

Statement of

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on behalf of

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before the

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My name is Barry J. Portman, and I am the Federal Public Defender for the Northern District of California. I appear today to present the views of the Federal Public and Community Defenders.

There are presently more than 40 Federal Public and Community Defenders organizations in the United States. Federal Public and Community Defender Organizations operate under the authority of 18 U.S.C. § 3006A and exist to provide criminal defense and related services in federal court to persons financially unable to afford counsel. We appear before magistrates, United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

Federal Public and Community Defenders represent the vast majority of defendants in federal court. We represent persons charged with frequently-prosecuted federal crimes, like drug distribution, and with infrequently-prosecuted federal crimes, like sexual abuse. We represent persons charged with white-collar crimes, like bank fraud, and persons charged with street crimes, like first degree murder. Federal Public and Community Defenders have, in short, a great deal of experience with the guidelines. Based upon that experience, we are pleased to offer our comments on the proposed amendments to the Federal Sentencing Guidelines Manual that the Commission has published in the Federal Register.

Before turning to specific proposed amendments, we have several general observations. First, we are concerned that the Commission, apparently inadvertently, is changing the nature of the guidelines from charge-offense with real offense elements, to real offense.

As the Commission itself has indicated, in drafting the initial set of guidelines

one of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing).¹

The Commission's first effort to draft a set of guidelines incorporated a pure real offense system. The Commission found, however, that a real offense system was impractical and "risked return to wide disparity in sentencing practice".² The Commission then opted for the present system, one based on the offense charged but with "a significant number of real offense elements".³

Several of the proposed amendments would alter the present system by converting a guideline to a real offense guideline. We believe that this approach is wrong. The Commission, for good reasons, has rejected a comprehensive real offense system and should not, ad hoc, abandon that decision. If the Commission wants to make a fundamental alteration of the system, the Commission should tackle the issue head-on and across-the-board. The problems

¹U.S.S.G. Ch. 1, Pt. A(4)(a), at 1.4.

²Id. at 1.5.

³Id.

that the Commission identified when it rejected a comprehensive real offense system are only magnified by the creation of a real offense system ad hoc.

We are not endorsing a real offense system. Indeed, we have strong reservations about a system in which the charge that the government has proved beyond a reasonable doubt would serve only to set a maximum and otherwise would be virtually irrelevant to determining punishment. Rather, we are suggesting that a major alteration of the guideline system ought to be undertaken directly and comprehensively, not inadvertently and on an ad hoc basis.

A second area of concern to us involves responding to an enactment that increases a statutory maximum. Congressional action to increase a maximum for an offense should not automatically result in a general increase in the offense levels of the guideline applicable to that offense. A statutory maximum sets an appropriately severe punishment for the most aggravated form of the offense. An increase in the maximum means that Congress believes that the most aggravated form of the offense should be treated more severely, but does not necessarily mean that Congress believes that the heartland form of the offense should be treated more severely.

Our final area of concern involves the sufficiency of the material available to explain and justify what the Commission is proposing. Some explanations in the "Reason for Amendment" sections do little more than restate the proposed amendment. Others make vague, generalized statements that do not identify the problem being addressed and the rationale for the solution to the

problem. Staff memoranda can be helpful, but they are not accessible to all parties who are interested in guideline changes. They are, moreover, of inconsistent quality. Data presented, for example, may not support the conclusion reached.

A major deficiency in all of the supporting material, whether the explanations in the "Reason for Amendment" sections or the staff memoranda, is the failure to present data about, and analyze the impact of the proposal on, federal prison population. As of the end of last month, there were 60,772 inmates in federal prison facilities with a capacity to hold 38,172, according to the Federal Bureau of Prisons. Federal prisons today are operating at 160% of capacity.

Congress has mandated that the Commission, in formulating guidelines, "take into account the nature and capacity of the penal, correctional, and other facilities and services available."⁴ Congress further provided that "the sentencing guidelines . . . shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission."⁵ Congress intended that the Commission use prison impact data as a part of its decision-making process.⁶ Good faith compliance with the Congressional mandate

⁴18 U.S.C. § 994(g).

⁵Id.

⁶See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983) ("The purpose of the requirement is . . . to assure that the available capacity of the facilities and services is kept in mind when the guidelines are promulgated.").

would seem to require that prison impact data be available early in the amendment cycle. Deciding to amend a guideline and then generating data to show the impact of the amendment on federal prisons does not comply with the letter or spirit of the Congressional mandate. Generating the data just before voting to approve an amendment might comply with the letter, but does not comply with the spirit, of the Congressional mandate.

Amendment 7 -- § 2B3.1 (Robbery)

The Commission has asked for comments on three proposed amendments to the robbery guideline. Proposed amendment 7(A) would increase the enhancement of subsection (b)(1) from 2 levels to 4 levels. Proposed amendment 7(B) would increase the weapon enhancement of subsection (b)(2) by one to 4 levels. Proposed amendment 7(C) would add a special instruction increasing the offense level if the defendant committed one additional robbery (2-level increase), 2 additional robberies (3-level increase), 3 or 4 additional robberies (4-level increase), or 5 or more additional robberies (5-level increase). We oppose all three of these proposals.

Amendment 7(A)

The Commission is proposing to increase the enhancement for subsection (b)(1) in order "to more adequately reflect the seriousness of this offense." The available evidence, however, indicates that current sentences, rather than being too low, are too high. In bank robbery cases sentenced between January 19, 1989

and June 30, 1990, courts sentenced below or at the bottom of the guideline range in 41.9% of the cases (below = 11.6%; bottom = 30.3%), and sentenced above or at the top of the guideline range in only 27.2% of the cases (above = 4.8%; top = 22.4%).⁷ For cases sentenced under the guideline in effect starting November 1, 1989, the difference is even greater: Courts sentenced below or at the bottom of the range in 51.6% of the cases (below = 8.1%; bottom = 43.5%), and sentenced above or at the top of the range in 24.2% of the cases (above = 4.8%; top = 19.4%).⁸ If subsection (b)(1) is to be modified to reflect more adequately the seriousness of bank robbery, the enhancement should be reduced, not increased.

Although the Commission seems to be concerned only with bank robbery,⁹ subsection (b)(1) also covers post offices. The Commission has presented no data whatsoever about sentences for robberies involving post offices, so there is no factual basis for concluding that the enhancement of subsection (b)(1) inadequately reflects the seriousness of robbery of a post office.

Amendment 7(B)

The Commission's prime concern with the present weapon enhancement appears to be with prosecutorial handling of violations of 18 U.S.C. § 924(c). The Commission states that

⁷See A. Purdy, Report of the Bank Robbery Working Group, at Appendix A (Dec. 6, 1990).

⁸See id. at Appendix B.

