developments and we appreciate the opportunity to comment. We may wish to respond to future developments that more directly effect the Bureau's operation.

Sincerely,



J. Michael Quinlan
Director

UNITED STATES DISTRICT COURT

**PROBATION OFFICE
DISTRICT OF NEW JERSEY**

**DAVID A. MASON
CHIEF PROBATION OFFICER
WILLIAM P. CARROLL
DEPUTY CHIEF PROBATION OFFICER**

March 8, 1988

**527 U.S. POST OFFICE & COURTHOUSE
P.O. BOX 459
NEWARK 07101-0459
(201) 645-6161**

Mr. William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1311 Pennsylvania Avenue
Suite 1400
Washington, D.C. 20004

RE: Proposed Guideline Amendments

Dear Mr. Wilkins:

I have taken the opportunity to review your proposed guideline amendments for public comment and will offer my thoughts as they pertain to the proposed amendments for Continuing Criminal Enterprise.

I would agree that the guidelines should take into account, and specify as appropriate offender characteristics those CCE convictions which reflect violence, force and threats. Any increase in the base offense level could be similar to those acts, which might occur during the commission of a bank robbery. Although certainly within the realm of narcotic trafficking and its relationship to continuing criminal enterprise ventures, society is always the victim, however, it would be most difficult to equate the effects of drug abuse to specific criminal enterprise.

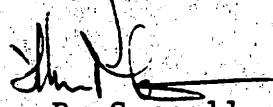
I also agree with the Commission's proposal that guidelines take into account the size of the enterprise and the specific defendant's role in its operation. Although there are certain law enforcement standards which measure if the U.S. Attorney's Office could prosecute a defendant under the continuing criminal enterprise statutes, beyond this minimum entry level, sizes of CCE organizations differ from district to district. It seems to me that the Commission may wish to increase guideline levels based on the size of the enterprise, the number of individuals supervised, the amount of illegal substances which are distributed over the course of the life of the enterprise, and as well as the life of the enterprise itself. A drug distribution organization which has a life of several years obviously would inflict more harm to the public than a group which flourished for a lesser period of time.

Based on my assessment of the proposed guideline changes, it would appear that the base offense level indeed should be raised a minimum of three consecutive levels.

I would tend to think that prior drug convictions stand alone and/or the sanctions of separate criminal courts for separate instances under state and federal laws. I would tend to believe that they should be counted under the defendant's criminal history but, moreover, if the pattern of criminal enterprise can indeed reflect significant drug activities based on convictions, I would think that some element of those convictions, i.e., time frame, amount of drugs, etc., can also be included under the CCE offense level to determine the organizer's culpability. In essence, I believe this is the spirit of the enterprise statutes.

Should you require any additional information, please let me know.

Very truly yours,



William P. Carroll, Deputy Chief
U.S. Probation Officer

WPC:pl

The Prison Project

1419 V Street, N.W.
Washington, D.C. 20009
202-332-7741

March 22, 1988

U. S. Sentencing Commission

Dear Chairman Wilkins,

The guidelines fail to take advantage of the rehabilitative services available in the community. Services provided in the community are more effective than services provided in the prison environment.

The Guidelines fail to take advantage of split-sentences. The Guidelines fail to recognize that community programs after imprisonment have proven effective. The Guidelines fail to recognize that offenders who have lengthy criminal records can be helped. The Guidelines fail to recognize that participation in appropriate, constructive programs as prison sentence alternatives can lower recidivism.

The Guidelines fail to recognize that the deterrent effect of imprisonment peaks at 6 months to one year. The Guidelines fail to recognize the impact of drugs on crime and fail to provide for effective alternative programs. The guidelines fail to recognize alternatives on supervised release for violent offenders. The Commission has failed to educate the public that 10 years of imprisonment is not 10 time the deterrent of 1 year. The Guidelines fail as an example for other states and for developing nations.

The following suggestions of simple language are put forward:

1. An offender is to receive a wholly or partly suspended term of imprisonment if he is willing to participate in an available, suitable alternative program. The amount of imprisonment suspended shall be sufficient to provide an incentive for the offender to complete the program.

2. The defense counsel shall be entitled to a postponement of sentencing if the court imposes, or is about to impose, incarceration, if the defense counsel needs to attempt to locate additional, suitable alternative programs.

Attached are excerpts of pertinent studies.

