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PCRT-0791

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
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August 20, 1990

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

RE: RESPONSE TO REQUEST FOR COMMENT ON GUIDELINE ISSUES

Dear Communications Director:

Pursuant to Phyllis J. Newton's request for comment on guideline issues, memorandum dated August 9, 1990, the following response relates to the issue of acceptance of responsibility. It is the undersigned officer's opinion that the acceptance of responsibility assessment, as currently used in guideline applications, severely deprecates and undermines the sentencing process if an error is made in assessing the defendant's acceptance of responsibility. When errors are made in assessing the defendant's acceptance, again, in this officer's opinion, the sentencing process is invalidated and discredited in the mind of the defendant.

The problem with making a definitive statement regarding the defendant's acceptance of responsibility prior to imposition of sentence is manyfold. When acceptance of responsibility is not correctly assessed, the judicial system is not only discredited, but it also fails to realize the goal of uniformity which is a fundamental basis of promulgating the guidelines in the first place.

The crux of the problem lies in whether or not sufficient data exists in the presentence investigation stage to accurately assess a defendant's acceptance of responsibility. Depending on the Court's finding related to the acceptance credit, the Court chances making an incorrect decision whether it decides to credit or not credit acceptance of responsibility (see Appendix A). As the decision process currently stands, acceptance of responsibility relies almost wholly on the statements and assertions made by the defendant regarding his or her involvement and responsibility in the instant offense. Judges, attorneys, probation officers, and other parties involved in the judicial process have long understood the problems of accurately evaluating a person's veracity concerning his or her conduct after being charged. Consequently, it is the undersigned officer's assertion that there is and always will be insufficient data to make an assessment about a defendant's acceptance of responsibility prior to sentencing. Therefore, it is believed that the acceptance of responsibility issue tends to muddle and complicate the sentencing process unnecessarily at the presentencing stage.

Though there may be problems with correctly assessing the issue of a defendant's acceptance of responsibility at the sentencing stage, it should not be taken out of the total equation. Acceptance of responsibility is a significant first step in the rehabilitative process. Without first realizing one's inappropriate conduct or behavior, there is no basis for change. Secondly, it is believed (also supported by empirical research) that behavioral change can be influenced by different motivators.

One of the problems with crediting a defendant with acceptance of responsibility at the sentencing stage is that you immediately lose a powerful motivator. However, if you delay this assessment further in the judicial process, it could conceivably provide hope for the defendant that he or she could have his or her sentence reduced should they sustain and maintain law-abiding behavior. This would also provide the Court and the probation office with more tangible data to base a decision on regarding a defendant's acceptance of responsibility. Some indices, which would suggest and could possibly be used to determine a defendant's acceptance of responsibility, would include the following:

1. There are no new criminal violations for a specified period.

2. The supervisee has secured and maintained lawful and gainful employment and has supported his or her dependents over a specified period.

3. Supervisee has remained drug-free for the specified period.

By deferring the assessment of acceptance of responsibility to later in the rehabilitative process, the judicial system would reduce the probability of making an error in its assessment. This would enhance the system's credibility while at the same time provide a strong motivator for defendant's to sustain positive adjustment in the community. This also would conceivably be a "win-win" situation for all parties concerned (defendant, criminal justice system, and taxpayers).

I wish to extend my appreciation to the Commission for its active solicitation for input on how to improve the system. By utilizing the wealth of experience and knowledge throughout the system, the end product can only improve. Should the acceptance of responsibility group require additional information about my ideas presented in this letter, please do not hesitate to contact me at FTS 852-2319.

Very truly yours,



Tim Searcy
U. S. Probation Officer

TS/ss

APPENDIX A

ACCEPTANCE OF RESPONSIBILITY 2 X 2

DECISION MATRIX

Court's Assessment of Acceptance	True State of Affairs: Defendant Accepts Responsibility	True State of Affairs: Defendant Doesn't Accept Responsibility
Credits Acceptance	Cell A CORRECT DECISION % ?	Cell B INCORRECT DECISION % ?
Doesn't Credit Acceptance	Cell C INCORRECT DECISION % ?	Cell D CORRECT DECISION % ?

1262-0891

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RETIRED
JOSEPH J. DUDLEY
G. WILLIAM SMITH

OF COUNSEL
R. E. LOW

*ALSO ADMITTED IN ARIZONA

August 30, 1990

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

Dear Commission Members:

My name is Michael D. O'Neill and I am an attorney writing to you on behalf of my client Terry Wayne Quarles. Mr. Quarles is a 21 year old who was tried together in Federal District Court in the State of Minnesota with 19 year old, Lamont Brown. Neither defendant had a prior record. The charges against both defendants were 1) aiding and abetting the other to possess with the intent to distribute in excess of 50 grams of cocaine base (21 U.S.C. 841(a)(1); 21 U.S.C. 841(b)(1)(a); 18 U.S.C. Section 2) and 2) conspiracy to possess with the intent to distribute in excess of 50 grams of cocaine base (21 U.S.C. 841(a)(1); 21 U.S.C. 841(b)(1)(a); 21 U.S.C. 846).

At trial, the facts showed that on June 6, 1990, Mr. Brown had in his undershorts, 212 grams of cocaine base. On this day, Mr. Quarles was with Mr. Brown as they were both together at a St. Paul hotel parking lot. Mr. Brown was found guilty at trial of possession and conspiracy to possess in excess of 50 grams of cocaine base. Mr. Quarles was found not guilty of aiding and abetting Mr. Brown in possession of the cocaine base. In spite of Mr. Quarles contention at trial that he did not know Mr. Brown was in possession of the cocaine base and that he was at the hotel

to obtain a room for he and a girlfriend, Mr. Quarles was found guilty of conspiracy to possess in excess of 50 grams of cocaine base.

At trial, an expert for the United States testified that the cocaine base found on Mr. Brown was about 40 percent pure cocaine with the rest of the grams being an additive. Also, a second expert for the United States testified that the street value of the cocaine base was around $10,000.00.

As it stands now, both Mr. Brown and Mr. Quarles fall on level 34 of the sentencing guidelines, because the 212 grams found are used against both Mr. Brown and Mr. Quarles.

It is my belief that the guidelines use of this particular 212 grams (with only a 40 percent purity level, and only a $10,000.00 street value) overstates the severity level for Mr. Quarles:

1. The assumption that this 212 grams of cocaine base is 100 times greater than ordinary cocaine is not borne out by the facts.

(a) The expert testimony at trial regarding this particular cocaine base showed this cocaine base to have a purity level of around 40 percent, or approximately 84 grams of cocaine in it. Because of this low purity level, and the fact that not all cocaine base is 100 times greater than regular cocaine, the expert testified the street value for this particular 212 grams of cocaine base was only approximately $10,000.00.

2. Unless an agreement between two co-conspirators is borne out by the facts, and no such agreement was borne out in our case, the guidelines should take the grams found and divide them by the number of co-conspirators found guilty. Such a formula allows each co-conspirator to be responsible for their percentage involvement in the illegal activity.

If the sentencing guidelines were to allow (1) the purity level to be considered or (2) the percentage involvement in the co-conspiracy to be considered; or (3) both, Mr. Quarles would receive a sentence that the sentencing commission should consider more fair.

Example of a more fair sentence:

1. (Using purity level) 84 grams of cocaine equals level 16... lowest level.

2. (Using purity level and dividing by the number of co-conspirators) 84 divided by 2 equals 42 equals level 14...lowest level.

3. (Increasing level because cocaine is combined to make cocaine base) 42 grams multiplied by 100 equals 42 grams of cocaine base equals level 30... highest level.

In this example, Mr. Quarles would be equated with a level somewhere between level 14 and level 30. To determine where Mr. Quarles should fall, the facts introduced at trial regarding the purity level and the street value of the cocaine base could determine how much above level 14 that Mr. Quarles should be placed.

I would appreciate any type of response or any suggestions that the commission may have, as my client faces up to 15 years in prison the way the guidelines read at this time. Before the commission sanctions such a severe penalty for a 21 year old first time offender, the commission members should know how the guidelines work in this case.

Thank you for your time and anticipated consideration.

Sincerely,

DUDLEY AND SMITH, P.A.

Michael D. O'Neill

MDO:mel

PCRI-0991

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September 6, 1990

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

Dear Director:

In response to the invitation by the Sentencing Commission, I would like to bring one item to your attention. We have a case of an individual with no criminal record who sells low cost electronic gadgets. Most of his customers pay in cash. On one occasion when trying to deposit the proceeds of that day, he was told by the cashier in the bank that if less than $10,000 a day is reported from his business, there would be less paperwork for all concerned. After that time, he was engaged for two years in what the United States Attorney considers "structuring." Approximately $1,000,300 was so structured. The individual used his wife and his sister, both of whom were then employed in the business, to make the actual deposits. There was no unlawful motive other than the desire, suggested by the bank, to save on paperwork.

Under the sentencing guidelines, the base offense level would be 13. Guidelines § 2S1.3(a)(1)(A) (defendant "structured transactions to evade reporting requirements"). Five levels would be added because the value of the structured funds exceeded $1,000,000. Guideline §§ 2S1.3(b)(2); 2S1.1(b)(2)(F). An additional two levels would be added for the defendant's aggravating role in the offense. Guideline § 3B1.1(c) ("defendant was an organizer, leader, manager or supervisor").

The United States Attorney in the case agrees with me that the guidelines make no sense when applied to the facts of this case. It is clear that the guidelines were not intended to cover this situation, but the U.S. Attorney sees no way out of it in light of the mandatory language of both the statute and the guidelines. We have considered the approach of a downward departure simply so that justice will be done. At present writing it is not clear whether his superiors will approve a plea bargain based on this approach. If the matter is treated in normal fashion, the client will face up

to 43 months of incarceration which I believe to be an outrage.

Please bring it to the attention of the commission as an example of rigidity which makes no sense. There is inadequate space in prisons for real criminals. To criminalize an individual who works 16 or 17 hours a day, 7 days a week, and is a useful member of society, on the basis of facts such as the ones I presented to you, is a telling example of why the guidelines should be amended. If you have any questions please feel free to contact me.

Very truly yours,

EPHRAIM MARGOLIN

EM/scb

ILKL-069[illegible] Saint Peter Paul

M E M O R A N D U M

DATE: August 15, 1990

FROM: Leslyn Amthor Spinelli, USPO

SUBJECT: **Comment on Sentencing Guidelines**

TO: Jack R. Verhagen, CUSPO

In response to Phyllis Newton's request for comments on the Sentencing Guidelines, I would offer the following:

The career offender guidelines appear to be needlessly harsh, I believe because the **career offender offense levels are tied to statutory maxima.** In the case of Dave Belanger, for example, although the underlying offense level was only 16, his career offender offense level was bumped all the way up to 34 because the statutory maximum was 30 years. He was also placed into the career offender status because of two prior drug felonies, each of which yielded only one criminal history point. I would suggest that the career offender provisions be modified and tied to the underlying offense level. The statutory maximum in a drug case is often sky-high but unrealistic. I would suggest, for example, someone with career offender status could be subject to a sentence 50% higher, or X number of levels higher, than that dictated by the underlying guideline offense level. This would accomplish the purpose of incapacitating career offenders for longer periods of time while keeping the individual case in mind.

9/14/28

Phyllis: This represents the consensus of our staff. Also, the career offender guideline is to be used for certain felonies previously committed qualifying for this status. You might talk to Melissa Felsh re: Kyle & David Belanger

Jack

at 608-264-5545

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Benjamin F. Baer (ex officio)
Paul L Maloney (ex officio)

September 21, 1990

Mr. Jack R. Verhagen
Chief U.S. Probation Officer
140 U.S. Courthouse
120 N. Henry Street
Madison, WI 53703

Dear Jack:

On behalf of the Commission, I thank you for your office's recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

We appreciate your interest in our work and look forward to your continued assistance as we strive to further improve the guidelines.

Regards,

Paul K. Martin
Communications Director

VCR1-1191

UNITED STATES GOVERNMENT

memorandum

DATE: September 12, 1990

REPLY TO ATTN OF: G. Wray Ware, CUSPO
WD/VA

SUBJECT: Request for Comment

TO: Phyllis J. Newton
Staff Director

Reference is made to your request for comments dated August 9, 1990.

Your request was turned over to our resident guideline expert for comment. Attached is United States Probation Officer Ross' memo addressing your request of August 9, 1990.

If we can be of further assistance, please contact me at 804/792-6397.

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114
* U.S.G.P.O.: 1986-491-248/40011

UNITED STATES GOVERNMENT

memorandum

DATE: August 31, 1990

REPLY TO ATTN OF: William P. Ross III, USPO

SUBJECT: **Comments on Sentencing Guidelines**

TO: G. Wray Ware, Chief USPO

For the majority of cases within the district, I would conclude that the application of the Sentencing Guidelines has become a smooth and functional process. The officers have an increased understanding of the guidelines and all of the reference material.

The areas creating some problems are in the application of Chapters Three and Four of the guidelines. One problem identified is the acceptance of responsibility. This part of the guidelines is most difficult and generates many objections to the report. This problem is compounded by the plea negotiations between the government and the defendant. Often the agreement stipulates whether or not the reduction is applied prior to the defendant's guilty plea and any interviews with the probation officer. Also, many historical cases include vague information about the extent of the defendant's involvement, and no individual can accurately assess the defendant's acceptance of responsibility. I understand the Sentencing Commission has approved a staff working group to address acceptance of responsibility, and this should be a priority.