⁹The "Reason for Amendment" makes available "the Commission's study on bank robbery".

it is clear from the cases sentenced that, notwithstanding the clear intent of the Justice Department's 'Thornburgh Memorandum' on plea bargaining, prosecutors are not consistently charging 924(c) when a weapon is possessed during a bank robbery. Therefore, the Commission faces a policy question whether it should act to eliminate or limit the resulting disparity.

The Commission, however, has no data about why prosecutors are not charging under section 924(c). A failure to charge may be based upon a variety of reasons, from a weak case to a perception that the penalty is sufficient without a mandatory 5 year consecutive term. Before making any change, the Commission should collect and analyze data about the reasons for failing to utilize section 924(c).

The Commission has also suggested that the weapon enhancement should be increased in order "to more closely accommodate Congress' view of the seriousness of committing a felony while possessing a weapon". The Commission does not provide any evidence that the present enhancement fails to accommodate Congress' view about severity. The available evidence does not indicate that sentences in bank robbery cases where a weapon is used or possessed are inadequate. Commission data show that, in bank robbery cases under 18 U.S.C. § 2113(a) sentenced from January 1, 1989 through June 30, 1990, courts sentenced below or at the bottom of the guideline range in 39.1% of the cases (below = 8.6%; bottom = 30.5%), and above or at the top of the range in 32.2% of the cases (above =

5.8%; top = 26.4%).¹⁰ For cases sentenced after the November 1, 1989 amendment, the data is even more striking: Courts sentenced below or at the bottom of the range in 43.4% of the cases (below = 6.7%; bottom = 36.7%), and above or at the top of the range in 30.0% of the cases (above = 6.7%; top = 23.3%).¹¹

Amendment 7(C)

The Commission, in proposed amendment 7(C), seeks to address its concern that

the guidelines may result in lower sentences in certain multiple robbery cases than under pre-guideline practice, and that variations in plea bargaining practices in different U.S. Attorney's offices with respect to dismissing or not pursuing provable counts of bank robbery may result in unwarranted disparity.¹²

The Commission apparently uses "may" because there is no data that indicate that sentences in multiple robbery cases are lower under the guidelines than under preguideline practice or that plea bargaining practices have resulted in unwarranted disparity.

There is, moreover, no evidence that the failure to account for uncharged or dismissed robberies is perceived by courts as resulting in sentences that are too low. The Commission's data is,

¹⁰See A. Purdy, Report of the Bank Robbery Working Group, at Appendix D (Dec. 6, 1990). For cases under 18 U.S.C. § 2113(d), courts sentenced below or at the bottom of the range in 34.7% of the cases (below = 2.8%; bottom = 31.9%) and above or at the top of the range in 27.7% of the cases (above = 8.3%; top = 19.4%). Id.

¹¹Id. at Appendix E.

¹²Emphasis added.

at best, inconclusive. For example, while the upward departure rate for defendants with uncharged or dismissed robberies is roughly twice that for defendants without uncharged or dismissed robberies, so is the downward departure rate.¹³

The special instruction is unnecessary because § 4A1.3, which recommends a departure if the defendant's criminal history score is inadequate, enables the court to account for dismissed or uncharged robberies. Further, the special instruction is a move towards a real offense system of sentencing, a system that the Commission has rejected as impractical and risking "return to wide disparity in sentencing practice."¹⁴ If the Commission wants to move to a real offense system, it should amend chapter 1, part A(4)(a) and §

¹³See A. Purdy, Report of the Bank Robbery Working Group, at Appendix H.

The Commission staff memorandum concludes that "on balance it appears that in cases in which robberies were committed, but not reflected in the guideline range either because the charges were dismissed or not brought, the judges tended to sentence the defendant more harshly relative to the applicable guideline range--as compared to cases in which the guideline range was relatively higher because all robberies were accounted for by conviction." *Id.* at 20. The memorandum notes that "of those cases involving dismissed or uncharged bank robberies the sentences fell less often at the bottom of the guideline range than cases in which all robberies resulted in conviction (28.5% of cases with dismissed or uncharged counts versus 45.1% of cases with all robberies accounted for by convictions)". *Id.*

Appendix H of the staff memorandum, however, indicates that sentences below, or at the bottom of, the guideline range occurred in 58% of the cases with all robberies accounted for by convictions (below = 12.9%; bottom = 45.1%), and in 54.6% of the cases with uncharged or dismissed robberies (below = 26.1%; bottom 28.5%). Appendix H also discloses that sentences above, or at the top of, the guideline range occurred in 20.4% of the cases with all robberies accounted for by convictions (above = 4.3%; top = 16.1%), and in 21.4% of the cases with uncharged or dismissed robberies (above = 9.5%; top = 11.9%).

¹⁴See U.S.S.G. Ch. 1, Pt. A(4)(a), intro. comment.

1B1.2. The Commission should not, ad hoc and without further study, move toward a system in which the charge that the government must prove beyond a reasonable doubt is irrelevant to determining the sentence (other than setting a maximum).

**Amendment 8 -- § 2B3.2 (Extortion by Force
or Threat of Injury or Serious Damage)**

The Commission has three proposed amendments and one request for comment. Proposed amendment 8(A) would amend subsection (b)(1) to increase the floor amount from \$2,500 to \$10,000 and to require use of the robbery loss table instead of the burglary loss table. Proposed amendment 8(A) would, in addition, add a new paragraph to subsection (b) to require a 2-level increase if the offense involved a threat of death, bodily injury, or kidnapping and a 4-level increase if such a threat were directed at "numerous" victims.¹⁵ Proposed amendment 8(B) would amend present subsection (b)(2) requiring an enhancement "if the offense involved preparation to carry out a threat of death, serious bodily injury, or kidnapping, or if the participant(s) demonstrated the ability to carry out such threat; or the offense involved product tampering or attempted product tampering". The proposed enhancement is 3 to 5 levels. Proposed amendment 8(C) would amend subsection (b) by adding three new paragraphs enhancing the offense level if the offense "was part of a pattern of conduct involving [organized

¹⁵The Commission has also bracketed language that would require an increase to level 24 if the offense level following the 4-level increase is less than 24.

crime] [organized criminal activity]"; "was part of a larger pattern of extortion over time or extended to more victims than taken into account in the count(s) of conviction"; or "was to the family of the victim and such threat lasted for a period of time". Finally, the Commission, in proposed amendment 8(D), seeks comment about whether the amount calculated under subsection (b)(1) should represent more than the greater of the amount demanded or obtained.

Amendment 8(A)

The purpose of proposed amendment 8(A) is to treat extortion by force or threat the same as robbery.¹⁶ We do not believe that extortion should be treated as equivalent in seriousness to robbery. The Commission has presented no data comparing the fact patterns in extortion and robbery cases. The typical robbery involves an immediate threat to the victim. The typical extortion does not, enabling the victim to seek assistance from law enforcement authorities. Extortion, moreover, can arise from an attempt to collect debts. The defendant in such cases, unlike robbery defendants, can have a plausible claim of right to the victim's property.