Very Truly yours,

Tom Donelson

Tom Donelson
Coordinator

DISTRICT OF COLUMBIA PRETRIAL SERVICES AGENCY

400 F Street, N.W. • Washington, D.C. 20001 • (202) 727-2911

JOHN A. CARVER III, ESQ.
Director

GEORGE F. MORIARTY JR., ESQ.
Deputy Director

MEMORANDUM

TO: Interested Parties
FROM: John A. Carver *John A. Carver*
RE: August 1987 Drug Test Statistics
DATE: September 15, 1987

Drug analyses by the Pretrial Services Agency during the month of August revealed a steady rise in the proportion of adult arrestees testing positive. The number of defendants testing positive for one or more of the five drugs screened was 1135 of the 1540 tested or 74% of all arrestees. (By contrast the percentage of positive test results during July was 72%.)

The percentage of arrestees testing positive for PCP increased from 44% in July to 47% in August. There was an increase in the percentage of defendants testing positive for cocaine during this period, up one percent from July, to an all time high of 52%. Among drug positive arrestees, 46% tested positive for multidrugs.

For purposes of comparison, test results are reported in the customary format, and a chart plotting monthly test result trends for the past twelve months is attached.

The breakdown of August 1987 test results is as follows:

Total positive for PCP -- 720 (47% of those tested, 63% of all positive)

Total positive for Opiates -- 244 (16% of those tested, 22% of all positive)

Total positive for Cocaine -- 801 (52% of those tested, 70% of all positive)

Total positive for Amphetamines -- 12 (.8% of those tested, 1% of all positive)

EXECUTIVE COMMITTEE

Chairman: DAVID J. MCCARTHY JR., ESQ., Professor, Georgetown University Law Center • HONORABLE PATRICIA M. WALD, Chief Judge, United States Court of Appeals for the District of Columbia Circuit • HONORABLE NORMA HOLLOWAY JOHNSON, Judge, United States District Court for the District of Columbia • HONORABLE WILLIAM C. PRYOR, Chief Judge, District of Columbia Court of Appeals • HONORABLE FRED B. UGAST, Chief Judge, Superior Court of the District of Columbia.

(2)

THE THERAPEUTIC COMMUNITY: STUDY OF EFFECTIVENESS

Social and Psychological
Adjustment of 400 Dropouts
and 100 Graduates from the
Phoenix House Therapeutic
Community

by

George De Leon, Ph.D.

Social Adjustment at Followup (1970-71 Cohort)

Drug Use

Any use of opioids declined dramatically to less than 5 percent of the graduates and 26 percent of the dropouts. Marijuana users decreased for dropouts and graduates.

Alcohol users increased for graduates, usually to a frequency of 1-3 days a week. However, among both the percent of daily users did not change.

Drug Treatment

Graduates showed a significant decline in the percentages entering drug treatment. For dropouts, the percentages of time in drug treatment increased somewhat over the pretreatment levels, particularly after the second year of followup.

Criminality

On all measures--criminal engagements, arrests, convictions and months in jail--there was a significant decline in followup compared with the year before treatment. Graduates showed little evidence of criminality, while for dropouts criminal involvement was at a reduced level.

Employment

On all measures of employment--salary, job rank, months working--dropouts and graduates showed significant improvement. The graduate change was significantly greater.

Success Rates

Across all years of followup, 31 percent of the dropouts remained best successes (no crime and no drug use) compared with 75 percent of the graduates; 56 percent of the dropouts and 93 percent of the graduates improved over their pretreatment status.

Social Adjustment at Followup (1974 Cohort)

Drug Use

Any opioid use declined to zero for graduates and to less than 18 percent for dropouts. The proportions claiming some use of marijuana and alcohol showed modest increases for both groups but usually to a frequency of 1 to 3 days a week.

Drug Treatment

No graduate entered drug treatment during followup. For dropouts the percentage of people in drug treatments declined significantly compared to their pretreatment levels, but percent time in drug treatment did not change.

Criminality

On all measures, there was a significant decline in followup compared with the year before treatment. Graduates showed little evidence of criminal activity, while for dropouts criminal involvement was at a significantly reduced level.

Employment

On all measures of employment--salary, job rank, months working--dropouts and graduates showed significant improvement. The graduate change was significantly greater.

Success Rates

Across 2 years of followup, 34 percent of the dropouts remained best successes (no crime and no drug use) compared with 68 percent of the graduates; more than 56 percent of the dropouts and 94 percent of the graduates improved over their pretreatment status.