Several matters within Chapter Four have generated comments. Many officers have voiced concern for the need to add another criminal history category to adequately reflect an offender's behavior with more than 13 criminal history points. I understand an amendment is being considered to implement such a change, and its approval would be suitable. Additionally, most officers have expressed the need for the Commission to provide a more definitive guide for related cases, particularly cases consolidated for court.

Otherwise, the memorandum dated August 9, 1990, from the U.S. Sentencing Commission mentioned that working groups will begin working on several matters that address most of the issues frequently discussed within this district.

Thank you for the opportunity to comment on this matter.

WPR/ajw

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114
☆ U.S.G.P.O.: 1986-491-248/40011

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Ilene H. Nagel
Benjamin F. Baer (*ex officio*)
Paul L Maloney (ex officio)

September 21, 1990

Mr. G. Wray Ware
Chief U.S. Probation Officer
273 Poff Federal Building
210 Franklin Road
Roanoke, VA 24011

Dear Chief Ware:

On behalf of the Commission, I thank you for your office's recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

We appreciate your interest in our work and look forward to your continued assistance as we strive to further improve the guidelines.

Regards,

Paul K. Martin
Communications Director

TCRI-1291

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September 13, 1990

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

Dear Sir:

I am an attorney practicing in Indianapolis, Marion County, Indiana. I have represented defendants in the federal court system, both before and after the advent of the federal sentencing guidelines, and am familiar with those guidelines, at least as much as one can possibly be familiar with them. I am also familiar with some of the problems they are causing and, since you have invited comments concerning these guidelines, thought it appropriate that I should write you in this regard.

A mighty leap was taken when we went to the sentencing guidelines; it not only vastly increased the periods of incarceration for all defendants but it took from the federal court what little discretion it had in sentencing. I participated in one matter appealed to the Seventh Circuit Court of Appeals by the government, resulting in a decision reversing one of our local federal judges because she had taken into consideration certain factors apparent at the time of the sentencing hearing, which factors they said she had no right to consider because such factors had previously been considered in the sentencing guidelines. It is one thing to pass general rules and regulations applying to all defendants and yet it is an entirely different thing when someone stands before a judge whose circumstances are peculiar and which require special attention, especially when the power of the judge to give that particular case special attention has been taken away by the guidelines.

I am both amused and amazed that one of the basic purposes of the guidelines was to reduce prison overpopulation; it has had just the opposite effect. As nearly as I can gather, if a person is sentenced to ten years, he/she will serve right at 85% of that time. Of course, this has resulted in longer sentences as opposed to prior sentencing and, with longer sentences, prison population increases. To think otherwise would be to ignore the obvious

effect of such longer sentences and so one of the basic premises of the federal sentencing guidelines was, even at the time it was stated, contrary to what had to be once they were put into full force and effect. We are building new prisons because of the federal sentencing guidelines; all of our prisons are severely overpopulated, we're adding staff, we're building new prisons, and we have completely forgotten the concept of rehabilitation. We are now warehousing people and where we once had limited space for one inmate, that inmate is now sharing that same space with two or three other people. As we continue to dehumanize these prisoners, as we forget about rehabilitation and look only to punishment, acknowledging that this is no deterrent to others, we may expect to come out of the prison system at the end of their long term prisoners who have no regard for themselves or for others, an inevitable result of the shortsighted thinking that has permeated the U.S. Sentencing Commission.

I received a letter from a prison the other day who said to me that when we are sending these drug people to prison for long terms what we are doing is creating a community of drug people who are, by virtue of their acquaintanceship, establishing nationwide networks so that even while they are incarcerated, or upon their release, when they return to their drug dealing habits, they will do so much better informed and with much larger networks than were ever contemplated prior to their incarceration. That, too, is an inevitable result of putting these people together, letting them swap ideas, and letting them set up these networks. Believe me, this is not a figment of anyone's imagination. Unlike the hypothetical situation envisioned by the Sentencing Commission, I am talking about real life.

Another adjunct of the long sentences and the prison overpopulation is the fact that many prisoners have nothing to do; they have nothing but time on their hands. No consideration is given to their incarceration in areas close to their home and loved ones and often they are sent so far away that they cannot have any visitors, excepting on random occasions. Lack of continuity of family relations, whether it be a son, a daughter, a mother, a father, an aunt or an uncle, merely alienates the prisoner and, when he returns to society, he does so without any substantial support group. This is brought about because we send these prisoners to wherever there is a bed to send them; we do not give any consideration to their needs because they are "criminals". It is this kind of callous disregard for the individual that makes us almost as bad as them. It is one thing for them to ignore the rights of their fellow citizens; it makes us equally bad when we ignore their rights.

Another person who I recently represented in the federal system accompanied a person into a bank and he, along with the other person, robbed the bank. Since the other person had the gun, in addition to the bank robbery charge, my client had to do five additional years because there was a gun involved in the robbery, regardless of whether or not he is the one who had the weapon. He had cooperated fully with the Federal Bureau of Investigation from the word go, had offered to testify against the other man, showed remorse, and had no previous criminal history, but he's doing nine years and must serve approximately 85% of that time. He left behind him a young wife, pregnant, with a two year old son. We, as taxpayers, are now supporting his family as well as supporting him and that is so true about so many prisoners and their families within both the federal and the state systems.

I could go on and on about the inequity of the systems, but really I don't think you are too interested in hearing from me in this regard. It is much easier to sit around a large table in a large room and talk about hypothetical situations and come to hypothetical conclusions. And, it is much easier to treat everyone the same, regardless of the particular circumstances of the case, and it is much easier to dictate what the judges must do as opposed to letting them use their individual judgment and to tailor their sentences to the individual before them than it is to say "So and so did this crime, here's what it is all about, fashion a sentence that will punish but at the same time not overly punish, and rehabilitate this person so that one day the odds are good that this person will become a valuable member of society." I realize that is an extreme position and would require a great deal of thought and a great deal of compassion on the part of this Commission and I do not expect them to be receptive to some of the thoughts I have addressed in this letter but, whether it comes from me, some other attorney, a federal judge, a U.S. attorney, or from any other source, still these are valid considerations to be given by the Sentencing Commission. Until such time as these issues are addressed, the road ahead will be expensive, long and vindicative and will impact on all of us.

I assume this letter will be filed away; however, I think I've gotten some good out of it whether the Commission does or not because I have given you my views on these matters.

Sincerely,

BUTLER, BROWN & BLYTHE

Duge Butler, Jr.

dbj/kb

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September 21, 1990

Mr. Duge Butler, Jr.
Butler, Brown & Blythe
301 Barrister Building
155 East Market Street
Indianapolis, IN 46204

Dear Mr. Butler:

I am in receipt of your recent letter to the Commission and thank you for taking the time to express your views on the sentencing guidelines. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

Several points that you raised in your letter require a response. First, it is incorrect to state that the purpose of guideline sentencing was to reduce the federal prison population. This was never the intent of Congress in passing the Sentencing Reform Act in 1984. Uniformity in sentencing and reduction of disparity were two of the more important goals identified in the legislation creating the Commission.

Studies conducted by the federal Bureau of Prisons and the Commission project that the guidelines will result in a 6 to 10 percent increase in the federal prison population during the next 10 years. However, the number of inmates will increase much more dramatically during this period due primarily to mandatory minimum sentences. These Congressional directives establish harsh minimum sentences for many drug and firearm offenses and dictate to the Commission the guideline level it must set. It is important, then, to distinguish the causes of the increase in federal prison population.

The Sentencing Reform Act that established the Commission recognized that the "medical model" concept of parole rehabilitation had failed. Therefore, the act abolished parole and gave clear instructions to the Commission that rehabilitation was not to be considered by the court in imposing a sentence of incarceration.

Finally, you mention a client of yours who received a nine-year sentence for bank robbery that included a five-year enhancement for use of a firearm. Based on the facts that you have related, it appears to me that the prosecutor charged and secured a convicted under 18 U.S.C. § 924(c), a statute that requires a mandatory five year consecutive sentence. Like mandatory minimums, this sentencing enhancement trumps the guidelines.

I can assure you that the Commission takes the comment it receives from the public seriously and I encourage you to identify substantive areas in the guidelines where you feel changes need to be made. I look forward to hearing from you.

Sincerely,

Paul K. Martin
Communications Director

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS
PROBATION OFFICE

PERRY D. MATHIS
CHIEF PROBATION OFFICER

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September 14, 1990

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

Attn: Communications Director

RE: **Guideline Comments**

Thank you for the correspondence from Staff Director Phyllis J. Newton requesting comment on certain guideline matters. I submit some items for consideration.

Guideline Application and Plea Bargain: We are observing that in some cases plea bargains appear to be circumventing the guideline application process. Although the U.S. Probation Officer continues to prepare the presentence investigation report in the prescribed manner, it subjects the U.S. Probation Officer to a lot of criticism, puts undue stress upon the officer and adds to the perception that the probation officer is the "bad guy" in the sentencing process. There are plea bargains where the U.S. Attorney's Office will stipulate that even though the actual loss in a monetary crime is a large among, a lesser amount should be used in calculating the guidelines. For example, in a recent case involving fraud of more than $70,000, the plea bargain was that the guideline figure for calculation purposes should be $20,000. We have had cases in which firearms were discovered in the same room where drugs were found and the plea bargain stipulated that the firearm was not in any way connected with the drugs. We have seen favorable stipulations for Role in the Offense when information very clearly shows that enhancement should be awarded for role rather than ignoring or reducing levels for role. We have seen recommendations for acceptance of responsibility even though a defendant may be re-arrested or have a positive report for drug abuse while on bond.

The examples cited above are not everyday occurrences but they do occur often enough that it should cause the Commission concern. We feel that the plea bargain issue should be addressed.

The issue of restitution continues to be a concern. It is difficult to understand how ability to pay should be an issue in

restitution matters but it has become an issue. In view of 18 U.S.C. 3663(h), it seems to me that a victim should be afforded the right to seek full restitution even after a defendant finishes any custody/supervision responsibility if it can be determined that a defendant later becomes able to pay. An order of restitution for the full amount would provide the victim with a better standing in civil court when efforts may be made to collect.

We feel that the Commission could strengthen the Acceptance of Responsibility issue through some incremental awarding of points. Some courts are automatically awarding two point reduction for a plea based on the stipulated plea agreement even though it may be very clear that a defendant has not affirmatively accepted responsibility. Perhaps one point for a plea and other points for other actions of affirmatively demonstrating acceptance should be considered.

Sincerely,

Perry D. Mathis

Perry D. Mathis, Chief
U. S. Probation Officer

PDM/jw

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William W. Wilkins, Jr. Chairman
Julie E. Carnes
Helen G. Corrothers
Michael S. Gelacak
George E. MacKinnon
A. David Mazzone
Ilene H. Nagel
Benjamin F. Baer (ex officio)
Paul L Maloney (ex officio)

September 21, 1990

Mr. Perry D. Mathis
Chief U.S. Probation Officer
U.S. Courthouse & Federal Building
812 North 7th Street
Kansas City, KS 66101-3037

Dear Chief Mathis:

On behalf of the Commission, I thank you for your recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

The issue of manipulation of the guidelines through the plea bargaining process is of great concern to the Commission as well as the Department of Justice. I can assure you that both agencies will study this matter closely in the upcoming months.

The Commission appreciates your interest in our work and looks forward to your continued assistance as we seek to improve the guidelines.

Regards,

Paul K. Martin
Communications Director

UNITED STATES GOVERNMENT

memorandum

DATE: September 14, 1990

REPLY TO ATTN OF: Raul A. Cavazos, Supervising
U.S. Probation Officer-McAllen

SUBJECT: COMMENTS ON GUIDELINE ISSUES

TO: Louis G. Brewster, Chief
U.S. Probation Officer-Houston

The following is submitted, pursuant to your memorandum of 8/20/90, on the above-captioned subject. All PSI Unit SUSPOs were contacted for input.

Five matters were identified by the Commission for comment. Comments will focus on items 1 & 5: Problem areas in guideline application and adequacy of current training program and informational materials. These two items, by far, directly impact on our daily PSI operation. Consequently, they have generated the greatest number of problems and concerns for our staff.

Problem areas in guideline application have evolved from an initial "many" to a current "few." The following are the current "few:"

1) Chapter 3, Part D, Multiple Counts remains the most troublesome. Specifically, 3D1.2, Groups of closely-related counts, (a-d). The trouble lies in the complexity per se, of the concept. Sheer practice in application and the resulting experience help diminish the problems. I don't know of any easy solution, other than, perhaps, training and rewriting the guideline in simpler form.

2) Chapter 7 - Violations of probation and supervised release, 7A1.2 and 7A1.3-Revocation of Probation and Supervised Release need to be more definitive, specifically 18.3565(a)(2): "Revoke the sentence of probation and impose any other sentence that was available under Subchapter A at the time of the initial sentencing." Any other sentence is vague and subject to interpretation.

3) 5E1.2, Fine for individual defendants; specifically, (i)... "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. Does this mean that the Court cannot impose, as a special condition of supervised release, the cost of supervision, unless it imposes a fine?

4) Part D, Offenses involving drugs - 2D1.2(c)-Drug Quantity Table - The incremental increases of marihuana are comparatively low from level 6 thru level 24; from level 26, on up, the amounts of marihuana increase dramatically; moreover, the within range amounts of marihuana, from level 26, on up, are of considerable variance when compared with those of level 24, on down. It would seem more reasonable to have a more gradual increase with less variance within the levels.

5) Given the current scandals involving the Savings and Loans and the Housing and Urban Development, outrageous disparities exist between "white collar" base offense levels and drug offenses levels.