We believe that it would be premature to add the two proposed enhancements based upon the nature of the threat. The Commission has presented no data indicating how often cases involving threats of death, serious bodily injury, or kidnapping, and cases involving such threats to "numerous" persons, arise -- and how sentencing courts deal with those cases under the present guideline. The

¹⁶See proposed amendment 8(A), reason for amendment.

proposed enhancement for threats to "numerous" victims, moreover, is ambiguous. How many people does it take to be "numerous"? The failure to define the key term used in the enhancement is likely to lead to unjustifiably disparate results in application of the proposed enhancement.

Amendment 8(B)

The Commission has not stated a purpose for proposed amendment 8(B)¹⁷ and has not presented any data suggesting that the proposed enhancement is necessary. We do not know the frequency with which cases involving preparation, demonstrated ability, or product tampering occur and how sentencing courts deal with them under the present guideline. We therefore believe it would be premature to adopt proposed amendment 8(B).

Amendment 8(C)

The Commission has not stated a purpose for proposed amendment 8(C) and has not presented any data that indicates that the proposed enhancements are necessary. Proposed subsection (b)(6), dealing with ["organized crime"] ["organized criminal activity"], does not define what is meant by those terms. Proposed subsection (b)(8), which applies if the offense "was to the family of the victim" and the threat "lasted for a period of time", does not define what is meant by a "period of time". The failure to define a key term used is likely to lead to unjustifiably disparate results in application of the proposed enhancement.

¹⁷The "Reason for Amendment" section of proposed amendment 8(B) simply describes what the enhancement is.

Amendment 8(D)

The Commission solicits comment about whether the amount calculated under subsection (b)(1) should represent more than the greater of the amount demanded or obtained.¹⁸ We do not believe that any change is necessary. There is no evidence to suggest that the present formulation understates the seriousness of the offense. Any modification of the enhancement along the lines outlined by the Commission will be complex, for the actual loss to the victim may not be simple to calculate. For example, if a victim purchases a home security system, the expenditure is not a complete loss to the victim if the victim continues to use the system.

**Amendment 11 -- § 2D1.1 (Unlawful Manufacturing,
Importing, Exporting, or Trafficking
(Including Possession with Intent to Commit these Offenses)),
§ 3B1.2 (Mitigating Role)**

The Commission requests comment about whether the guidelines rely too heavily on drug quantity to determine punishment, particularly for less culpable aiders and abettors. We believe that basing the offense level primarily on quantity in drug cases results in an offense level for a minimal or minor participant that is often so high that the adjustments authorized by § 3B1.2 do not adequately reduce the offense level to reflect the defendant's lesser role.

¹⁸It is unclear from the Commission's description of the proposal whether the "other losses" are to be another alternative or are to be added to the greater of the amount demanded or obtained.

Once a drug offense reaches a certain scale, no significant purpose is served by making the offense level of a minimal or minor participant dependent upon quantity. As a former Assistant United States Attorney has noted, "many drug defendant appear to be easily replaceable cogs in the vast drug distribution machinery. These defendants have quite different levels of culpability than the king pins who dominate the drug business."¹⁹

We recommend that the Commission address the problem directly along lines outlined in the January 3, 1991 letter sent to Chairman Wilkins by Thomas W. Hillier, II, the chair of the legislative subcommittee of the Federal Public and Community Defenders.

**Amendment 13 -- § 2D1.1 (Unlawful Manufacturing,
Importing, Exporting, or Trafficking
(Including Possession with Intent to Commit these Offenses))**

The rationale behind the new special instruction, which enhances the offense level if the controlled substance is d-methamphetamine, is to implement section 2701 of the Crime Control Act of 1990. We do not believe that the Commission's solution responds to what Congress intended and that, given the technical problems involved, Congress should be asked for clarification.

¹⁹Young, Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability, 3 Fed. Sent. R. 63 (1990).

Methamphetamine, according to the DEA, "exists in free base form and in salt form, generally the hydrochloride salt."²⁰ While there are some cases involving the free base form, "usually such cases are lab cases in which the perpetrators were arrested before they had the opportunity to completely finish the manufacturing process."²¹ The vast majority of cases involve the salt form of methamphetamine. Methamphetamine salts are smokable and exist in powder and crystal form. However, "a powder cannot be differentiated from a crystal."²²

Section 2701 of the Crime Control Act of 1990 directs that the drug guidelines be amended "for offenses involving smokable crystal methamphetamine". The Congressional purpose seems to have been to enhance the offense level for "ice". Ice is created by dissolving d-methamphetamine in water or another solvent and then slowly recrystallizing it, a process that results in methamphetamine of relatively high purity. Ice is marketed principally in Hawaii and California.

The Congressional mandate is ambiguous. The language of section 2701, read literally, would seem to call for an enhancement for virtually every offense involving methamphetamine because the type of methamphetamine generally sold illegally is both

²⁰Memorandum from Dennis F. Hoffman to Paul L. Maloney at 1 (Dec. 14, 1990), an attachment to Memorandum to Chairman Wilkins et al from Phyllis J. Newton entitled "Miscellaneous Proposed Drug Amendments" (Dec. 26, 1990).

²¹Id.

²²Id.

crystalline and smokable. The Congressional intention, however, is to target a type of d-methamphetamine known as ice. The Commission's proposal -- to enhance the offense level for all d-methamphetamine cases -- is broader than what Congress intended.

Given the technical problems involved in identifying the precise substance that Congress intended to result in an enhancement ("ice"), we recommend that the Commission ask Congress to clarify the statutory directive.

Amendment 15 -- § 2D1.8 (Renting or Managing a Drug Establishment)

The base offense level under § 2D1.8 presently is 16, regardless of the nature or quantity of the substance involved. The Commission has proposed two options for calculating the base offense level in order to eliminate anomalous results produced by the present guideline. We believe that option one should be adopted.

Under option one, the base offense level is determined by the drug quantity table of § 2D1.1 -- i.e., by the quantity and type of drug involved. The base offense level for a defendant whose only role is to rent or allow the use of a premises is 4 levels less than the offense level from § 2D1.1, and is capped at level 16. In addition, new commentary would indicate that the mitigating role adjustment of § 3B1.2 does not apply to such a defendant. Option two links the offense level directly to quantity and type of drug involved, and requires a minimum level of 16.

Option two simply perpetuates the anomaly identified by the Commission in its statement of the reason for the amendment. A defendant who distributes less than 250 grams of marijuana gets an offense level of 6 under § 2D1.1, while a defendant convicted letting his apartment be used for the sale of the same quantity of marijuana gets an offense level of 16 under the option 2 amendment to § 2D1.8.