Phoenix House

Criminal Activity of Dropouts

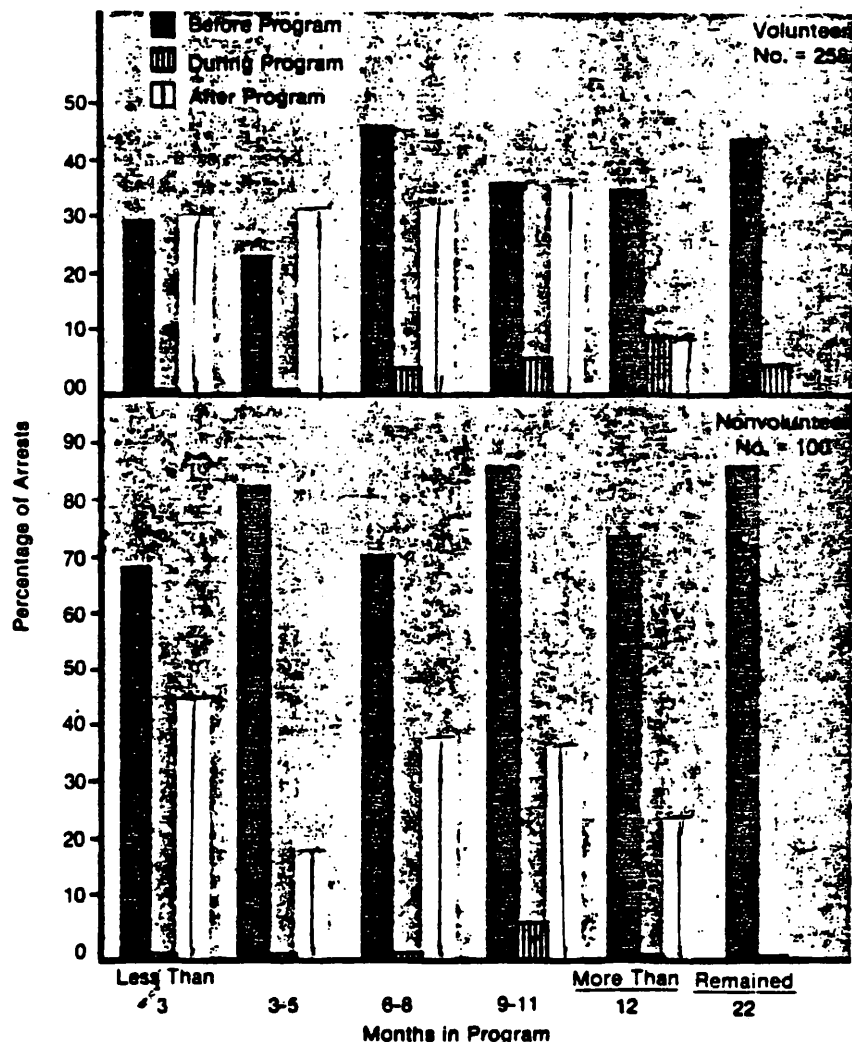
George De Leon, PhD; Sherry Holland; and Mitchell S. Rosenthal, MD

This description convincingly reveals the feasibility of the Phoenix Program's influence on the social behavior of its members in or out of a Phoenix community.

Within the last two years data have been systematically gathered which demonstrate the effect of the Phoenix Program in terms of its therapeutic and educational goals.^{2,3} Further findings on personality change and reductions in psychopathological signs are currently being prepared for publication. However, in terms of socialization process, the success of any treatment program for the addict must be considered in terms of its effect on drug-related criminal activity, other criteria of success notwithstanding, eg, steady employment, stability of marital and social relationships.

The general purpose of the present study, therefore, was to explore the relationship between criminal activity and residency in a Phoenix House therapeutic community. Most Phoenix residents do not remain the 18 to 24 months necessary to complete the program. Overall, of those admitted to the Phoenix House Program, 40% remain more than 12 months. In assessing effectiveness of treatment, it is essential to study the population that "splits" or drops out. Specifically, arrest rates were determined during one year prior to and one year following residence in a Phoenix facility, for a sample of addicts who failed to complete the program. Comparisons were made with data on a sample of addicts who remained and were in the last stages of the pro-

Fig 1.—Percent arrests for dropouts and for addicts who remained within Phoenix Program. For dropouts percents are for periods during, one year prior to, and one year after the program; while for remaining group, percents are for periods 22 months before and 22 months after admission. Data are for both volunteer and nonvolunteer residents.