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5010-114
☆U.S. GPO: 1988—201-760/80102

6) Another item of concern deals with the disparity between maximum terms available for violations of 18 USC 922(g) offenses "felon in possession of firearms and/or ammunition" and the maximum guideline ranges available. It would appear that the maximum, as prescribed by statute (10 years) cannot be reasonably reached for this serious offense, despite the November 1989, upward revisions made for this type of offense. As an example, a defendant with a total offense level of 10 and a criminal history category of VI, would only be sentenced to a guideline range of 24-30 months imprisonment. This is quite incongruous, considering that an offender would already be at level VI and that it would likely take an unusual departure to raise that sentencing range close to the ten years.

7) A good many of the offenses we encounter involve multi-defendant drug cases. It is difficult to differentiate between "minor" participant and a participant who should not receive any adjustment, as indicated in 3B1.4. It is believed Sections 3B1.2 and 3B1.4 need further clarification, as the definitions provided do not supply enough guidance. To a lesser extent, there are also problems differentiating between a "minor" and a "minimal" participant. Section 3B1.1 has not proved as problematic. In an effort to further clarify how to evaluate the roles of defendants, a definition is being offered. It is suggested the following be added to application note 3, following 3B1.2:

> A "minor" participant generally means any participant who works under the direction of and/or is paid by another participant, and does not have decision making authority, nor does this participant direct the activities of others. This participant is recruited by others, and is involved in the offense to a greater extent than is described as minimal. Examples of a "minor" would be a bodyguard, an individual who is a messenger on a continuing basis, or an individual who facilitates the commission of the offense, but whose role is not necessary to the offense. To further differentiate when a person is a "minor" participant and when no points are involved, it is suggested the following be added to the commentary for 3B1.4: No adjustment should be given to participants whose role is important in the commission of the offense, but have little decision making authority and do not qualify for an adjustment under 3B1.3. Examples of this would be a participant whose only role is that of "broker" in an offense, or a participant whose only role was to transport a large amount of drugs to a particular destination.

8) In reference to scoring criminal history, it is felt there is some disparity. Section 4A1.1(c) provides for one point to be added to each sentence not included under 4A1.1(a) or (b). Under this provision, defendants can receive the same increase for remarkably different offense severities. For example, a defendant may receive one point for a misdemeanor possession of marihuana

that involved only a few grams and where a fine was the only penalty; yet, another defendant may be convicted of a felony drug offense involving, perhaps, 100 pounds of marihuana, and receive probation. Under both sentences, the defendant receives one point. To take this further, it is possible for a defendant convicted of a Class C misdemeanor involving petty theft (in Texas, this offense carries a fine as the only punishment), and receive one point; yet, another defendant will receive the same increase for a sentence of probation assessed in a crime of violence, such as burglary of a habitation. There have been a number of occasions where I have scored a defendant whose instant offense is a drug offense, as a Category I offender, when this same defendant has had a previous scoreable felony drug conviction, for which he received probation. It seems quite inconsistent that a defendant who has a previous felony conviction for which he received probation to be in the same criminal history category as the defendant who has no prior convictions.

Additionally, under the scoring rule, it is possible for a defendant, with a previous drug or crime of violence conviction for which probation was assessed, to be placed in criminal history category I; yet, with a second drug or crime of violence conviction (which may also carry probation as the sentence), the defendant is designated a career offender with its ramification (provided the instant offense involves drugs or a crime of violence). This appears to be an "all or nothing" provision in the scoring process. It is believed the scoring discrepancy problem is also compounded when contrasted to a defendant who perhaps received 60 days in jail for DWI, or child support matter, and is placed in criminal history category II.

In an attempt to resolve this, it is suggested that all scoreable felony convictions for which probation was assessed be given two points, unless additional points are assigned under 4A1.1(d), at which time only one point would be given for the conviction. This would insure that no defendant with a scoreable prior felony conviction would be a category I offender, and it would differentiate some of the scoring between felony and misdemeanor convictions.

9) In an attempt to assist us with understanding the guidelines, any information that may be available regarding the philosophy of the Sentencing Commission in formulating Chapters 2&4 would be appreciated. Courts have often asked the probation office, if we understood the reasoning the Sentencing Commission used in certain aspects of Chapter 2&4, when formulating the guidelines for those chapters.

The following are concerns, regarding training:

1) The train the trainer approach initiated by the Commission in October 1987, has, by and large, served our district well. Each PSI unit supervisor has had this training. Nevertheless, staff consensus reflects a need for more follow-up training of the trainer. Follow-up workshops every nine months are suggested. Having Supervisor Denzlinger, who, on several occasions

has been on loan to the Commission, as the district's guideline "guru" has been an invaluable asset.

2) Updating the Commission's ASSYST program is urgently needed.

In summary, staff adjustment to guidelines has been progressing well. The staff is becoming more and more proficient with guideline application and the guidelines, per se, are becoming less and less arcane. The aforementioned comments reflect more a need for "fine tunning" the district's comparatively smooth guideline operation.

Thank you.

RAC/erg

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Paul L. Maloney (ex officio)

October 5, 1990

Mr. Raul A. Cavazos
Supervising U.S. Probation Officer
Texas Commerce Center
Suite 729
McAllen, TX 78501-5159

Dear Mr. Cavazos:

On behalf of the Commission, I thank you for your recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

We appreciate you taking the time to write and share your very practical comments.

Regards,

Paul K. Martin
Communications Director

PCRT-189

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
PROBATION OFFICE

KEITH A. KOENNING
CHIEF PROBATION OFFICER

668 EUCLID AVENUE, ROOM 606
CLEVELAND 44114

September 20, 1990

Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D. C. 20004

RE: Request for Comment

In regard to your memorandum of August 9, 1990, I write to advise that the U. S. Probation Officers involved in the preparation of Guideline Presentence Reports for the Northern District of Ohio, have some definite concerns in the areas of guideline application, and the adequacy of current training programs.

Guideline Application:

1. The present guideline manual should include more detailed explanation in the application of departures, especially downward departures, giving the writer more flexibility in recommending departures for reasons other than those stated in the manual.

2. A clearer description is needed in the areas of Uncounseled Convictions, especially felony convictions (Section 4A1.2, Commentary #6), and in the area of career offender. For example, what constitutes a "crime of violence."

3. It would appear some consideration should be given to revising Commentary #3 to 4A1.2, Related Cases. Multiple concurrent sentences are not adequately being taken into consideration due to their consolidation, thus providing a criminal history category which does not truly reflect the defendant's pattern of criminality.

4. Mitigating Role: Section 3B1.2; the Commentary and Application Notes are vague and need clarification.

5. Section 3C1.1 and Application Note 1(c) need to be expanded, in terms of the types of behavior which constitute Obstruction of Justice.

6. The area of multiple count guideline application needs to be expanded to clarify and explain differences in guideline 3D1.2(a), (b) and (c).

TRAINING NEEDS:

1. The compendium of "Questions Most Frequently Asked" is considered valuable. A semi-annual update would be most useful.

2. The Selected Guidelines Application Decision is considered valuable to better understanding the U. S. Sentencing Guidelines. This information should continue to be provided to all who write guideline presentence reports

SUGGESTION:

Portions of the United States Sentencing Commission Guidelines Manual should be typed on to a floppy disc for transfer to a hard drive. Then make this program available to all presentence writers. Writers often use information which is directly quoted from the guideline manual in preparing presentence reports. This program would provide writers with the capability of easy access to guideline statements which could be transferred through WordPerfect and incorporated directly into the presentence report.

Very truly yours,

Keith A. Koenning

Keith A. Koenning
Chief Probation Officer

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September 24, 1990

Keith A. Koenning
Chief Probation Officer
Northern District of Ohio
668 Euclid Ave, Room 606
Cleveland, OH 44114

Dear Chief Koenning:

On behalf of the Commission, I thank you for your recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

We appreciate your interest in our work and look forward to your continued assistance. Rest assured that we plan to keep up regular distribution (twice yearly) of the *Questions Most Frequently Asked About the Sentencing Guidelines* and the *Case Law Update*.

Regards,

Paul K. Martin
Communications Director

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
PROBATION OFFICE

KEITH A. KOENNING
CHIEF PROBATION OFFICER

668 EUCLID AVENUE, ROOM 606
CLEVELAND 44114

March 13, 1991

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

Re: Proposed Amendments

I have read the proposed amendments.

I urge the Sentencing Commission to consider expanding the Schedule of Substitute Punishments at 5C1.1 to include day reporting, and intensive supervision. Also, I suggest that a distinction be made between home detention and home detention *with* electronic monitoring.

I recommend that Application Note 6, to 5C1.1, be enlarged to permit intensive outpatient treatment in addition to residential treatment.

Respectfully submitted,

Keith A. Koenning

Keith A. Koenning

PCRI- 1991

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PROBATION OFFICE

FRED C. PIERCE
CHIEF PROBATION OFFICER
SUITE 500, PHOENIX BUILDING
330 SOUTH THIRD STREET
LAS VEGAS, NEVADA 89101-6032
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September 24, 1990

Ms. Phyllis J. Newton, Staff Director
U. S. Sentencing Commission
1331 Pennsylvania Ave., N.W.
Suite 1400
Washington, DC 20004

ATTN: Communications Director

RE: YOUR REQUEST FOR COMMENTS PER YOUR LETTER OF 8/9/90

Dear Ms. Newton:

Per your request of August 9, 1990, attached are the comments received from our District's Sentencing Guideline Trainers. If we may be of any further assistance, please contact our office.

Thank you.

Sincerely,

Fred C. Pierce/ces

FRED C. PIERCE, Chief
U. S. Probation Officer

FCP:ces

Attachments

UNITED STATES GOVERNMENT

memorandum

DATE: September 24, 1990

REPLY TO ATTN OF: STEPHEN E. WARD, Supervising USPO

SUBJECT: **SENTENCING COMMISSION COMMENTS**

TO: FRED C. PIERCE, Chief USPO

After reviewing the Sentencing Commission's memo of 8/9/90, it appears that the work groups and priorities outlined address current needs. The area of training, particularly additional formalized programs, might be helpful. As the body of case law develops, this could potentially be an area where more attention might be necessary.

SEW:ces

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

UNITED STATES GOVERNMENT

memorandum

DATE: September 11, 1990

REPLY TO ATTN OF: Wayne L. Momerak
U.S. Probation Officer

SUBJECT: **SENTENCING COMMISSION COMMENTS**

TO: Fred C. Pierce, Chief
U.S. Probation Officer

In response to your memo of August 17, 1990. We wish to address the following issues:

1. Acceptance of Responsibility: 3E1.1

We believe that much conflict over this section could be avoided by complete elimination of this adjustment. Consideration of cooperation could be addressed while determining the sentence within the appropriate guideline range.

2. In many instances attorneys, both Government and defense, are still using charge bargaining as a way to welcome plea agreements that may avoid "real offenses." For example; under 4B1.1 (career offender) attorneys have "date charged" to avoid overlap on conspiracy cases. The USPO sometimes remains in a quandry as to relevant conduct activities. This is particularly true with Rule 11 e, A, B and C binding agreements.

3. Computer programs are next to useless if not brought up to date more than once a year.

WLM:ebb

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Paul L. Maloney (ex officio)

October 4, 1990

Mr. Fred C. Pierce
Chief U.S. Probation Officer
Suite 500, Phoenix Building
330 S. Third Street
Las Vegas, NV 89101-6032

Dear Chief Pierce:

On behalf of the Commission, I thank you for your recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

We appreciate you taking the time to write and share your insightful comments.

Regards,

Paul K. Martin
Communications Director

PCRI-2091

Erich D. Andersen
8365 Fairlane Dr. #10
Birch Run, MI 48415

September 25, 1990

Dear Communications Director:

Please find enclosed one copy of my article on the "abuse of a postion of trust" enhancement provision in the Sentencing Guidelines. The article is to be published in the Oregon Law Review. I send it in response to the Commission's call for comments on Guideline section 3B1.3.

I hope that my article may be of some use to the Commission. I may be reached at the above address if the Commission should have any questions or comments. Thank you.

Erich Andersen

Erich D. Andersen

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Paul L. Maloney (ex officio)

October 4, 1990

Mr. Erich D. Anderson
8365 Fairlane Dr. #10
Birch Run, MI 48415

Dear Mr. Anderson:

On behalf of the Commission, I thank you for your sending me your article examining the "Abuse of Position of Trust" adjustment in the guidelines. Your submission has been distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

I appreciate your consideration in making a copy available to the Commission.

Regards,

Paul K. Martin
Communications Director

ENHANCEMENT FOR "ABUSE OF A POSITION OF TRUST" UNDER THE FEDERAL SENTENCING GUIDELINES

Erich D. Andersen[1]

Many criminal offenses contain an aspect which the United States Sentencing Commission has called an "abuse of a position of public or private trust."[2] One example is insider trading. This offense characteristically involves the unauthorized use, by some insider, of confidential corporate or market information for personal gain.[3] The insider occupies a position of trust, which he abuses when he takes such information and uses it to obtain money or advancement.[4]

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[1] Law Clerk to the Honorable James P. Churchill, Senior United States District Judge for the United States District Court for the Eastern District of Michigan; Former Law Clerk to the Honorable Diarmuid F. O'Scannlain, United States Circuit Court Judge for the United States Court of Appeals for the Ninth Circuit; B.A. 1986, J.D. 1989, University of California, Los Angeles. I would like to thank my wife, Anne Read-Andersen, and my friend and former colleague, Joseph D. Kearney, for their valuable criticism and editing suggestions. Rosa Kim and Fred Isaacs also made helpful comments on an early draft of this article. This article is dedicated to my wife, Anne.