Option one eliminates all of the anomalous results that the present guideline can produce and, in addition, addresses directly the problem created by overdependence upon quantity for determining the offense level of minimal and minor participants.²³

Amendment 21 -- new § 2K1.1 (Unlawfully Trafficking in, Receiving, or Transporting Explosive Materials; Improper Storage and Failure to Report Theft of Explosive Material)

The Commission proposes to combine present §§ 2K1.1, 2K1.2, 2K1.3, and 2K1.6 into a single guideline designated § 2K1.1. The Commission has indicated five objectives for proposed amendment 21 -- (1) to "address concerns raised by judges, probation officers, and practitioners and suggested by a review of presentence reports and case law"; (2) to "eliminate duplication and confusion in the application of the current guidelines, particularly with respect to multiple cross references and the potential application of more than one guideline to the same statute"; (3) to "reduce departures and potential sentencing disparity by relying more heavily on

²³See letter to Chairman Wilkins from Thomas W. Hillier, II, at 1-2 (Jan. 3, 1991).

specific offense characteristics and real offense conduct and less on the statute of conviction"; (4) to simplify "application of the guidelines by making the explosive materials and firearms guidelines more parallel"; and (5) to "avoid the need to revisit firearms and explosive materials guidelines".

We do not believe that any useful purpose would be served by this comprehensive rewriting of the explosive materials guidelines. There has not been a sufficient number of cases involving these guidelines to warrant such an extensive revision. The Commission staff memorandum reports on only 22 single-guideline cases under § 2K1.3 and 7 single-guideline cases under § 2K1.6; the memorandum does not report any cases under §§ 2K1.1 and 2K1.2.²⁴

With regard to the Commission's first objective, the Commission has not identified what concerns of judges, probation officers, and practitioners are being addressed. Consequently, we cannot evaluate this objective.

The Commission's second objective is to eliminate "duplication and confusion in the application of the current guidelines". The statutory provisions notes indicate an overlap with regard to 18 U.S.C. 842(j) and (k).²⁵ While there is duplication, there should

²⁴See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix N, appendix P.

²⁵The statutory provision note to § 2K1.2 lists 18 U.S.C. § 842(j), and the statutory provisions note to § 2K1.3 lists 18 U.S.C. § 842(k). The statutory provisions note of § 2K1.3 lists 18 U.S.C. § 844(b), which sets forth misdemeanor penalties for violating 18 U.S.C. § 842(j) and (k). Thus, statutory provision notes indicate that §§ 2K1.2 and 2K1.3 apply to 18 U.S.C. § 842(j)

be no confusion because the Commission has promulgated a guideline to deal with such situations -- § 1B1.2 ("Applicable Guidelines"). That guideline directs the sentencing court to apply the guideline that is most applicable to "the offense conduct charged in the count of the indictment or information of which the defendant was convicted". Thus, whether §2K1.2 or § 2K1.3 applies to a defendant convicted under 18 U.S.C. § 842(j), for example, will turn on what conduct is charged in the indictment". If the Commission wishes to clarify the matter, an amendment to the application notes or statutory provisions notes would seem to be preferable to a comprehensive revision of the explosives guidelines.

With regard to the Commission's third objective (to "reduce departures and potential sentencing disparity"), the Commission staff memorandum reports on only 29 single-guideline cases under §§ 2K1.1, 2K1.2, 2K1.3, and 2K1.6.²⁶ There is, therefore, insufficient data upon which to base a conclusion that departures are a significant problem.

The Commission's fourth objective, simplifying "application of the guidelines by making the explosive materials and firearms guidelines more parallel", would justify changes to bring the existing guidelines into conformity with each other, but would not justify substantive changes in the existing guidelines. Greater

and that §§ 2K1.1 and 2K1.3 apply to 18 U.S.C. § 842(k).

²⁶See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix N, appendix P.

parallelism does not adequately justify the sweeping substantive revisions of proposed amendment 21.

The Commission's final objective, avoiding the "need to revisit" the explosive materials guidelines", is laudable but based upon an assumption that there is a need to visit those guidelines in the first place. So far, nothing has been presented to justify such an assumption.

**Amendment 22 -- new § 2K2.1
(Prohibited Transactions Involving Firearms)**

The Commission proposes to combine present §§ 2K2.1, 2K2.2, 2K2.3, and 2K2.5 into a single guideline designated § 2K2.1. The proposed new guideline uses a "real offense" approach. Thus, proposed subsections (a)(2), (3), and (4) apply if a defendant is a "prohibited person" described in 18 U.S.C. 922(g), even if the defendant is not convicted under that provision.²⁷ The proposed new guideline also increases offense levels. For example, the base offense level for a defendant with a dishonorable discharge from the Air Force (a prohibited person as described in 18 U.S.C. § 922(g)) who is convicted under that provision of shipping a .22 caliber rifle to his wife, is 12 under present § 2K2.1(a)(2). The base offense level for the same offense under proposed § 2K2.1(a)(4) is [14-16] (the level is 20 under proposed §

²⁷ See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at 13-15.

2K2.1(a)(3) if the defendant has a prior conviction of specified offenses, such as possession of marijuana with intent to distribute).²⁸ In addition, the defendant's base offense level would be enhanced [1-2] levels under proposed §2K2.1(b)(8) because of defendant's status as a prohibited person.²⁹

We do not believe that any useful purpose would be served by comprehensively rewriting the firearms guidelines at this time. The Commission, effective November 1, 1989, extensively revised §§ 2K2.1, 2K2.2, and 2K2.3, increasing offense levels.³⁰ There has not been a sufficient number of cases involving the revised guidelines to warrant an extensive revision.³¹ The limited data

²⁸See id. at 28-32.

²⁹The proposed new guideline has double counting problems. If the defendant is in fact a prohibited person described in 18 U.S.C. § 922(g), the applicable base offense level depends upon whether the defendant has any prior convictions for specified types of offenses. With 2 such prior convictions, the base offense level is 24; with one such prior conviction, the base offense level is 20; and with no such prior conviction, the base offense level is [14-16] (proposed § 2K2.1(a)(2), (3), (4)). A prior offense counted in determining the base offense level, however, is also counted in determining the criminal history score. Moreover, the enhancement of proposed subsection (b)(8) is applicable only to prohibited persons.

³⁰U.S.S.G. App. C at c.97 (amend. no. 189).

³¹There have been 59 single-guideline cases under the version of § 2K2.1 that took effect November 1, 1989; 17 single-guideline cases under the version of § 2K2.2 that took effect November 1, 1989; 29 single-guideline cases under the version of § 2K2.3 that took effect November 1, 1989; and 6 single-guideline cases under the version of § 2K2.5 that took effect November 1, 1989. See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix D, table I-A; appendix G, table II-A; appendix K; appendix L.

available, however, indicate that courts do not believe that the present guideline, as amended November 1, 1989, results in inadequate sentences.³²

The Commission has indicated that amendment 22 has 5 objectives. They are, first, to "address concerns raised by judges, probation officers, and practitioners and suggested by a review of presentence reports and case law". The Commission has not identified what those concerns are, however, so we cannot evaluate this objective.