Synopsis and Index to the Phoenix House Article

"Phoenix House, Criminal Activity of Dropouts" by George De Leon, PhD; Sherry Holland; and Mitchell S. Rosenthal, MD, published in the Journal of the American Medical Association, November 6, 1972, Volume 222, No. 6.

1. Security of the Phoenix House Program:

- a. The number of persons arrested while participating in Phoenix House was 2 arrests out of 358 participants over a 4 1/2 year period, see Page 688, Column 3, last two lines of the last paragraph.
- b. The percentage of arrests during residence, including periods when offenders had left the program but were later re-admitted, was 2.8% and 4.8% which compares with a 4.5% rate for the total U.S. population, see Page No. 688, third column.
- c. The small number of arrests while offenders are in residence in the program is illustrated graphically on Page No. 687, Figure 1. The middle bar, which has vertical lines, represents the percentage of arrests while in the program, and the percentages are drastically reduced in comparison with arrest rates prior to being placed in the program. The levels for most groups are below the normal level for the general population of the United States.

2. Recidivism of offenders ordered by the courts as part of a sentence had a larger decrease in recidivism than did voluntary participants, see Page 689, first column, first paragraph, and the second column, last paragraph. Many offenders being sentenced are willing to participate in a stringent program of the Phoenix House type, but are not provided any incentive, such as a suspension of a portion of a term of imprisonment.

3. Older offenders, with lengthy criminal records, have a more greatly decreased rate of recidivism after participating in the program than the decrease experienced by younger offenders, with shorter criminal records, see Page No. 689, Column 2, last paragraph. Currently, many repeat offenders who are willing to participate in a stringent program are given lengthy terms of imprisonment without any program to reduce the high rate of recidivism after incarceration.

4. Some offenders who receive sentences to stringent programs such as Phoenix House will walk away from the program. In order to develop an offender's self-discipline, the doors of

the program are monitored, but not locked. Proper authorities are promptly notified when an offender leaves the program, but is there a backlash effect making the offenders worse criminals than before? The statistics demonstrate that there is no backlash effect and that even offenders who participate for less than three months show a significantly reduced rate of recidivism after walking out of the program, see page 687, Figure 1.

5. For offenders who completed the full 22 month program, there was a 90% decrease in the rate of arrest in comparison with rates prior to entering the Phoenix House program, see Page 689, Column 2, Line 4 and Page 688, Figure 2.



Superior Court
of the District of Columbia
Washington, D.C. 20001

Fred B. Ugast
Chief Judge

September 15, 1986

The Honorable Marion S. Barry
Mayor of the District of Columbia
District Building
Washington, D.C. 20004

Dear Mayor Barry:

A recent letter from Second Genesis, Inc. has informed us that there is no available bed space at Second Genesis at the present time and for sometime in the future. Additional inquiry has revealed that negotiations, with the Department of Human Services, regarding the addition of sixty-five adult slots (to the existing seventy-five adult slots provided currently for District of Columbia residents) have been unsuccessful. On behalf of the judges of the Superior Court, I strongly urge you to do whatever is possible to find the funds for the proposed sixty-five slot expansion.

In addition, if at all possible, basic funding for residential drug treatment programs should be expanded since we rely quite heavily on these services for incarceration alternatives for defendants with drug problems. Further, as I am sure you realize, the recent and substantial increase in drug arrests as a result of operation "Clean Sweep" has exacerbated the already critical shortage of these services.

Knowing that drug prevention and drug treatment is as high a priority concern for you as it is for this Court, I am certain that you will find a way to provide these urgently needed resources.

Sincerely,

Fred B. Ugast
Fred B. Ugast
Chief Judge

Date September 16, 1986

Sidney Shankman, M.D.

Address: Second Genesis, Inc.

Attn: Larry P. Polansky
Executive Officer

Please note that the attached letter was
also addressed and sent to David Clarke
and Wilhelmina Rolark.