[2] See, e.g., United States Sentencing Commission, Guidelines Manual § 3B1.3, at 3.7 (1989) [hereinafter "Guidelines Manual"] (reproduced in the appendix to this article).

[3] See, e.g., SEC v. Texas Gulf Sulphur Co., 401 F.2d 883 (2d Cir. 1968), cert. denied, 404 U.S. 1005 (1971).

[4] See Guidelines Manual § 2F1.2, Commentary, Application Note 1, at 2.74. As this article discusses below, the Commission has restricted application of the adjustment in the area of insider trading to those persons who occupy positions of "special trust." Id. The Commentary indicates that such persons include corporate

Where the abuse of a position of trust is an aspect of the offense, there is no need to provide for an additional enhancement for this fact.[5] Where the punishment for the offense itself does not account for the abuse, however, an enhancement is proper because of the additional element of culpable behavior.[6] Accordingly, the Sentencing Commission has provided, in the federal Sentencing Guidelines, for an upward adjustment in a criminal's base offense level when the defendant has "abused a position of public or private trust . . . in a manner that significantly facilitates the commission or concealment of the offense."[6]

As recent cases reveal, however, it is sometimes difficult to

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presidents and attorneys, but not tipees. Id.

[5] In United States v. Reich, 661 F. Supp. 371, 377 (S.D.N.Y. 1987), the district court discussed in hypothetical terms whether the "abuse of a position of trust" adjustment, contained in section 3B1.3 of the Sentencing Guidelines, is built into a notion of insider trading. The court ultimately did not resolve the question because Reich was a pre-Guidelines case.

The Sentencing Guidelines now make it clear that the abuse of a position of trust notion is not built into the offense of insider trading. This is why the Commentary to the guideline section on insider trading authorizes the adjustment for defendants who occupy positions of "special trust." See supra note 4.

[6] In its discussion of section 3B1.3 of the Guidelines, the Commission explains that the adjustment is appropriate because persons who abuse positions of trust "generally are viewed as more culpable." Guidelines Manual § 3B1.3, Commentary, Background, at 3.7. The Commission has been criticized in the past for not sufficiently articulating the underlying purposes of such provisions. See Ogletree, The Death of Discretion? Reflections on the Federal Sentencing Guidelines, 101 Harv. L. Rev. 1938, 1952-53 (1988); Weigel, The Sentencing Reform Act of 1984: A Practical Appraisal, 36 UCLA L. Rev. 83, 99-103 (1988).

[6] Guidelines Manual § 3B1.3, at 3.7 (reproduced in full in the appendix to this article). While section 3B1.3 provides for an adjustment where a defendant uses a "special skill" to commit or conceal a crime, this article will only address the "abuse of a position of trust" enhancement contained in that section.

determine when a person has abused a "position of trust."[7] Courts have not limited their findings of abuse to obvious areas such as insider trading or fraud by elected officials. They have authorized the adjustment for criminal conduct by a janitor,[8] a security guard,[9] a baby sitter,[10] and a bank loan clerk.[11]

While applying the adjustment in this expansive manner, however, almost every federal circuit court addressing the issue at any length has struggled to find limits on application of the adjustment.[12] Perhaps because of the confusion, the Sentencing Commission has asked for "comment . . . as to whether this guideline or commentary should be amended to more clearly specify the types of conduct to which this adjustment is intended to apply."[13]

This article will offer several recommendations for amendment. All of these recommendations arise out of a view, developed by study in this area, that the "abuse of a position of trust" concept has the potential for being interpreted so broadly that it will

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[7] See infra, at 7-13.

[8] See United States v. Drabeck, No. 89-30237, slip op. 6083, 6090 (9th Cir. June 14, 1990).

[9] See United States v. Parker, Nos. 89-1390, 89-1391, 89-1402, slip op. 3491, 3516 (2d Cir. May 7, 1990).

[10] See United States v. Zamarripa, No. 89-2145, slip op. 1, 506 (10th Cir. June 11, 1990) (reversing district court's departure from the Guidelines and holding that the conduct was adequately accounted for in section 3B1.3 of the Guidelines).

[11] See United States v. Ehrlich, 902 F.2d 327, 330-31 (5th Cir. 1990).

[12] See, e.g., Drabeck, No. 89-30237, slip op. at 6089-90.

[13] 55 Fed. Reg. 5739 (Sent. Comm'n 1990).

apply whenever a defendant commits a crime in, or related to, the workplace. To avoid this result, the Sentencing Commission should more narrowly define a "position of trust" for the purposes of sentence enhancement and impose a tighter causation requirement.

Before turning to specific recommendations, this article will briefly explain how the abuse of a position of trust adjustment fits into the recent history of criminal sentencing and the new Guidelines scheme. Next, it will consider the obstacles that courts have encountered in applying the adjustment. The article will then discuss how the Commission has accounted for the abuse of a position of trust in the base offense levels and specific offense characteristics of certain crimes. Finally, the article will offer and explain a proposal that the Sentencing Commission change the abuse of a position of trust adjustment from one of general application in the Guidelines to one of limited application.

I. THE RETURN OF RETRIBUTIVE SENTENCING

The federal Sentencing Guidelines arose out of a minor revolution in criminal sentencing that occurred in the 1970s and 1980s.[14] This revolution was fought largely over the purposes and goals of criminal sentencing and the role of judges in the process.

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[14] For a good digested version of the history of criminal sentencing in this country, see United States v. Scroggins, 880 F.2d 1204-08 (11th Cir. 1989). Scroggins suggests that the retribution model of sentencing prevailed in the early part of this country's history and slowly gave way to a "medical model," which emphasized rehabilitation and flourished in the 1960s. By 1984, the rehabilitation goal was on the wane. Congress began to acknowledge that "[w]e know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated." S. Rep. No. 225, 98th Cong., 2d Sess. 40.

Before the revolution, federal criminal law was strongly influenced by a rehabilitative model of criminal sentencing.[15] The rehabilitative model assumed that it was possible through criminal penalties to change offenders so that they would not commit future crimes. During the 1970s, however, a number of commentators expressed opposition to this theory.[16] They argued that the probation and parole system was a sham and that prisons did not rehabilitate.[17]

The new thinking was, in fact, largely a return to an emphasis on retribution theory with some concrete ideas about

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[15] See, e.g., Williams v. New York, 337 U.S. 241, 248 ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."); Ind. Const. Art. 1 (1978) (the "penal code shall be founded on the principles of reformation and not of vindicative justice); see generally A. Campbell, Law of Sentencing 31-41 (1978) [hereinafter "Law of Sentencing"].

[16] See, e.g., M. Frankel, Criminal Sentences: Law Without Order ch.9 (1973); A. von Hirsch, Doing Justice: The Choice of Punishments ch. 6, 15-17 (1985); P. O'Donnell, M. Churgin & D. Curtis, Toward a Just and Effective Sentencing System: Agenda for Legislative Reform ch. 6-10 (1977); N. Morris, Madness in the Criminal Law 145 (1982) ("Sentencing reform has been influenced intellectually and theoretically by an efffort to minimize sentences and the hypocrisy of adjusting prison terms to supposed indicia of rehabilitation demonstrated in prison, and by a trend toward models of guided discretion in judicial sentencing"); Winick, Legal Limitations on Correctional Therapy and Research, 65 Minn. L. Rev. 331-422 (1981).. See also Scott L. v. State, 760 P.2d 134 (Nev. 1988) (Nevada holds that retribution and "just desserts" remain appropriate sentencing rationales).

[17] Despite this movement towards giving retribution a greater role in criminal sentencing, the rehabilitation model still has persuasive advocates. See, e.g., Law of Sentencing at 26 (Supp. 1989) ("despite popular support for the vindication rationale, such notion is in fact a capitulation to mankind's basest instincts . . . [and] was the primary impetus behind sentences of torture, mutilation, and slow death that characterized the Middle Ages.").

implementation. Two theories which gained early adherents were so-called "flat sentencing" and "presumptive sentencing" systems.[18] "Flat sentencing" involved assessing a set sanction against every person convicted of committing a certain crime. Once a sentencing court determined the sentence for the individual offender, the sentence would become "flat," meaning that the defendant would have to serve the entire, or almost the entire, term. The similar "presumptive sentencing system" dictated that each crime would carry a presumptively correct standard penalty. That penalty, however, could be augmented or reduced by aggravating or mitigating factors.[19]

Elements of this "presumptive sentencing system" found their way into the current federal Sentencing Guidelines. The Guidelines operate on a system that assumes a standard penalty for a given offense, which can be adjusted upwards or downwards depending upon whether the defendant abused a position of public or private trust in such a way as to facilitate the commission or concealment of the offense.

By the time the Guidelines came into being, however, several states had adopted different forms of determinative or presumptive sentencing systems.[20] Most of the states devised some sort of

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[18] See generally, George, The Comprehensive Crime Control Act of 1984 406-07 (1989) (looseleaf).

[19] Id.

[20] See S. Rep. No. 98-225, 98th Cong., 2d Sess. 61-62, reprinted in, 1984 U.S. Code Cong. & Admin. News 3182 [hereinafter "Crime Control Report"] (discussing state legislation).

guidelines to control the exercise of judicial discretion.[21] State courts accepted the constitutionality of these provisions.[22]

The executive and legislative branches of the federal government soon became interested in the idea of developing a comprehensive federal sentencing system centered on a retributive philosophy.[23] Congress was concerned not only that the sentencing laws did not always reflect the new thinking, but also that a great disparity existed in the penalties for various crimes.[24] Congress acknowledged that some of the blame for such disparity should be placed at its feet. It had selected penalties in a haphazard manner over the decades and had not undertaken to create a Federal

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[21] See id.

[22] See, e.g., Juneby v. State, 641 P.2d 823 (Alaska App. 1982).

[23] See, e.g., Crime Control Report at 38:

> In the Federal system today, criminal sentencing is based largely on an outmoded rehabilitation model. The judge is supposed to set the maximum term of imprisonment and the Parole Commission is to determine when to release the prisoner because he is "rehabilitated." Yet almost everyone in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated. Since the sentencing laws have not been revised to take this into account, each judge is left to apply his own notions of the purposes of sentencing. As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.

[24] Id.

Criminal Code to iron out the discrepancies.[25] Congress laid much of the blame for disparate sentences, however, at the door of the federal courts.[26] The new system would take away much of this judicial discretion in sentencing matters to remove the perceived disparities.

The initial answer to the problem of how to focus and revise the federal criminal sentencing laws was the Sentencing Reform Act of 1984.[27] Congress endeavored in this Act to iron out some of the disparities in existing penalty provisions by setting out a system of offense classifications.[28] Congress left the process of working out the details of this system, however, to the United States Sentencing Commission.[29] The Sentencing Commission was charged with the task of devising federal Sentencing Guidelines for Congression approval.[30]

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[25] See Crime Control Report at 39; see generally George at 409-10.

[26] See, e.g., supra note 23.

[27] See Public Law 98-473, 98 Stat. 1976. See generally diGenova & Belfiore, An Overview of the Comprehensive Crime Control Act of 1984 -- The Prosecutor's Perspective, 22 Am. Crim. L. Rev. 707 (1985); Rezneck, The New Federal Sentencing Provisions, 22 Am. Crim. L. Rev. 785 (1985).

[28] See 28 U.S.C. § 991(b)(1)(B), 3559; see also United States v. La Guardia, 902 F.2d 1010, 1013 (1st Cir. 1990) ("Uniformity in sentencing was undeniably a primary goal of Congress and the Sentencing Commission in establishing a neotenic sentencing framework").

[29] See 28 U.S.C. §§ 991-98, 3553(b). The Guidelines became effective on November 1, 1987, and survived a constitutional challenge in 1989. See Mistretta v. United States, 109 S. Ct. 647 (1989).

[30] See 28 U.S.C. § 991.

II. THE STRUCTURE OF THE GUIDELINES

The federal Sentencing Guidelines provide a comprehensive scheme for criminal sentencing that is intended to limit the role and discretion of judges.[31] In a typical one-offense sentencing under the Guidelines, the district court will consult a mandatory presentence report prepared by a probation officer[32] and take the following steps to ensure that the report leads to the proper sentence: (1) look up the statute of conviction in the statutory index; (2) find the "base offense level" for that crime; (3) consider certain "specific offense characteristics," such as the possession of a gun during the commission of the offense; (4) determine if any "adjustments" from chapter three of the Guidelines apply (these adjustments account for, among other things, the defendant's role in the offense and the status of the victim); (5) calculate a "criminal history score" on the basis of the defendant's past criminal record; (6) determine the defendant's guideline range based upon the sum of the above factors by looking at a sentencing table contained in the Guidelines; (7) determine the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution; and (8) refer to "specific offender characteristics" for additional adjustments.[33] After considering these factors, the sentencing

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[31] See Weigel, supra note 6, at 89.

[32] See Fed. R. Crim. P. 32(c)(1).

[33] See Guidelines Manual § 1B1.1, at 1.13 (application instructions); Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 6-7 (1988) (article by United States Sentencing Commissioner and United States Circuit Judge Stephen Breyer); Wilkins & Steer, Relevant

judge may "depart" from the range indicated by the Guidelines if there are unusual factors, not taken into account by the Guidelines, which warrant such a departure.[34]

Under the Guidelines, an "abuse of a position of trust" may factor into the defendant's sentence as an adjustment,[35] a built-in aspect of an offense,[36] or a specific offense characteristic.[37] Section 3B1.3 of the Guidelines provides for a general upward adjustment when the defendant has "abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense."[38] There should be no adjustment, however, "if an abuse of trust . . . is included in the

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Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495, 497-500 (1990) (article by United States Sentencing Commissioner and General Counsel of the United States Sentencing Commission).