A second objective identified by the Commission is to "eliminate duplication and confusion in the application of the current guidelines, particularly with respect to multiple cross references and the potential application of more than one guideline

³²For § 2K2.1, in the 59 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was below the guideline range in 4 cases (6.8% of the cases) and at the bottom of the range in 25 cases (42.4% of the cases), and was above the range in 3 cases (5.1% of the cases) and at the top of the range in 14 cases (23.7% of the cases). Id. at appendix D, table I-A.

For § 2K2.2, in the 17 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was below the guideline range other than for substantial assistance in 4 cases (23.5 % of the cases) and at the bottom of the range in 8 cases (47% of the cases), and above the range in one case (5.9% of the cases) and at the top of the range in no cases. Id. at appendix G, table II-A.

For § 2K2.3, in the 29 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was below the guideline range in 4 cases (13.8% of the cases) and at the bottom of the range in 11 cases (37.9% of the cases), and above the range in 3 cases (10.3% of the cases) and at the top of the range in 3 cases (10.3%). Id. at appendix K.

For § 2K2.5, in the 6 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was at the bottom of the guideline range in 5 cases (83.3% of the cases) and above the top of the range in one case (16.7% of the cases). Id. at appendix L.

to the same statute". The statutory provisions notes to the present guidelines do not indicate that the latter problem exists.³³ It is not evident, moreover, that the proposal is less confusing and has fewer cross references than the present guidelines.

The Commission's third objective is to "reduce departures and potential sentencing disparity by relying more heavily on specific offense characteristics and real offense conduct and less on the statute of conviction". There are only 111 cases under the November 1, 1989 version of §§ 2K2.1, 2K2.2, 2K2.3, and 2K2.4 -- inadequate data upon which to base a conclusion that departures are a significant problem. The data available on § 2K2.1, the most plentiful data available, fail to indicate that departures are a problem.³⁴

The Commission, moreover, deliberately chose a guideline system that is offense of conviction based, with limited real

³³Even if there were some overlap in the coverage of certain offenses, there is no indication that § 1B1.2 ("Applicable Guidelines"), the guideline that the Commission promulgated to deal with such situations, is inadequate. That guideline directs the sentencing court to apply the guideline that is most applicable to "the offense conduct charged in the count of the indictment or information of which the defendant was convicted".

³⁴The downward departure rate under § 2K2.1 is 6.8%, and the upward departure rate is 5.1%. Id.

The data available for the other three guidelines involved are so limited as to make the departure rates meaningless. There are 29 cases under § 2K2.3; the downward departure rate is 13.8% and the upward departure rate is 10.3%. Id. at appendix K. There are 17 cases under § 2K2.2; the downward departure rate is 35.3% and the upward departure rate is 5.9%. Id. at appendix G, table II-A. There are 6 cases under § 2K2.5; the downward departure rate is 0% and the upward departure rate is 16.7%. Id. at appendix L.

offense characteristics, out of a concern that a real-offense system "risked return to wide disparity in sentencing practices".³⁵ It is not clear why it is necessary to rely on real offense conduct to a greater extent than the guidelines do at present. Greater reliance on real offense conduct is not needed in order to get adequately high offense levels. The data indicate that, under the November 1, 1989 version of § 2K2.1, courts are sentencing below or at the bottom of the guideline range in 49% of the cases (below = 6.8%; bottom = 42.4%), and above or at the top of the range in 28.8% of the cases (above = 5.1%; top = 23.7%) -- suggesting that the offense levels under the guideline are too high.³⁶

The Commission's fourth objective is to simplify "application of the guidelines by making the explosive materials and firearms guidelines more parallel". This objective would justify changes to bring the existing guidelines into conformity with each other, but would not justify substantive changes in the existing guidelines. Greater parallelism does not adequately justify the sweeping substantive revisions of proposed amendment 22.

The Commission's final objective is to "avoid the need to revisit firearms and explosive materials guidelines". Nothing indicates that the Commission failed substantially to achieve this goal with the November 1, 1989 amendment.

³⁵U.S.S.G. Ch. 1, Pt. A(4)(a), intro. comment.

³⁶See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix D, table I-A.

**Amendment 29(C) -- § 4A1.2 (Definitions and Instructions
for Computing Criminal History)**

The Commission proposes to add a new subsection to § 4A1.2 that would deal with prior sentences that are being appealed. The new subsection would direct counting such sentences unless execution of the sentence has been stayed pending appeal. The Commission proposes two options for dealing with sentences stayed pending appeal. The difference between the two options is whether to apply subsection (d) of § 4A1.1. Subsection (d) calls for adding 2 criminal history points "if the defendant committed the instant offense while under any criminal justice sentence". Under option one, subsection (d) would apply to sentences stayed pending appeal; under option two, subsection (d) would not apply.

The options address a problem that we do not expect to arise very often. In our judgment, option two is better because option one presents an insurmountable problem of application.

Option one is premised upon the assumption that the sentencing court can readily ascertain whether the defendant would have been "under any criminal justice sentence" at the time of the subsequent offense. That assumption, in our view, is incorrect. Suppose, for example, that a defendant is sentenced under the old federal law to a term of 18 months, appeals the conviction, and commits a second offense 16 months later. Would subsection (d) apply? No definite answer is possible. Subsection (d) would apply if defendant were on parole at the time of the later offense, because defendant would have been in the custody of the Attorney General at

the time of that offense. Subsection (d) would not apply, however, if defendant were not paroled, because defendant (by virtue of the good time rules) would have been discharged from custody and therefore not "under any criminal justice sentence" at the time of the later offense -- unless the defendant would have misbehaved in prison and forfeited all good time allowance.

Federal sentences will not be the only ones causing this problem. The problem will also arise with state sentences because state laws vary widely concerning good time, parole, and discharge from custody. Option one does not have the application problem.

Amendment 30 -- § 4A1.1 (Criminal History Category)

Under present § 4A1.2(a)(2), the sentencing court must, for purposes of determining the defendant's criminal history score, treat as one sentence "prior sentences imposed in related cases". Application note 3 to § 4A1.2 indicates that "cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing."

The Commission has proposed three options for modifying the treatment of cases consolidated for trial or sentencing. Under all three options, sentences would not be considered related if they were for sentences separated by an intervening arrest. We see no reason to modify the related cases rule. None of the options will improve the ability of the criminal history score to predict the

likelihood of future criminal behavior, the function of the criminal history score.