7

Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates

Alfred Blumstein, Jacqueline Cohen,
and Daniel Nagin. *Editors*

PANEL ON RESEARCH ON DETERRENT
AND INCAPACITATIVE EFFECTS

Committee on Research on Law
Enforcement and Criminal Justice
Assembly of Behavioral and Social Sciences
National Research Council

NATIONAL ACADEMY OF SCIENCES
Washington, D.C. 1978

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effective crime rate. Thus, using the e
variations in the individual parameters (q , J , and λ), can be
Figure 3 presents $1 - \eta$ (the percentage reduction from the potential
level of crime) as a function of qJS and λ . The reduction in crime is
larger for larger values of qJS . Interestingly, the level of incapacitative
effectiveness (percentage reduction in crime) varies most at the lowest
levels of qJS , and tapers off as qJS increases. This larger variability at
low values of qJS is more pronounced the higher the value of λ . As with
 qJS , the differences in impact on crime are greatest for the lower

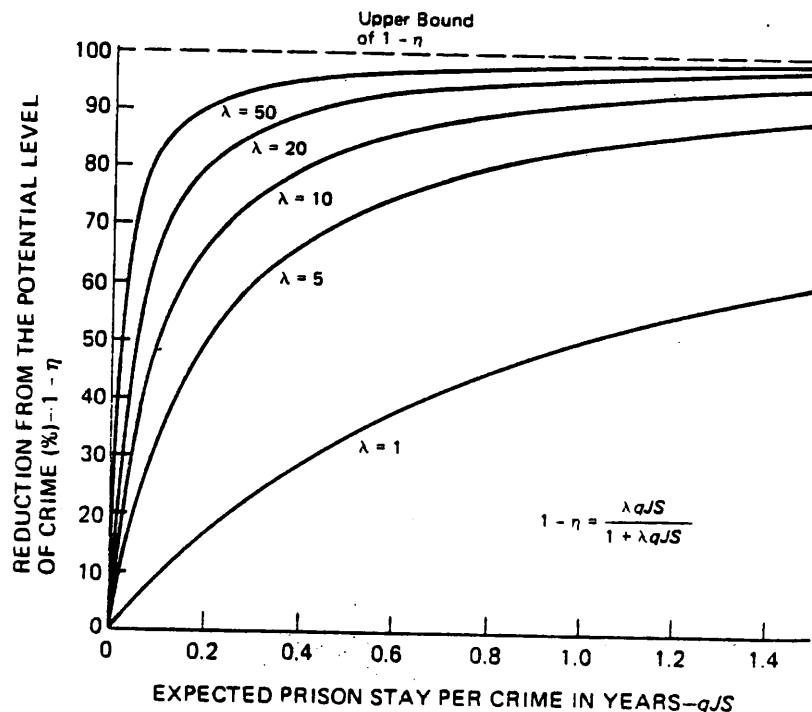


FIGURE 3 Percentage reduction from the potential level of crime ($qJS=0$) as a function
of qJS and λ . The expression $1 - \eta = (\lambda qJS) / (1 + \lambda qJS)$ is from Shinnar and Shinnar
(1975).

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[DETERRENCE PEAKS AT 4 MONTHS JAIL]

8.

The Economic Cost of Crime to Victims

Bureau of Justice Statistics
Special Reports are prepared
by BJS staff and
Frederic L. Sedgwick,
or for data analysis.
Brook, publications
administers their
assisted by Millie
Joyce M. Stanford.
as written by
Shenk and Patsy
3 statisticians.

April 1984, NCJ-93450

Table 2. Personal and household crimes: Total and median economic losses, by type of crime, 1981, 1980, and 1975