[34] Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guideline if 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 Sentencing Commission in formulating the guidelines." Guidelines Manual § 5K2.0, at 5.42. The Supreme Court recently took certiorari of a case addressing the issue of whether the defendant should have an opportunity to comment before a district court imposes a sentence based upon a departure under the Guidelines. See United States v. Burns, appeal taken from D.C. Cir., cert. granted, No. 89-7260 (July 31, 1990).

[35] See Guidelines Manual § 3B1.3, at 3.7.

[36] See, e.g., id. § 2C1.3, at 2.36 (stating that adjustment provided for in section 3B1.3 should not be applied).

[37] See, e.g., id. § 2C1.2, at 2.35 (adjustment provided for in section 3B1.3 should not be applied, but only because specific offense characteristic provides for eight-point enhancement where elected official offers, gives, solicits, or receives a gratuity on account of an official act -- that is, where he abuses a position of trust).

[38] Id. § 3B1.3, at 3.7.

base offense level or specific offense characteristic" of the crime for which the defendant has been convicted.[39] In such circumstances, the "abuse of a position of trust" adjustment would result in unfair double-punishment.

III. THE GENERAL ADJUSTMENT OF SECTION 3B1.3

The general sentencing adjustment provided for in section 3B1.3 has two "prongs." The first prong requires the sentencing court to ask whether the defendant has "abused a position of public or private trust."[40] The second prong requires that the court determine whether such abuse has "significantly facilitated the commission or concealment of the offense."[41]

For discussion purposes, it is useful to consider these two prongs independently. Each prong presents its own analytical problems, and the courts have begun to look at section 3B1.3 as requiring a two-step analysis.[42]

A. The "Abuse of a Position of Trust" Prong

The courts have had tremendous difficulty in determining what it means to "abuse a position of public or private trust." The word "trust" has a broad meaning that can encompass all kinds of relationships. Viewed broadly, "trust" is an "assured reliance on

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[39] Id.

[40] Guidelines Manual § 3B1.3, at 3.7.

[41] Id.

[42] See, e.g., United States v. Foreman, No. 89-50038, slip op. 6191, 6197-6201 (9th Cir. June 19, 1990).

some person or thing: a confident dependence on the character, ability, strength, or truth of someone or something."[43] Viewed narrowly, "trust" can imply only a fiduciary relationship created by law. Thus far, the courts have indicated only that a "position of trust" under the Sentencing Guidelines involves certain characteristic features.

In United States v. Drabeck, the United States Court of Appeals for the Ninth Circuit focused on the lack of supervision accorded a criminal defendant in upholding application of the adjustment.[44] Defendant Drabeck worked for a janitorial service, which had a cleaning contract with a certain bank. As an incident of his job, Drabeck had keys to the bank and often worked unsupervised after the bank was closed. One evening when no bank employees were present, he removed $6,300 in traveler's checks from the bank's coin vault, located in an area where the general public was not allowed to enter. To get into the vault, Drabeck had to turn the handle of the vault door, which was either unlocked or defective.

Drabeck pleaded guilty to one count of bank larceny. In sentencing him, the district court applied an upward adjustment for

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[43] Webster's Third New International Dictionary 2456 (1986). Note that courts often turn to the dictionary when terms used in the Guidelines are ambiguous. See, e.g., Foreman, slip op. at 6189 (construing term "facilitate" in Guideline § 3B1.3 by reference to dictionary definition); cf. United States v. Brannan, No. 89-50016, slip op. 2647, 2653 (9th Cir. Mar. 12, 1990) (relying in part on dictionary definition of "counterfeit" in affirming conviction of defendant for use of a "counterfeit access device" in violation of 18 U.S.C. § 1029(a)(1)).

[44] See United States v. Drabeck, No. 89-30237, slip op. 6083, 6086-90 (9th Cir. June 14, 1990).

an abuse of a position of trust. Drabeck appealed, arguing that "Guideline § 3B1.3 was not meant to apply to any person lower on . . . the 'hierarchy of fiduciary responsibility' than an ordinary bank teller."[45] A janitor, Drabeck argued, is lower on this hierarchy and therefore he should not have received the adjustment for stealing the traveler's checks.[46]

The Ninth Circuit disagreed. It first observed that the Commentary to section 3B1.3 does indeed identify the "ordinary bank teller" as a person who does not "abuse a position of trust" when he/she embezzles from a bank.[47] The court reasoned, however, that the "lack of supervision over the defendant distinguishes him sufficiently from an ordinary bank teller such that the exception from the enhancement that the Commentary affords the [bank] teller is inapplicable to [Drabeck]."[48]

At first glance, the court's point about a lack of supervision makes sense. A janitor often works when the bank is closed and there are no other employees around to watch him. Because of this lack of supervision, the bank management is less aware of the janitor's possible mischief and must place more trust in him than the "ordinary bank teller," who is closely supervised all day.

A second look, however, reveals that a lack of supervision does not necessarily suggest a position of trust. The janitor is

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[45] Id. at 6089.

[46] Id.

[47] See id. at 6087-88 (discussing Guidelines Manual § 3B1.3, Commentary, Application Note 1, at 3.7).

[48] Id. at 6088.

not as closely supervised as the bank teller precisely because he has fewer opportunities to engage in criminal mischief that will be costly to the bank. The janitor does not have ready access to money and receipts, as does the "ordinary bank teller." Such realities suggest that a lack of supervision may not be so much an indication that the janitor occupies a position of trust, as an indication that the janitor's job is less likely to afford him an opportunity for perpetrating a crime that will be very costly to the bank. In short, it does not necessarily follow that the janitor is in a greater position of trust than the ordinary bank teller simply because the janitor is less supervised.[49]

Other cases focus less on the lack of supervision factor and more on the defendant's authority and control over the crime scene or victim. In United States v. Ehrlich, the defendant was a bank loan clerk responsible for "loan balancing." This job entailed verifying that the bank's general ledger account totals matched those of the bank's data processing company. Ehrlich would file debit and credit slips to correct the balances of the affected accounts caused by clerical, data entry, or computer error in the

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[49] It is possible that the Commission intended the cryptic "ordinary bank teller" example to provided guidance not so much for the "position of trust" prong as the facilitation prong. The idea would be that the bank teller's job does not facilitate the commission of the offense of embezzlement because the bank teller is in no better position to embezzle than any number of people who work in financial institutions. The Commission, however, simply does not tell us what the ordinary bank teller example is supposed to illustrate. Thus, the courts tend to look to the example as a paradigm for application of the adjustment in all its facets. The bold courts threaten to disregard the counter-intuitive example altogether, see Drabeck, slip op. at __, but most simply sail through the fog without a sextant, not minding that they cannot see the coastline.

computer balancing process. Ehrlich manipulated this loan balancing process in such a way as to embezzle money from the accounts. A jury found her guilty of embezzlement and the district court imposed sentence, including a two-point upward adjustment for abuse of a position of trust under section 3B1.3 of the Guidelines. Ehrlich appealed, alleging among other things that the trial court erred in applying the adjustment. In particular, Ehrlich argued that her job was like that of an ordinary bank teller.[50]

The Fifth Circuit rejected the argument, emphasizing that Ehrlich was in a position of greater trust than the ordinary bank teller because she had extraordinary authority over the bank's accounts. "Ehrlich's position gave her the authority to routinely initiate loan balancing transactions."[51] "Ehrlich was given the authority to balance the loan suspense account, which she debited to effect three of the six embezzlements."[52] "This account is large and important, and . . . the bank assigns control of the loan suspense account only to employees deemed trustworthy and highly responsible."[53]

The Tenth Circuit also focused on authority and control in applying the abuse of a position of trust adjustment to a baby

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[50] See United States v. Ehrlich, 902 F.2d 327, 330-31 (5th Cir. 1990).

[51] Id. at 331 (emphasis added).

[52] Id. (emphasis added).

[53] Id. (emphasis added).

sitter who sexually abused the child he was hired to watch.[54] In United States v. Zamarripa, the district court had departed from the sentencing range indicated by the Guidelines to take into account the special circumstances surrounding the defendant's crime. The Tenth Circuit vacated and remanded for resentencing, however. It concluded that the district court erred in departing because section 3B1.3 provided an upward adjustment for the special circumstances cited by the district court. Section 3B1.3 provided for an adjustment because "[a] babysitter is in a position of trust, and this position certainly enables him to commit a sexual crime more easily than a man on the street."[55]

While courts have looked to supervision, authority, and control to define the "position of trust," however, they have not yet acknowledged that crime within the scope of employment is the most common feature in the cases upholding application of the upward adjustment.[56] United States v. Parker is a good example of

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[54] See United States v. Zamarripa, No. 89-2145, slip op. at 2 (10th Cir. June 11, 1990).

[55] See Zamarripa, No. 89-2145, slip op. at 5-6.

[56] See Drabeck, slip op. at 6087-90 (adjustment where janitor committed bank larceny while on duty); Foreman, slip op. at 6200-01 (police officer attempted to use badge associated with law-enforcement position to escape search at airport); Ehrlich, 902 f.2d at 330-31 (bank loan clerk embezzled during course of employment); Zamarripa, slip op. at 5-6 (babysitter abused child while on duty); United States v. Parker, Nos. 89-1390, 89-1391, 89-1402, slip op. 3491, 3516 (2d Cir. May 7, 1990) (security guard provided information about cash delivery while on duty at check-cashing firm); United States v. McElroy, Nos. 90-1040, 90-1041, slip op. (2d Cir. July 31, 1990) (bank officers misapplied bank funds).

United States v. Berkowitz, 712 F. Supp. 707 (N.D. Ill. 1989) is consistent with this interpretation. In Berkowitz, the court refused to apply the adjustment where the defendant stole documents from a United States Attorney's office while he was there to review

this phenomenon. Defendant Parker had a job as an armed security guard at a check-cashing firm in Elizabeth, New Jersey. This firm delivered large amounts of cash to corporate clients in New York City.[57] Parker conspired to rob a vehicle of the check-cashing firm as it made a delivery to a building in New York. On the day of the robbery, Parker learned of the delivery schedule of the vehicle and passed the information on to his co-conspirators. Parker also provided a description of the vehicle. Parker's co-defendants ambushed the vehicle as it arrived to make a cash delivery, shooting two payroll guards in the process.

Parker appealed from his sentence under the Guidelines, arguing, among other things, that he should not have received a two-point upward adjustment for abuse of a position of trust under section 3B1.3.[58] The Second Circuit dismissed the argument, reasoning that "Parker was the only defendant who [on the day of the robbery] was a Payroll employee."[59] A co-defendant "had not worked there in two months, and it could only facilitate his planning and the execution of the crime to have confirmation from an insider as to the description of the Payroll car and the time it was likely to arrive."[60] Parker had to concede that "because of

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documents as a part of discovery in a criminal case in which he had been indicted. See id. at 709. The district court, in a one-sentence analysis of the issue observed that the defendant "simply took [illegal] advantage of an opportunity." Id. Berkowitz did not commit his offense within the scope of employment.

[57] See Parker, slip op. at 3494-95.

[58] See id. at 3516.

[59] Id.

[60] Id.

his position he 'could have confirmed the details of car, personnel and route that were already known by [the co-defendant], and upon which he had planned this robbery.'"[61]

The courts' apparent equation of employment with "position of trust" is inconsistent with the Commission's view of the adjustment. The Commentary to section 3B1.3 explains that the "ordinary bank teller" who embezzles at work should not receive the adjustment.[62] Because the Commission excludes the bank teller from the universe of defendants who could receive the adjustment, it must have meant that "position of trust" is not synonymous with scope of employment. Yet every court to publish a decision on the subject has upheld application of the adjustment where the defendant has committed the offense within the scope of employment.[63]

The federal appellate courts can hardly be blamed for their expansive reading of section 3B1.3, however. Such a result is almost predetermined when the courts of appeal use a deferential standard of review. While most federal circuit courts of appeal have not determined the standard of review to be employed in reviewing adjustments for abuse of a position of trust under section 3B1.3, two such courts have taken the lead and announced

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[61] Id.

[62] See Guidelines Manual § 3B1.3, Commentary, Application Note 1, at 3.7.

[63] See supra Note 39.

that they will review for clear error only.[64] This deferential standard of review insulates district court decisions, but has the undesirable effect of insulating district court decisions from closer scrutiny. Borderline applications of the adjustment are less likely to be overturned at the appellate level under such a standard.

B. THE "FACILITATION" PRONG

The second prong of section 3B1.3 requires sentencing courts to determine whether the abuse of a position of trust has "significantly facilitated the commission or concealment of the crime."[65] This is a causation requirement to ensure that there is a nexus between the abuse of a position of trust and the criminal offense.

Thus far, the courts have not used the facilitation prong to limit application of the adjustment. Without much critical analysis, the courts have merely emphasized the importance of a defendant's special knowledge of the crime scene or victim in

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[64] See Drabeck, slip op. at 6089 (district court's factual finding that defendant abused a position of trust reviewed for clear error); Ehrlich, 902 F.2d at 330 ("A district court's application of § 3B1.3 is a sophisticated factual determination that will be affirmed unless clearly erroneous."); see also Wilkins & Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495, 520 (1990) ("the burden of persuasion as to specific offense characteristics and other offense level adjustments properly should rest with the party asserting their application"). But see Foreman, slip op. at 6197 (issue "whether an upward adjustment under § 3B1.3 is proper" is a legal issue and reviewed de novo, but "factual issue" of whether defendant's "conduct significantly facilitated the concealment of her crime" is reviewed for clear error only).