The concern about the related cases rule may result from a failure to appreciate the purpose served by the criminal history score and what that score is intended to measure. The criminal history score is not intended to, and does not, measure simply the extent of a defendant's previous convictions. Rather, the criminal history score is intended to measure the likelihood of future criminal conduct.³⁷ Thus, certain prior convictions are not counted in determining the criminal history score -- stale convictions, foreign, tribal, and certain military convictions, and convictions for certain petty offenses.

Similarly, criminal history points are assigned for other than prior convictions. Two points are added if the defendant committed the offense while "under any criminal justice sentence", and two points are added if the defendant committed the offense less than two years after release from imprisonment exceeding 60 days.³⁸

The criminal history score is based primarily upon the U.S. Parole Commission's salient factor score,³⁹ and the Sentencing Commission, when it adopted the initial set of guidelines, believed that the criminal history score would be predictive of future

³⁷See U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 41-44 (June 18, 1987).

³⁸Only one point is added for the latter factor if two points are added for the former.

³⁹U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 43 (June 18, 1987).

criminal behavior.⁴⁰ Sentencing Commission data indicates that the Sentencing Commission was correct in its belief.⁴¹

The rule that two points are added if the defendant committed the offense less than two years after release from imprisonment exceeding 60 days applies is largely unrelated to the severity of the offense for which the defendant was serving the sentence. Unless the offense is minor (i.e., called for a term of less than 60 days imprisonment), two points are added whether the sentence was for tax evasion, for burglary, or for murder. This rule is based upon the premise that someone who commits an offense after recently undergoing a punishment experience is more likely to offend again upon release.

The part of the definition of related cases that looks to whether the cases were consolidated for trial or sentencing also focusses upon the punishment experience. Cases that are consolidated will result in a single punishment. For purposes of prediction, if the previous sentence is imprisonment for 60 days or more, it does not matter whether the sentence is for one offense or three offenses consolidated for sentencing.

⁴⁰Id. ("the high correlation between the two instruments [criminal history score and the U.S. Parole Commission's salient factor score] suggests that the criminal history score will have significant predictive power").

⁴¹See U.S. Sentencing Com'n Staff Working Document, Recidivism of Federal Offenders: Preliminary Report 3 (Dec. 1990) ("the criminal history categories used in establishing the federal sentencing guideline ranges do, in fact, predict future criminal behavior").

The Commission has presented no data indicating that the present rule results in sentences that are inadequate. Instead, the available data suggest that the present rule calls for appropriate sentences.⁴² Moreover, the Commission has presented no data to indicate that any of the three options will improve the predictive power of the criminal history score.

The Commission's three options yield strange results. For example, defendant A served 15 years for murder and was released from prison three years ago. Defendant B served concurrent 14

⁴²The Commission staff memorandum reports that, based on "a 25% sample of monitoring cases", 17.3% of the upward departures for inadequacy of the criminal history score were due, in whole or part, to an inadequacy resulting from sentences that were consolidated for trial or sentencing. See Memorandum to Phyllis Newton from Jay Meyer, Work Group Coordinator, entitled "Revision of Chapter Four 'Related Cases' Definition", at 2-3 (Nov. 6, 1990). That data is interesting but not particularly relevant because it does not represent the rate of departure. What is missing is the total number of cases in which a court might have departed. Only with that number can the departure rate be calculated.

Another staff memorandum suggests that the departure rate is much lower than the overall upward departure rate. A Commission staff memorandum reports that out of some 35,000 cases sentenced between January 19, 1989 and June 30, 1990, 2,141 cases fell within criminal history category VI. J. Meyer, Report on Criminal History Categories "0" and "VII", at 3 (Nov. 20, 1990). That memorandum further indicates that there were 52 departures involving defendants in criminal history category VI. (Commission data show 13 departures in a representative sample of one-fourth of the 35,000 cases. Extrapolation yields 52 as the total number of departures for the entire 35,000.) Id. Assuming that the percentage of upward departures due, in whole or part, to an inadequacy resulting from sentences that were consolidated for trial or sentencing is constant for all criminal history categories at 17.3% (the figure calculated in Memorandum to Phyllis Newton from Jay Meyer, Work Group Coordinator, entitled "Revision of Chapter Four 'Related Cases' Definition", at 2-3 (Nov. 6, 1990)), then the departure rate for criminal history category VI due to the consolidated for trial or sentencing rule is 0.4% (9 departures -- 17.3% of 52 -- in 2,141 cases). The overall upward departure rate is nine times that rate (3.5%). U.S. Sentencing Com'n, Annual Report 1989, at table B-6.

month terms for two embezzlements and was also released from prison three years ago. All three options result in defendant B getting more criminal history points than defendant A, who gets 3 criminal history points. If defendant B's offenses were separated by an intervening arrest, defendant B gets 6 points under all three options. If there is no intervening arrest, defendant B gets 4 or 5 points under option 1,⁴³ and 4 points under option 3.⁴⁴

Amendment 31 -- Chapter 5, part A (Sentencing Table)

The Commission has proposed three options for establishing a new criminal history category VII for defendants with high criminal history scores. Option one calls for category VII to cover 15 or more criminal history points. Option two calls for category VII to cover 20 or more criminal history points. Option three calls for category VII to cover 16-18 criminal history points; for scores of 19 or more, the court could use category VII or depart. The Commission seeks comment about whether there should be a new category and, if so, which option should be adopted. In addition, the Commission seeks comment about how to deal with career offenders if a new category VII is established.

We believe that there is no need to add a new criminal history category. When sentencing defendants in criminal history category

⁴³The number of points depends upon what the Commission determines with regard to the number of points to add under proposed new subsection (f).

⁴⁴Option 2 applies only if there is an intervening arrest.

VI, courts currently depart upward under § 4A1.3 very infrequently. Adequacy of the criminal history category, moreover, seems to be only one of the reasons prompting the departure.⁴⁵ Commission data show that, out of some 35,000 cases sentenced between January 19, 1989 and June 30, 1990, 2,141 fell within criminal history category VI.⁴⁶ The data further indicate that there were 52 departures involving defendants in criminal history category VI, a departure rate of 2.4%.⁴⁷ The data, therefore, do not support a conclusion that there is a need for a new criminal history category.⁴⁸

Finally, none of the options will enhance the predictive power of the criminal history score. The criminal history categories are based upon predicting the likelihood of future criminal conduct,⁴⁹

⁴⁵See J. Meyer, Report on Criminal History Categories "0" and "VII", at 4 (Nov. 20, 1990) ("in most cases, inadequacy of Category VI penalties was cited as only one rationale for the departure")(discussing reported cases).

⁴⁶Id. at 3.

⁴⁷Id. Commission data shows 13 departures in a representative sample of one-fourth of the 35,000 cases. Extrapolation yields 52 as the total number of departures for the entire 35,000; 52 is 2.4% of 2,141.