Type of crime	Total loss (in millions)		Median loss	Loss quartiles
	in current dollars	in 1981 constant dollars		
Personal sector				
1981 (16,371,000)	2,782	2,782	45	15-45-135
1980 (15,270,000)	2,362	2,608	40	15-40-120
1975 (16,378,500)	1,531	2,587	22	7-22-70
Crimes of violence				
1981 (1,742,500)	651	651	80	24-80-250
1980 (1,493,400)	507	560	77	20-77-200
1975 (1,409,300)	329	556	43	12-43-130
Rape				
1981 (56,100)	20	20	145	60-145-400
1980 (50,600)	23	25	50	15-50-179
1975 (53,700)	15	25	30	15-30-130
Robbery				
1981 (954,600)	421	421	85	25-85-300
1980 (757,600)	283	312	85	25-85-255
1975 (758,400)	184	311	43	11-43-145
Assault				
1981 (731,900)	210	210	64	20-64-200
1980 (685,200)	200	221	65	20-65-175
1975 (597,100)	130	220	43	12-43-120
Crimes of theft				
1981 (14,628,400)	2,130	2,130	40	15-40-122
1980 (13,776,600)	1,855	2,047	40	14-40-107
1975 (14,969,200)	1,202	2,031	20	7-20-65
Personal larceny with contact				
1981 (538,700)	64	64	50	23-50-120
1980 (479,400)	43	47	39	17-39-100
1975 (460,900)	34	57	30	11-30-85
Personal larceny without contact				
1981 (14,089,700)	2,066	2,066	40	15-40-124
1980 (13,297,200)	1,812	2,000	40	14-40-110
1975 (14,508,300)	1,168	1,974	20	7-20-65
Household sector				
1981 (15,431,300)	8,129	8,129	65	20-65-285
1980 (15,139,700)	7,724	8,525	60	18-60-250
1975 (14,328,900)	4,037	6,822	40	10-40-150
Burglary				
1981 (5,309,000)	4,127	4,127	160	40-160-645
1980 (4,958,300)	3,561	3,930	150	35-150-550
1975 (4,831,000)	1,624	2,745	85	20-85-300
Household larceny				
1981 (9,039,900)	1,249	1,249	40	13-40-100
1980 (9,150,700)	1,310	1,446	40	12-40-100
1975 (8,397,300)	608	1,028	20	7-20-68
Motor vehicle theft				
1981 (1,082,500)	2,754	2,754	1,500	327-1,500-4,000
1980 (1,030,700)	2,854	3,150	1,300	400-1,300-4,300
1975 (1,100,500)	1,806	3,052	830	250-830-2,200

SEE NOTE, table 1: Because medical expenses, damage losses, and cash and theft losses can all result from a single victimization, the estimate of the number of victimizations in parentheses does

not equal the sum of the entries from the tables that follow. When more than one form of loss occurred during a single victimization, the loss was summed.

9.

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9.

ANNUAL REPORT

FISCAL YEAR 1986

DISTRICT OF COLUMBIA

BOARD OF PAROLE



Government of the District of Columbia
Marion Barry, Jr., Mayor

	FY 86	Projected FY 87	Projected FY 88
PAROLE GRANTS*			
ADULT			
Parole Grants	1,129	1,223	1,540
Grants to Work Release	296	320	388
Total Grants	1,425	1,543	1,928
YOUTH			
Parole Grants	214	231	217
Grants to Work Release	128	139	167
Total Grants	342	370	384
Total Parole Grants	1,767	1,913	2,312
POST RELEASE REVOCATION ACTIONS			
Parole Warrants Issued	1,019	1,352	1,798
Parole Revocation Hearings	875	947	1,192
Parole Revocation Actions			
ADULT			
Criminal	252	273	322
Technical	270	292	345
Total	522	565	667
YOUTH			
Criminal	59	64	76
Technical	111	120	142
Total	170	184	218
Total Technical and Criminal Revocation	692	749	885

10

1985 ANNUAL REPORT

DISTRICT OF COLUMBIA COURTS

TABLE 13
SUMMARY OF CRIMINAL ACTIVITY 1985

	Branch				Total
	Felony	U.S. Misdemeanor	Traffic	D.C. Misdemeanor	
Pending January 1	2,488	3,328	2,259	469	8,544
Filed	6,160	19,443	12,440	5,081	43,124
Reinstated	839	2,741	4,229	567	8,376
Transferred In	—	600	—	—	600
Total to be Disposed	9,487	26,112	18,928	6,117	60,644
Dispositions					
Prior to Adjudication					
No Papers	—	5,843	1,997	2,037	9,877
Nolle Prosequi	19	3,704	3,484	1,083	8,290
Other	15	3	26	7	51
Total	34	9,550	5,507	3,127	18,218
By Court					
Jury Trials	910	694	19	5	1,628
Court Trials	48	571	170	70	859
Pleas	4,377	7,454	3,165	400	15,396
Dismissed/DWP	855	1,578	260	103	2,796
Incompetent to Stand Trial	28	7	—	—	35
Security Forfeited	—	—	1,654	1,075	2,729
Other	9	10	—	—	19
Total	6,227	10,314	5,268	1,653	23,462
Placed on Inactive Status					
Absconded	733	1,768	4,219	841	7,561
Mental Observation	89	82	12	32	215
Pretrial Diversion	—	1,229	1,900	—	3,129
Traffic School	—	—	122	—	122
Total	822	3,079	6,253	873	11,027
Transferred Out	48	—	—	—	48
Total Dispositions	7,131	22,943	17,028	5,653	52,755
Pending December 31	2,356	3,169	1,900	464	7,889