[65] Guidelines Manual § 3B1.3, at 3.7.

discussing the facilitation requirement. For instance, in Parker, the defendant-security guard argued that his job at a check-cashing firm could not have facilitated the commission of the robbery of a payroll car connected to the firm.[66] The Second Circuit disagreed, reasoning that "it could only facilitate [the] planning and execution of the crime to have confirmation from an insider as to the description of the payroll car and the time it was likely to arrive."[67]

Similarly, in Ehrlich, defendant argued that her job as a bank loan clerk merely afforded her an opportunity to embezzle "'that could have as easily been afforded to other persons.'"[68] Thus, she argued, the adjustment under section 3B1.3 was improper. The Fifth Circuit conceded that "[p]erhaps any number of . . . employees could have obtained and executed the same instruments, debit and credit slips, and then routed them" to the data processing center.[69] However, defendant's "position of trust gave her specialized knowledge of the [data processing] system, as well as information about non-reconciled MedCentre accounts, that few other employees shared. More importantly, Ehrlich's position gave her the

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[66] See Parker, slip op. at 3516.

[67] Id.

[68] Ehrlich, 902 F.2d at 331 (quoting Guidelines Manual § 3B1.3, Commentary, Application Note 1, at 3.7). Ehrlich's argument is not surprising given the language in the application note (viz., "an opportunity that could have as easily been afforded to other persons"). This language could be read to suggest that a position of trust does not contribute "in some substantial way" to the facilitation of the crime unless only one person enjoys the privileges of that "position of trust."

[69] Id.

authority to routinely initiate loan balancing transactions, which facilitated embezzlements."[70]

One court could have put some teeth into the facilitation requirement, but it left the requirement toothless. In United States v. Foreman, a Missouri police officer arrived at Los Angeles International Airport, and was detained for questioning by Drug Enforcement Agency officers who observed her engaging in suspicious activity.[71] When the agents identified themselves, Foreman showed the agents her police badge and stated that she was an active police officer. Her efforts did not avail. The agents eventually arrested her for possession of a controlled substance.

In determining Foreman's sentence under the Guidelines, the district court included a two-point upward adjustment, concluding that Foreman had "use[d] her employment as a police officer to attempt to deflect the investigation of her, and thus to attempt to escape responsibility for her criminal activity."[72] Foreman appealed from her sentence, arguing, among other things, that "the use of her police identification did not abuse her position of trust 'in a manner that significantly facilitated' her crime."[73] "[Any] efforts on her part to use her position as a police officer to avoid investigation were unsuccessful and thus could not have

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[70] Id.

[71] See Foreman, slip op. at 6194.

[72] Id. at 6201 (quoting district court's findings and conclusions) (emphasis added).

[73] Id. at 6197.

'significantly facilitated' her crime."[74]

A divided panel of the Ninth Circuit disagreed with this argument, holding that section 3B1.3 "may be read to provide an adjustment for abuse of a position of trust that significantly facilitated the attempted concealment of the offense."[75] Without first determining whether the language of section 3B1.3 is ambiguous, the court inferred an attempt provision by engaging in a linguistic analysis of the word "facilitate" and a far-flung examination of sentencing for attempts in other areas of the Guidelines.[76] The court determined that "the guideline's use of the word 'facilitated' implies that the drafters of this section intended it to apply to any abuse of a position of trust which significantly made it easier to commit or conceal a crime, regardless of the success of that abuse."[77] The court recognized that the Sentencing Commission specifically provided for attempts in other sections of the Guidelines and did not do so in section 3B1.3, but determined that this fact was not controlling, given its understanding of what it called the "Commission's overall Guidelines policy on attempts."[77]

The dissent appears to be correct, however, when it describes the majority opinion as "enlarg[ing] the language of section 3B1.3 far beyond anything the language of that provision can reasonably

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[74]Id.

[75]Id. at 6200 (emphasis added).

[76]See id. at 6197-98.

[77]Id. at 6189.

[77]See id. at 6200.

bear."[78] The majority "looks past the unambiguous language of the statute in order to justify its rather odd 'implication' that an unsuccessful effort to facilitate is the same as having 'significantly facilitated.'"[79] The majority's disregard of the official Commentary, which requires a finding that the abuse of trust "contributed in some substantial way" to facilitating the commission or concealment of the crime, compounds the majority's misreading of the Guideline's language.[80] An attempted abuse of a position of trust cannot have a "substantial" effect on facilitating the concealment of an offense because an attempt, by definition, means a lack of ultimate success. Moreover, the dissent properly questions the wisdom of inferring some overall Guidelines policy on attempts from a general section which refers only to base offense levels and not adjustments.[81]

Another point bears mentioning here. The Foreman court failed to consider whether the defendant's sentence could have been enhanced under a different guideline section. This appears to have been a mistake because section 3C1.1 provides for an upward adjustment in the defendant's base level where the defendant "willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense."[82] The Commentary to this

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[78]Id. at 6202 (Reinhardt, J., dissenting).

[79]Id. at 6205 (Reinhardt, J., dissenting).

[80]See id. at 6205-06 (Reinhardt, J., dissenting).

[81]See id. at 6207 (Reinhardt, J., dissenting).

[82]Guidelines Manual § 3C1.1, at 3.9 (see the Appendix to this

enhancement section explains that it reaches defendants who "conceal[] material evidence, or attempt[] to do so."[83] This language appears to apply to Foreman, who attempted to impede or obstruct the administration of justice by flashing her police badge in hope of avoiding a search.

IV. THE BUILT-IN ADJUSTMENT

A. The Overbreadth Problem

Section 3B1.3 states that it may not "be employed if an abuse of trust ...is included in the base offense level" of the crime for which the defendant has been convicted.[84] The Commission sometimes indicates where the adjustment has already been accounted for in the base offense level for the offense by noting this fact in the Commentary to the relevant guideline.[85] Where the Commentary states that the adjustment is not applicable, we may assume that it has been built into the base offense level for the crime. On the other hand, where the Commentary states that the adjustment is applicable, we may assume that the base offense level does not already take into account the abuse of a position of trust factor.

For instance, the adjustment of section 3B1.3 does not apply

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article).

[83] Id. § 3C1.1, at 3.9, Commentary, Application Note 1(a).

[84] Id. § 3B1.3, at 3.7.

[85] Cf. United States v. Fuente-Kolbenschlag, 878 F.2d 1377, 1380 (11th Cir. 1989) ("Had the Sentencing Commission intended to exclude the applicability of the special skill enhancement of guideline 3B1.3 from sentences computed under guideline 2B5.1, we must conclude that it would have done so in the Commentary to the base offense level guideline.").

where the defendant is a present or former federal officer who has engaged in conduct involving a financial or non-financial conflict of interest.[86] The logic here must be that the conduct of such a federal official is, by definition, an abuse of a position of public trust; therefore, imposing a sentence enhancement for the abuse would be redundant.[87] The base offense level for the crime accounts for the abuse of a position of trust element.

On the other hand, the adjustment does apply "[i]n the case of a defendant who was a union officer or occupied a position of trust in the union, as set forth in 29 U.S.C. § 501(a)."[88] Likewise, a fiduciary of an ERISA or welfare benefit plan is, by definition, in a position of trust and therefore should receive an

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[86]See Guidelines Manual § 2C1.3, at 2.36.

[87] Defendants made this argument to no avail in United States v. McElroy, Nos. 90-1040, 90-1041, slip op. (2d Cir. July 31, 1990). Defendants, officers in Vermont banks, were convicted of several offenses, including conspiracy to misapply bank funds. They argued that they should not have received an upward adjustment for abuse of a position of trust because an adjustment for that factor was already included in the base level for the offense. The Second Circuit disagreed. The court noted that the offense encompasses criminal conduct by any person who is "an officer, director, agent or employee of, or connected in any capacity with" a federally insured bank. Id. Since not all of these positions are necessarily positions of trust, abuse of trust is not necessarily part of the offense. This was an aspect not accounted for in the base level of the offense.

McElroy suggests that the abuse of a position of trust adjustment may become commonplace in the Savings and Loan fraud cases now working their way into the courts.

[88]See id. § 2E5.4, at 2.69. Section 501(a) acknowledges that "[t]he officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group." 29 U.S.C. § 501(a)(1988).

automatic adjustment when he steals or embezzles from the plan.[89] In these cases, we can assume that the base offense levels do not already contain a built-in adjustment for the abuse of a position of trust because the Commentary indicates that the adjustment should be made. The Commission has mandated application of the enhancement only for a class of defendants who fit squarely within the parameters of the "abuse of a position of trust" notion.

Where the Commission makes it clear that the "abuse" notion is or is not built into the offense, there is little difficulty in deciding whether the adjustment should be applied. It is not always clear, however, whether certain types of defendants should receive the adjustment.

For example, sometimes the Commission relies upon a hazy distinction to indicate which types of defendants should receive the adjustment. The Commentary to the base offense level guideline for insider trading states that "[s]ection 3B1.3 ... should be applied only if the defendant occupied and abused a position of special trust."[90] Examples of persons in positions of "special trust," we are told, "might include a corporate president or an attorney who misused information regarding a planned but

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[89]See Guidelines Manual § 2E5.2, Commentary, Application Note 2, at 2.68 (stating that a "'[f]iduciary of the benefit plan' is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan").

[90]Guidelines Manual § 2F1.2, Commentary, Application Note 1, at 2.74 (emphasis added).

unannounced takeover attempt. It typically would not apply to an ordinary 'tippee.'"[91] The distinction between "special" and "ordinary" trust is not fully developed here; the Commentary barely sketches out a concept that is supposed to guide courts on difficult decisions.

At other points, the Guidelines treat an offense as if it invariably includes an "abuse" factor, even if it may not. For instance, in Guidelines section 2C1.6 the Commentary proscribes application of the section 3B1.3 adjustment in sentencing for several crimes, including the offering of loans or gratuities to bank examiners or the offering of anything of value for procuring a loan or discount on commercial paper from a Federal Reserve bank.[92] By proscribing application of the adjustment for these crimes, the Commission suggests that the base offense level already takes into account the "abuse of a position of trust" factor. Yet, some defendants who are sentenced under section 2C1.6 may not, in fact, abuse a position of trust. Defendants who offer or give gratuities, for instance, would not appear necessarily to abuse

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[91] Id., Commentary, application note 1. The academic literature is full of useful discussions about the many ways in which corporate and market insiders occupy and can abuse their positions of trust. See, e.g., Andre, A Preliminary Inquiry Into the Utility of Vote Buying in the Market for Corporate Control, 63 S. Cal. L. Rev. 533, 636 (1990) ("managers who have unlimited access to the corporate coffers are clearly in a position to abuse their trust"); Estreicher, Securities Regulation and the First Amendment, 24 Ga. L. Rev. 223, 301 (1990) ("The state may justifiably concern itself with . . . personalized encounters [between a professional investment advisor and client] not because the communications lack first amendment protection, but because they present opportunities for abuse of the professional's position of trust, overreaching, and fraud.").

[92] See Guidelines Manual § 2C1.6, Commentary, Application Note 1, at 2.38.

positions of trust. A defendant who is convicted of offering a bribe to secure a loan from a Federal Reserve bank would be sentenced under section 2C1.6.[93] Such a person, however, may not abuse a position of trust in the same way that a Federal Reserve bank officer would by accepting the bribe. Nevertheless, section 2C1.6 is said to have a built-in adjustment for the abuse of a position of trust aspect, even though there is a potential class of defendants who may not be guilty of such conduct.

B. The Underinclusiveness Problem

While the Guidelines sometimes indicate that certain offenses include built-in adjustments for abuse of a position of trust, they inexplicably fail to state whether other offenses already contain the built-in adjustment. The Ninth Circuit noted this peculiarity in Drabeck.[94] There, the court found itself unable to understand why the "ordinary bank teller" does not, as a matter of law, abuse a position of trust when he/she embezzles from the bank.[95] The court speculated that perhaps the abuse of trust adjustment is already built into the base offense level for the crime of embezzlement.[96] The court noted several cases "suggesting" this

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[93] See Guidelines Manual § 2C1.6, at 2.37.

[94] See United States v. Drabeck, No. 89-30237, slip op. at 6083, 6087-90 (9th Cir. June 14, 1990).

[95] Cf. United States v. Fousek, No. 89-5358, slip op. (8th Cir. Aug. 29, 1990) (bankruptcy trustee, convicted of embezzling funds from Chapter 13 debtors, does not challenge upward adjustment under Guidelines section 3B1.3 for abuse of a position of trust).

[96] But see id. (defendant does not appeal issue of upward adjustment for abuse of a position of trust for embezzlement).

fact, but wondered why the Commission had not made this explicit.[97]

The confusion in Drabeck is not surprising. Embezzlement would appear to be one of those crimes where most, if not all, defendants would abuse positions of trust. Yet the embezzlement section in the Guidelines says nothing about whether this fact has been accounted for in either the base offense level for the offense or the specific offense characteristic.[98] In its one example defining the limits of section 3B1.3, the Commission instructs that a bank teller who embezzles does not abuse a position of trust.[99] Yet at other points in the Guidelines the Commission explicitly provides for the adjustment in the case of embezzlement by other similarly situated individuals.[100] What separates the embezzling "ordinary bank teller" from other types of embezzlers who should receive the adjustment is not clear.