⁴⁸Commission staff speculates that "it seems plausible to infer that some courts might have refrained from departing beyond category VI in the past because of the uncertainty of structuring a departure beyond the sentencing table". Id. at 8. No evidence (letters or calls from judges or probation officers, for example) is presented to support such speculation. It is more plausible to conclude from the data that courts are departing whenever they believe departure appropriate. There should be little uncertainty about structuring a departure from category VI; the only constraint upon a court's ability to depart from category VI is that the departure be reasonable.

⁴⁹See U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 42 (June 18, 1987).

and a Commission staff report concludes that "the criminal history categories used in establishing the federal sentencing guideline ranges do, in fact, predict future criminal behavior."⁵⁰ There is no evidence that a new category VII will enhance the predictive power of the criminal history score.

Amendment 33 -- § 5G1.3 (Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment)

The Commission proposes to rewrite this guideline completely. Proposed subsection (a) would require consecutive terms if the defendant committed the offense while "serving a term of imprisonment (including work release, furlough, or escape status)", after sentencing for, but before starting service of, such a term of imprisonment, or while "on bail or other release status". Proposed subsection (b) would require the sentence for a new offense to be imposed "to result in a combined sentence equal to the total punishment that would have been imposed under § 5G1.2 . . . had all the sentences been imposed at the same time", if (1) subsection (a) is inapplicable and the new offense constitutes part of the same course of conduct as the offense whose term is undischarged, or (2) the prior undischarged term was imposed under the Sentencing Reform Act.

The Commission has set forth three options for subsection (c), which would deal with "any other case". Option one would require concurrent terms, with commentary recommending a departure for

⁵⁰Recidivism of Federal Offenders: Preliminary Report 3 (Dec. 1990).

"anomalous results that circumvent or defeat the intent of the guidelines to provide for incremental punishment for multiple offenses". Option two, labelled a policy statement, would recommend consecutive sentences "to the extent necessary to result in a total combined term of imprisonment [for the new and the old offenses] . . . so that a reasonable incremental punishment is imposed" for the new offense. Option three would require consecutive terms, with commentary recommending a departure for "anomalous results that circumvent or defeat the intent of the guidelines to provide for incremental punishments, but not more than necessary to comply with the purposes of sentencing for multiple offenses".

We believe that proposed subsections (a) and (b), except for expanding the guideline to require consecutive sentences if the offense was committed while defendant was on bail or other release status, improve the present guideline. That part of proposed subsection (a) should not be promulgated. The Commission has offered no justification for the expansion. In light of § 2J1.7 (commission of offense while on release), it is unclear why this guideline should cover offenses committed while on bail. It is also unclear how the policy of this guideline (consecutive sentences) could be effectuated when federal and state offenses are involved and the federal sentence is imposed first.

With regard to proposed subsection (c), we believe that option one is best. Option one is consistent with the goals of the Sentencing Reform Act and gives the court flexibility in dealing

with cases not adequately covered by the general rule. In the great majority of instances, concurrent sentences will be sufficient to impose additional punishment and therefore are consistent with the statutory directive that sentences be "sufficient, but not greater than necessary, to comply with the purposes" of sentencing (18 U.S.C. § 3553(a)). The sentence for the later offense will reflect that the defendant committed that offense while serving a sentence for a previous offense (because of chapter 4's criminal history rules).

If the court believes that a consecutive sentence might not result in incremental punishment (e.g., where the earlier sentence is very long), the court has 2 ways to adjust the sentence for the later offense in order to result in greater punishment -- (1) depart under § 4A1.3 (adequacy of criminal history category), or (2) depart by making part or all of the sentence for the later offense consecutive to the sentence for the earlier offense. The risk with consecutive sentences is excessively long sentences. The court's ability to adjust for an excessively long sentence is limited to departing to make the sentences concurrent.

We believe that option two would be the next best approach. The principal criticisms of option two are that it requires additional work by the sentencing court and that its policy cannot be effectuated because state sentencing laws vary in the determinacy of sentences. While option two may require additional calculations by the sentencing court, the additional work is not significant other than in a few cases. Option two addresses the

concern about fashioning a sentencing order that accounts for the variety of determinacy among the sentencing laws of the states -- the order can direct that the federal term begin on the earlier of a date certain or release from state custody.

We believe that it would be unwise for the Commission to adopt option three because option three would result in sentences that in most instances will be excessive. Option three, therefore, is inconsistent with the mandate of 28 U.S.C. § 994(l)(1) that the guidelines "reflect the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of multiple offenses committed in the same course of conduct . . . and multiple offenses committed at different times", as well as with the statutory directive of 18 U.S.C. § 3553(a) that sentences be "sufficient, but not greater than necessary, to comply with the purposes" of sentencing.

**Amendment 34(C) -- new § 5H1.11 (Military, Civic, Charitable,
or Public Service; Employment-Related Contributions;
Record of Prior Good Works (Policy Statement))**

We do not support promulgating a proposed policy statement that would recommend against consideration of a defendant's previous worthwhile contributions to the betterment of the community. Such a recommendation flies in the face not only of many, many years of judicial practice, but also of the goal of the Sentencing Reform Act to eliminate unjustifiable disparity in punishment. Two defendants with similar criminal history scores who commit similar offenses are not deserving of the same

punishment if one of them has, for example, donated bone marrow to save the life of a child with cancer or has for several years spent two weekends a month volunteering service to a hospice.

**Amendment 35 -- § 5K1.1 (Substantial Assistance to Authorities
(Policy Statement))**

The Commission's proposed amendments to this policy statement would (1) revise application note 1 to suggest departure in the absence of a government motion "in an extraordinary case where the government in bad faith breaches an agreement to file the requisite motion"; and (2) add a subsection stating that, when the sentencing court determines the extent of a § 5K1.1 departure, "substantial weight should be given to the government's evaluation of the extent and value" of the assistance. The Commission's purpose in amending the application note is to "reinforce the view of the Eleventh Circuit that the Commission has adequately considered the mitigating circumstance of substantial assistance".

We do not believe that the proposed amendment should be promulgated.

Although § 5K1.1 is a policy statement and therefore merely a recommendation of the Commission, courts for the most part have followed the recommendation and require a government motion. They have sought to ameliorate the risk of unfairness by indicating that a government motion may not be necessary if the prosecutor acts in bad faith.

Congress in 18 U.S.C. § 3553(e) mandated a government motion only for a departure below a statutory minimum. Congress in 28 U.S.C. § 994(n) mandated that the guidelines call for "a lower sentence than would otherwise be imposed" if the defendant substantially assisted authorities; section 994(n) does not mandate a government motion for such a departure. There is no statutory requirement of a government motion, therefore, if the departure is below the guidelines but not below a statutory minimum. As Judge Clark recently pointed out,

there appears to be no logical reason why the prerequisite nature of a government motion under § 3553(e) should be mechanically transposed onto departures from the guidelines authorized pursuant to 28 U.S.C.A. § 994(n). It is far more logical to interpret § 3553(e) as an exception to the general rule set out in § 994(n).⁵¹

Requiring a government motion risks unfairness to a defendant who has significantly aided law enforcement authorities. For example, a defendant may have significantly aided law enforcement authorities, but the prosecutor wants additional assistance. The defendant may decline out of fear of retaliation or because he or she has no further information to provide. In some districts, moreover, a special committee of assistant U.S. Attorneys, rather than the assistant prosecuting the case, must authorize a § 5K1.1

⁵¹United States v. Chotas, 913 F.2d 897, 903 (11th Cir. 1990) (Clark, J., specially concurring in part and dissenting in part).

motion, and the committee may not authorize the motion even though the assistant who tried the case wants the motion filed.