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[97]See id. at 6089. The Ninth Circuit in Drabeck cited United States v. Jimenez, 897 F.2d 286, 297 (7th Cir. 1990) (stating in dicta that enhancement of sentence for abuse of trust is not applicable to embezzlement); United States v. Herrera, 878 F.2d 997, 1001 n. 3 (7th Cir. 1989) (section 3B1.3 designed to prevent double-counting, thus it may not be employed if an abuse of trust is included in the base offense level); United States v. Reich, 661 F.Supp. 371, 373 (S.D.N.Y. 1987) (to sentence a lawyer under Guidelines, district court must determine whether breach of trust is built into notion of insider trading before deciding whether to adjust under section 3B1.3. But c.f. Fuente-Kolbenschlag, 878 F.2d at 1380 ("Had the Sentencing Commission intended to exclude the applicability of the special skill enhancement of guideline 3B1.3 from sentences computed under guideline 2B5.1, we must conclude that it would have done so in the Commentary to the base offense level guideline.").

[98]See Guidelines Manual § 2B1.1, at 2.17.

[99]See id. 3B1.3, Commentary, Application Note 1, at 3.7.

[100]See, e.g., id. § 2E5.4, Commentary, Application Note 1, at 2.69 (embezzlement by union officer); id. § 2E5.2, Application Note 1, at 2.68 (embezzlement by ERISA or welfare plan fiduciary).

The problems that can arise because of such ambiguity and silence on important matters are vividly illustrated in United States v. Fousek.[101] In Fousek, the defendant, a bankruptcy trustee, pleaded guilty to embezzling from a some Chapter 13 debtors. In sentencing the defendant, the district court not only adjusted for abuse of a position of trust but also departed upwards from the sentencing range indicated by the Guidelines because the offense "caused a loss of confidence in an important institution [i.e., the bankruptcy system]."[102] The Eighth Circuit Court of Appeals affirmed, rejecting Fousek's argument that the combination of the adjustment and the departure resulted in "double counting." The result for Fousek was that he not only may have been punished twice for abuse of a position of trust (once because of the adjustment provided for in section 3B1.3 and once because the base offense level for the offense may have already accounted for the abuse), but he also was punished for the effect of that abuse. The reasoning in Fousek reveals as much: "[W]hen a person in a position of public trust, as was Fousek, embezzles money from those he is bound to aid, it stands to reason that there will be some resulting loss of public confidence in that institution."[103] Fousek could reasonably argue that he was punished twice for the cause and once for the effect of his abuse.

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[101] Fousek, No. 89-5358, slip op. at __.

[102] See id. (departing by analogy to Guidelines Manual § 2F1.1, Commentary, Application Note 9, at 2.73, which states that an upward departure may be appropriate where "the offense caused a loss of confidence in an important institution").

[103] Fousek, No. 89-5358, slip op. at __.

V. THE ADJUSTMENT IN SPECIFIC OFFENSE CHARACTERISTICS

At various points in the Guidelines, the abuse of a position of trust adjustment appears as a "specific offense characteristic." Unlike general adjustments, which appear in chapter three of the Guidelines, "specific offense characteristics" appear as subsections in base offense level guidelines in chapter two. As the name indicates, "specific offense characteristics" provide offense-specific adjustments for certain kinds of defendants and conduct. Where a base offense level does not account for particularly egregious conduct, a "specific offense characteristic" will often make amends.

The "abuse of a position of trust" enhancement appears in a slightly modified form as a "specific offense characteristic" where the base offense level guideline describes criminal conduct by certain public officials. For instance, a specific offense characteristic in section 2C1.2 provides for an adjustment where an "elected official" or "any official holding a high level decision-making or sensitive position" offers, gives, solicits, or receives a gratuity with respect to an official act.[104] Likewise, specific offense characteristics of sections 2H1.2 (Conspiracy to Interfere with Civil Rights) and 2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property) also both provide adjustments for crimes in which "public officials" are involved.[105]

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[104]See id. § 2C1.2(b)(2)(B), at 2.35.

[105]See id. §§ 2H1.2, 2H1.3, at 2.84-.85.

The Commission has evidently chosen to treat differently abuses of trust by "public officials" because it views such abuses as among the most egregious possible. This is evident from the degree of enhancement accorded such "public officials." Instead of receiving the two-point upward adjustment of section 3B1.3, such "public officials" receive from four to eight-point upward adjustments when they commit the above-discussed offenses.[106]

VI. PROPOSALS

The "abuse of a position of trust" concept suffers from ambiguity and misdirection in the Guidelines. It is difficult, if not impossible, to understand in the abstract what it means to "abuse a position of trust."[107] The Commission has not made the task any easier. The present Commentary to section 3B1.3 creates more problems than it solves. The example of the "ordinary bank teller" is misleading,[108] and words such as "substantial," "significantly," and "easily," which appear in the Commentary apparently to limit the scope of the enhancement, betrays a futile

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[106]See id. §§ 2C1.2(b)(2)(b), at 2.35; 2H1.2, at 2.84; 2H1.3, at 2.85.

[107]See supra, at 7-13.

[108]The Commission's decision to use a negative example (i.e., those who do not run afoul of section 3B1.3) to describe the operation of section 3B1.3 of the Guidelines was a poor choice. The problems that the courts are having in interpreting section 3B1.3 might have been reduced if the Commission had used positive examples instead. Similar difficulties will almost certainly be avoided with the "special skill" enhancement of section 3B1.3. The commentary to that enhancement provision contains affirmative examples which provide much clearer guidance. See Guidelines Manual § 3B1.3, Commentary, Application Note 2, at 3.7 (reproduced in Appendix to this article).

effort to circumscribe a concept whose bounds are unclear.

The courts to date have accepted the invitation to uneven and ultimately unfair application extended by the Commission. The only consistent factor in applying the adjustment appears to be the scope of employment.[109] There are, moreover, signs that the adjustment may even have a broader reach.[110] Potential "positions of trust" abound in our society.[111] If the Commission does not amend section 3B1.3, the only real question is where the courts will draw the line. Line drawing will be a difficult task in the federal circuit courts. They are ill-equipped to delimit the enhancement for the Commission when they review district court decisions for clear error only.[112]

The "abuse of a position of trust" concept is not, however, devoid of meaning and potential application. Defendants who abuse positions of trust in such a way as to facilitate the commission or concealment of the offense are "more culpable" than their non-abusing counterparts.[113] The law has long recognized such abuse as

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[109]See supra note 36.

[110]See e.g., United States v. Foreman, No. 89-50038, slip op. 6191, 6201 (9th Cir. June 19, 1990) (upholding application of adjustment where defendant attempted to conceal crime by using police badge to escape search).

[111]It may not be too much to say that every person occupies, in the broad sense, a "position of trust" with respect to someone or something. Most of us sustain multiple trust relationships. Because these relationships are so common, sentence enhancement that arises out of these relationships has almost limitless potential.

[112]See supra note 43.

[113]See Guidelines Manual § 3B1.3, Commentary, Application Note 1, at 3.7.

an aspect of criminal conduct in certain crimes.[114]

A good idea, however, does not always translate into a good rule. Moral philosophers may agree that a public official who takes a bribe is more culpable than the private citizen who offers it; but would they agree that a union officer who embezzles money from the union coffers is more culpable than the bank teller who embezzles money from the bank?[115] Here, the line drawing becomes more post hoc rationalization than principled distinction between levels of culpability.

To continue to permit sentence enhancement for those who "abuse a position of trust," it seems the Commission will first have to acknowledge that there is much social policy invested in the terms of section 3B1.3. Like the concept of "duty" in the law of torts, "trust" is a conclusion that is disguised in moral garb. The goal in sentencing under this section should be to isolate those instances where social policy and common sense dictate that the defendant should receive additional punishment. This will, of course, be an imperfect process; there may be those who "deserve" the extra punishment, but do not receive it. This process, however, will not force judges to become philosophers and sweep in defendants for sentence enhancement whose extra-culpable conduct is merely the commission of an offense within the scope of employment.

The first step in implementing such a process would be to

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[114]See supra at 18-21.

[115]Compare Guidelines Manual § 2#5.4, at 2.69 (union officer receives adjustment) with id. § 3B1.3, Commentary, Application Note 1, at 3.7 ("ordinary bank teller" does not).

limit the application of section 3B1.3. As currently drafted, that section has a general application as a "role in the offense" enhancement.[116] This article proposes that section 3B1.3 be amended to state that it is applicable only where the commentary to a certain guideline specifies its applicability. This will not affect those few guidelines where the enhancement is already accounted for as a specific offense characteristic.[117] The amendment, however, would eliminate any confusion about whether the enhancement is already built into the base offense level for the offense.[118] Where the enhancement is not explicitly provided for, the courts should assume it does not apply.

The commentary to section 3B1.3 should next be amended to account for the new limitation. The bank teller example would no longer be necessary because the commentaries to the other guideline provisions will provide particularized examples of when the enhancement should be applied. The commentary should be amended to make explicit that the enhancement does not apply to a defendant who attempts to facilitate the commission or concealment of the offense through his abuse of a position of trust.[119] Attempts are

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[116]See Guidelines Manual §§ 3B1.1-3B1.3, at 3.5-.7 ("role in the offense" enhancement provisions include those for an "aggravating role" or "mitigating role" in the offense).

[117]See id. §§ 2C1.2, 2H1.2-.3, at 2.35, 2.84-.85.

[118]Because the general enhancement will no longer apply, those portions of guidelines commentaries which currently state that section 3B1.3 does not apply would have to be deleted. See, e.g., id. § 2C1.3, at 2.36 (application note indicates that section 3B1.3 does not apply).

[119]This amendment would overrule Foreman, No. 89-50038, slip op. at 6210, in which the Ninth Circuit applied the enhancement where the defendant attempted to conceal her offense by flashing

already adequately accounted for in the base offense levels for the various crimes and in section 3C1.1, which provides for an upward adjustment where a defendant "willfully ...attempted to impede or obstruct the administration of justice."[120]

Once the Commission has amended section 3B1.3 and its commentary in this fashion, it should then address the specific areas where the enhancement should apply. The Commission has already indicated that certain crimes contain a built-in adjustment for abuse of a position of trust.[121] For these crimes, it would be inappropriate to indicate that the adjustment is applicable under any circumstances. The Commission need only concentrate its efforts on those crimes where the enhancement is not already built into the offense. While not an exclusive list, these crimes would appear to include the following: insider trading, embezzlement, criminal sexual abuse, kidnaping, abduction, theft, commercial bribery and kickbacks. For these crimes, the Commission should tailor commentary to describe the types of defendants and conduct that shall give rise to an enhancement under section 3B1.3.

In crafting such commentary, the focus should be on the nexus between the thing entrusted and the criminal offense for which the defendant has been convicted. For instance, a janitor who steals money or traveler's checks from the bank where he works should not

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an out-of-state police badge. As discussed above, the reasoning of that case is suspect, at best. See supra at 15-18.

[120]Guidelines Manual § 3C1.1, at 3.9.

[121]See, e.g., id. § 2C1.3, at 2.36.

receive the enhancement.[122] The bank has not entrusted money or checks to him.[123] Conversely, the babysitter who sexually abuses the child he is hired to watch should receive the enhancement.[124] The child has been entrusted to the babysitter by the parents.[125]

Phrases like "special trust," however, will not be useful in fashioning commentary. The Commission uses this term in the area of insider trading to distinguish between corporate insiders and tipees.[126] This distinction, however, does not rest on some easily intelligible difference between "special" and "ordinary" trust. The distinction is based on a judgment that a factual distinction between two types of defendants should have some relevance in

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[122]I refer here, of course, to United States v. Drabeck, No. 89-30237, slip op. 6083 (9th Cir. June 14, 1990), where the Ninth Circuit upheld application of the enhancement. See id. at 6088.

[123]This reasoning would also reverse the result in Foreman, where the Ninth Circuit upheld the enhancement for a Missouri police officer who attempted to conceal her offense of possessing narcotics by flashing her police badge. See Foreman, No. 89-50038, slip op. at 6196. Here there is little or no nexus between the criminal act (possession of narcotics) and the position of trust -- the job as a police officer. Similarly, in United States v. Parker, Nos. 89-1390, 89-1391, 89-1402, slip op. 3491 (2d Cir. May 7, 1990), the check cashing firm's delivery vehicle had not been entrusted to the defendant or his co-defendants in any way. See id. at 3494-96.

[124]This example is based on United States v. Zamarripa, No. 89-2145, slip op. at ___ (10th Cir. June 11, 1990).

[125]Similarly, the bank loan clerk in Ehrlich would receive the enhancement (unless embezzlement already contains a built-in adjustment) because she was entrusted with the very accounts from which she embezzled. See United States v. Ehrlich, 902 F.2d 327, 330-31 (5th Cir. 1990).

[126]See Guidelines Manual § 2F1.2, at 2.74.

of trust" enhancement. At the outset, however, the Commission should revise its approach to prevent overuse of an ambiguous and dubious sentencing tool.

APPENDIX

Selected Provisions of the Federal Sentencing Guidelines:

§3B1.3 Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed in addition to that provided for in §3B1.1, nor may it be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic.

Commentary

Application Notes:

1. The position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons. This adjustment, for example, would not apply to an embezzlement by an ordinary bank teller.

2. "Special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.

Background: This adjustment applies to persons who abuse their positions of trust or their special skills to facilitate significantly the commission or concealment of a crime. Such persons generally are viewed as more culpable.

§3C1.1 Willfully Obstructing or Impeding Proceedings

If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels.

Commentary

This section provides a sentence enhancement for a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding, or otherwise to willfully interfere with the disposition of criminal charges, in

respect to the instant offense.