The Commission is moving in the wrong direction. A reduction for substantial assistance should be available whenever the court determines that defendant has significantly aided authorities -- even if the government has not moved for the reduction. The Commission's revised commentary, by calling for a finding of prosecutorial bad faith, sets forth a very narrow exception.⁵² The question involved, however, may not be whether the prosecutor is acting in bad faith, but whether the defendant's assistance was significant, or whether the defendant can render even further significant assistance. The Commission's approach permits the prosecutor, who is a party to the dispute, to resolve the dispute.

Finally, the Commission's lacks the authority to "reinforce the view of the Eleventh Circuit that the Commission has adequately considered the mitigating circumstance of substantial assistance". The departure standard is statutory. Under 18 U.S.C. § 3553(b), "the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the

⁵²There is a drafting problem with the last sentence of revised application note 1. The sentence begins "in an extraordinary case", suggesting that an ordinary case of bad faith does not suffice for a departure without a government motion. The Commission may have intended the phrase, "where the government in bad faith breaches an agreement to file the requisite motion", to define what constitutes an "extraordinary case", unintentionally omitting a comma after "case".

Sentencing Commission in formulating the guidelines". Subsection (a)(4) of section 3553 refers to "the kinds of sentence and the sentencing range . . . as set forth in the guidelines that are issued by the Sentencing Commission".

The statutory departure standard directs that whether a factor is adequately accounted for is to be determined solely on the basis of the guidelines -- not on the basis of policy statements. Thus, even if the Commission could foreclose judicial consideration of a departure, the Commission could not do so by means of a policy statement.

The Commission, however, does not have the authority to preclude a court from departing. The statutory standard commits the departure determination to a sentencing court, not to the Commission. Whether the guidelines adequately account for a factor present in a particular case is a determination that only a sentencing court is in a position to make. As the Commission has put it, "the controlling decision as to whether and to what extent departure is warranted can only be made by the courts."⁵³

Amendment 37(B) -- § 1B1.2 (Applicable Guidelines)

The Commission has requested comment about whether the proviso of subsection (a) of this guideline should be amended in order to

⁵³U.S.S.G. § 5K2.0, p.s. (para. 1). Until November 1, 1990, the sentence read that the controlling decision "can only be made by the court at the time of sentencing". The change to "the courts" was "clarifying". See U.S.S.G. App. C at c.201 (amend. 358).

provide expressly that a stipulation to a more serious offense that accompanies a plea of guilty or nolo contendere must be part of a formal plea agreement. We believe that § 1B1.2(a) as presently drafted, although not a model of clarity, requires that the stipulation be part of the plea agreement.

The proviso, when parsed, authorizes the use of a chapter 2 guideline other than the guideline applicable to the offense of conviction "in the case of conviction by plea . . . containing a stipulation that specifically establishes a more serious offense than the offense of conviction" The Commission's commentary does not specifically address the matter, but seems to assume that the stipulation will be part of the plea agreement.⁵⁴

The Commission views the proviso as a "limited exception" to the general rule that the court is to use the chapter 2 guideline applicable to the offense of conviction.⁵⁵ If the proviso is to be limited, the source of the stipulation that triggers the proviso should also be limited. Requiring the stipulation to be part of the plea agreement not only provides a clear-cut, objective rule, but the formality of a written agreement insures that the defendant

⁵⁴Application note 1 discusses the proviso, explaining that the proviso has "a practical basis". The final paragraph of application note 1 states that "as with any plea agreement, the court must first determine that the agreement is acceptable The limited exception provided here applies only after the court has determined that a plea, otherwise fitting the exception, is acceptable."

⁵⁵Application note 1 in two places -- the first sentence of the second paragraph and the last sentence of the final paragraph -- calls the proviso a "limited exception" to the general rule.

has knowingly and intelligently made a stipulation that will adversely affect the defendant.

Amendment 37(C) -- § 1B1.8 (Use of Certain Information)

PCRI-153/91 We support the proposed new application notes. This guideline deals with self-incriminating information provided by a defendant under a cooperation agreement with the prosecutor in which "the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant". Subsection (a) directs that self-incriminating information so provided "shall not be used in determining the applicable guideline range, except to the extent provided in the agreement". The phrase "determining the applicable guideline range" precludes the sentencing court from using the information when calculating the cooperating defendant's offense level and criminal history score.

The guideline appears to have been derived from 18 U.S.C. part V (immunity of witnesses).⁵⁶ The rationale for the guideline is that a defendant who cooperates with the government "should not be subject to an increased sentence by virtue of that cooperation where the government agreed that the information revealed would not be used for such purpose."⁵⁷

⁵⁶See U.S.S.G. § 1B1.8, comment. (n.4). 18 U.S.C. § 6002 provides that "no testimony or information compelled under the [immunity] order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case".

⁵⁷U.S.S.G. § 1B1.8, comment. (n.1).

The scope of the protection offered by this guideline turns on the phrase "self-incriminating information provided pursuant to the [cooperation] agreement . . . shall not be used in determining the applicable guideline range" ⁵⁸ The principal ambiguity arises when a defendant who has provided self-incriminating information to the prosecutor also provides that information to the probation officer during a presentence investigation. The issue is whether that information is "provided pursuant to the [cooperation] agreement".

A narrow interpretation of that phrase would permit the sentencing court to use that information. Even under such an interpretation, the sentencing court could not use that information if the cooperation agreement requires the defendant to disclose the self-incriminating information to the probation officer.

A narrow interpretation of the phrase sharply limits the protection offered by this guideline and frustrates the purpose of this guideline (protecting defendants who cooperate with the government). ⁵⁹ A narrow interpretation, moreover, can readily be gotten around in the cooperation agreement, so to insist upon a narrow interpretation seems empty formalism.

⁵⁸The operative language is "such information shall not be used in determining the applicable guideline range" (emphasis added). The referent for "such information" is a phrase in the previous clause of the sentence, "self-incriminating information provided pursuant to the [cooperation] agreement".

⁵⁹See U.S.S.G. § 1B1.8, comment. (n.1).

In our opinion, the new application notes simply would make clear that the Commission intends a broad interpretation of the guideline. We support such a clarification.