Application Notes:

1. The following conduct, while not exclusive, may provide a basis for applying this adjustment:

(a) destroying or concealing material evidence, or attempting to do so;

(b) directing or procuring another person to destroy or conceal material evidence, or attempting to do so;

(c) testifying untruthfully or suborning untruthful testimony concerning a material fact, or producing or attempting to produce an altered, forged, or counterfeit document or record during a preliminary or grand jury proceeding, trial, sentencing proceeding or any other judicial proceeding;

(d) threatening, intimidating, or otherwise unlawfully attempting to influence a co-defendant, witness, or juror, directly or indirectly;

(e) furnishing material falsehoods to a

probation officer in the course of a presentence or other investigation for the court.

2. In applying this provision, suspect testimony and statements should be evaluated in a light most favorable to the defendant.

3. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt is not a basis for application of this provision.

4. Where the defendant is convicted for an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury), §2J1.8 (Bribery of Witness), or §2J1.9 (Payment to Witness), this adjustment is not to be applied to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (e.g., where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely-Related Counts). The offense level for that Group of Closely-Related Counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

TCRI - 1219-1

UNITED STATES DISTRICT COURT

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ATTN: Paul Martin

RE: ACCEPTANCE OF RESPONSIBILITY

Dear Mr. Martin:

We met briefly during my recent 30 day tenure at the Sentencing Commission where I was a visiting Probation Officer for the "Hotline". I am writing you at the suggestion of one of the permanent staff with whom I recently conversed regarding the new amendments to U.S.S.G. § 3E1.1. I make these comments as a field officer who has written several guideline presentence reports and who has had to struggle at various times with the AOR issue.

It appears that the original intent of the Sentencing Commission in formulating U.S.S.G. § 3E1.1 was to enable the Court to show mercy and be lenient with those individuals who truly regretted their involvement in their criminal actions. This "truly regretful" attitude was described in the Commentary Notes as having "sincere contrition" and/or "sincere remorse". Recognizing the almost impossible task of determining the depth of a defendant's attitude, the Commission required tangible proof of an individual's regret. Various actions were listed in Commentary Note #1 suggesting how a defendant might demonstrate/manifest this hard to determine attitude. Citing these actions and others and noting their timeliness, the presentence report officer could then justify recommending that a defendant receive a reduction of two levels when "sincere contrition" and "sincere remorse" were present.

Under the aforementioned explanation, acceptance of responsibility, by at least this officer, was viewed as a unique attempt by the Commission to give the guidelines an altruistic side to their promulgation. The guidelines are an evolving attempt to quantify justice, an effort to make gray issues black and white. Although an attitude cannot be quantified, U.S.S.G. § 3E1.1 seemed to be a clear provision for showing leniency to a person with true regret

for his criminal actions and not merely regret for being arrested and convicted. It was apparent that, at least originally, actions taken in a timely fashion were necessary to demonstrate sincere remorse or manifest sincere contrition. An expression of sorrow, whether written or vocalized, was not sufficient to verify one's attitude, just as a cross around the neck or the Bible in one's hand was not sufficient.

In preparing for an upcoming presentence report for a career offender, I became surprised, disappointed, and disturbed over the pending changes regarding U.S.S.G. § 3E1.1. Commentary Notes have been amended to delete any reference to "sincere contrition" and "sincere remorse". How is acceptance of responsibility now defined? The only hint of a definition involving regret, i.e., "expresses remorse", is found in the Commentary Note which addresses the situation when a defendant goes to trial. Instead of requiring a defendant to readily acknowledge his guilt, truly regret his criminal conduct, and possibly make an attempt to rectify the situation created by his wrongdoing, the defendant now need only enter a plea of guilty, truthfully admit his involvement in the offense and related conduct, and express remorse (at least after going to trial). All defendants express remorse, at least when asked, and most defendants who enter pleas of guilty admit their involvement in the offense and related conduct. It appears that U.S.S.G. § 3E1.1 is now simply a reward for those defendants who save the Government time, energy, and money by not going to trial. Is this what is meant, by "legitimate societal interest"?

I believe that saving the Government time, energy, and money is a legitimate societal interest, but not the societal interest as originally conceived by the Commission and defined in U.S.S.G. § 3E1.1. With the new definition of acceptance of responsibility being entering a plea of guilty and truthfully admitting involvement in the offense and related conduct, expressing remorse is no longer really necessary for AOR The "hint" should, therefore, be expunged to keep intact the new definition. U.S.S.G. § 3E1.1 should also be retitled Acknowledgement of Guilt. It now truly becomes a black and white issue with no need of actions being taken in a timely fashion to substantiate its proper application. The actions which were previously considered to determine whether a defendant qualified for acceptance of responsibility can now simply be used in determining what point within the guideline range a defendant should be sentenced.

I believe that U.S.S.G. § 3E1.1 as originally conceived, although difficult to determine at times, was an exceptional and humane attempt to allow the sentencing judge to be merciful. Perhaps, in view of objections from the community, especially defense attorneys who always expected their clients to be credited with accepting

responsibility, the attempt should not have been made in the first place. Perhaps, Acknowledgement of Guilt and Acceptance of Responsibility sections should both be included in the guidelines. The two ideas are not the same, however, and should not be used synonymously. If reducing a sentence due to a person's true regret is no longer an issue, then please call "a spade a spade", remove the title of Acceptance of Responsibility, and relabel U.S.S.G. § 3E1.1 Acknowledgement of Guilt.

Respectfully submitted:

Michael C. Fisher
U.S. Probation Officer

MCF/vsg

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October 4, 1990

Mr. Michael Fisher
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655 E. Durango Blvd., Suite 421
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Dear Mr. Fisher:

On behalf of the Commission, I thank you for your recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

We appreciate you taking the time to write and share your insightful comments.

Regards,

Paul K. Martin
Communications Director

ICRL-2296

UNITED STATES DISTRICT COURT

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September 25, 1990

Phyllis J. Newton, Staff Director
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Dear Ms. Phyllis Newton:

I am writing in response to your August 9, 1990, memorandum soliciting comment on Guideline issues and amendments.

I. I have noticed on more than one occasion that there has been a great deal of confusion in Guideline Application resulting from the interplay of Sections 1B1.2 and 1B1.3. Generally, our officers have been able to resolve the problem of interpretation, and I believe that their ability to do so is a result of the formalized training which they have received from the Sentencing Commission. The problem arises from the fact that the two cited sections must be carefully read to begin Guideline application. On many instances, attorney's unfamiliar with the process do not see the sequential nature of these sections, occasionally bypass 1B1.2 and believe that Relevant Conduct allows for the use of any Guideline that appears to describe the overall offense behavior. I am of the opinion that these sections should be re-written in more specific language to guide new users through a step-by-step application process. Additional examples of commonly incorrect applications might prove an even greater clarification.

II. The concept of double counting is of such great importance that it should deserve a specifically numbered section rather than being hidden in the commentary. While this may be a minor point, erroneous application resulting from this process is not uncommon, and to merely highlight it might bring it to greater attention.

III. Probation Officers are almost routinely requested to amend Guideline Applications by Judges who have made decisions other than those reflected in the presentence report. While this matter is often later resolved by explaining to the Court the necessity of maintaining the integrity of the original report, such an explanation should be clearly set forth in Chapter Six to provide officers with a ready reference at the time of sentencing.

IV. The entire issue of Role in the Offense should be reviewed. There exists an unanticipated sentencing disparity arising from conflicts, both in the definition itself and between role and the ability to take advantage of a 5K1.1 departure. Role is based on managerial position primarily. We have had difficulty in several cases, primarily narcotics cases, where the managerial role could be estimated, however, the Indictment also included major drug suppliers of the organization who had no other function or relationship to the organization. Similarly, there have been several instances of very active, but low level defendants who were charged with the entire scope of the conspiracy under the reasonably foreseeable test. Nonetheless, these individuals received similar or greater sentences than more highly placed defendants. It would seem that a truer test of culpability must be considered or a disparate process will only be continued.

V. Acceptance of Responsibility: This section has evolved into pretty much of a given. Many officers tend to merely give credit for this section unless there is a definite commitment from the government that they will oppose the credit. I believe that it would be more honestly applied if it were specifically given for the plea alone with a possibly greater reduction for some concrete evidence of true acceptance such as those already delineated in the commentary.

VI. The concept of related cases should be further defined. Lengthy criminal conspiracies in this district often involve arrests on a local level for activities that are part of the conspiracy. Occasionally, the behavior is clearly part of the same pattern of behavior, but the local cases predate the scope of the conspiracy. Often in drug cases, these prior cases may well expose a defendant to career criminal provisions. These are such important issues that they should be clearly identified.

VII. The language concerning invalid (i.e. uncounseled) convictions for misdemeanors is totally confusing to probation staff. Specific language needs to be added to this section.

VIII. The fine table is exceptionally obtuse. Most officers tend to immediately rely on the fine table without consideration of the other required alternatives. Subsection (c)(4) is not clearly defined and is an ongoing problem. The reality of the situation is that most defendants can ill afford to pay the most minimal of fines and the statutory maximums are unrealistic math problems that offer no guidance to the sentencing court. I would suggest that a simple and direct fine table such as currently exists, be used in all cases with an exclusionary section for departures.

It is my opinion that the role of the presentence writer has become of even greater importance to the Court since the implementation of the Sentencing Reform Act. My officers are routinely called to chambers to explain Guideline Application as well as to provide a sounding board to individual jurists who are wrestling with sentencing decisions. Similarly, they appear frequently in open Court to explain and defend their reports. With the bifurcation of duties that exist in this office, there is now a core of officers who have come to be the hallmark by which the office is judged as a result of this greater daily exposure. It is my position that these officers should receive indepth training in Guideline Application, and I have seen that these officers do take advantage of all training opportunities. I would like to see a formalized training program established for all of my newly appointed officers to receive indepth training, of about a week's duration, solely on Guideline Application. Similarly, my experienced officers would benefit from regularly scheduled training in advanced Guideline techniques and recent decisions. I must say, however, that I am particularly impressed with the Commission's current commitment to training and the accessibility and responsiveness of your entire staff.

Sincerely,

Albert J. Christy
Chief U. S. Probation Officer

AJC/fr

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October 4, 1990

Mr. Albert J. Christy
Chief U.S. Probation Officer
9000 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Christy:

On behalf of the Commission, I thank you for your recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

We appreciate you taking the time to write and share your insightful comments.

Regards,

Paul K. Martin
Communications Director

I CRC-12891

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

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September 27, 1990

MEMORANDUM

TO: Communications Director
U.S. Sentencing Commission

FROM: Joseph P. Donohue
Chief U.S. Probation Officer

I am responding to Staff Director Phyllis J. Newton's recent memo soliciting our views on Guideline Sentencing issues:

INTERMITTENT/COMMUNITY CONFINEMENT (SECTION 5.C)

The Guidelines are overly restrictive. The Court should have greater discretion with reference to the use of intermittent/community confinement. This has particular application to non-violent first offenders. Intermittent/community confinement reduces prison overcrowding and costs and allows an offender to be productive while serving the sentence.

MANDATORY MINIMUM PRISON TERMS (SECTION 5G1.1)

We endorse the Sentencing Commission's position in urging Congress to refrain from enacting additional mandatory minimum prison terms. We feel that such terms are generally too severe and too broad in restricting judicial discretion.

ACCEPTANCE OF RESPONSIBILITY (SECTION 3E1.1)
OBSTRUCTION OF JUSTICE (SECTION 3C1.1)

These sections have been troublesome particularly in cases which have gone to trial. It is proposed that the Sentencing Commission refine the language of these Guidelines and related commentary along with furnishing case examples.

DEPARTURES -- PART K

The Sentencing Commission should consider expanding the grounds for departure. We note the significant authority extended to the Government in being allowed to move for a downward departure based solely on cooperation. There is concern that major offenders may be treated more leniently than minor offenders due to the fact that they have extensive knowledge of criminal activities.

MEMORANDUM

TO: Communications Director
U.S. Sentencing Commission
September 27, 1990

RULE 20 PROCEEDINGS

The Guidelines are open to manipulation in connection with Rule 20 transfers. A defendant whose attorney is successful in consolidating several offenses committed in various districts is able to avoid the assessment of criminal history points.

PERSONAL COMPUTERS -- ASSYST

It is proposed that the Sentencing Commission develop a system for communicating with Probation Officers through the use of personal computers. This would allow for the transmission of updated case law and other material pertinent to our computation of the Sentencing Guidelines. The Assyst Program has the potential to be an excellent resource but needs to be updated.

TRAINING

We recommend that the Sentencing Commission resume formal training programs. It is suggested that the training be expanded to include line officers engaged in the preparation of Guideline Presentence Investigation Reports.

Thank you for providing us with an opportunity to share our views.

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October 4, 1990

Mr. Joseph P. Donohue
Chief U.S. Probation Officer
330 Federal Bldg.
235 N. Washington Avenue
Scranton, PA 18503-1533

Dear Joe:

On behalf of the Commission, I thank you for your recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

We appreciate you taking the time to write and share your insightful comments.

Regards,

Paul K. Martin
Communications Director

LRI-94

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
PRETRIAL SERVICES AGENCY
PROBATION OFFICE

ROBERT M. LATTA
CHIEF PRETRIAL SERVICES OFFICER
CHIEF PROBATION OFFICER
600 U. S. COURT HOUSE
312 N. SPRING STREET
LOS ANGELES 90012

September 27, 1990

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

Attn: Mr. Paul Martin
Communications Director

Commissioners:

We are responding to the memorandum dated August 9, 1990, requesting comment on guideline issues and potential amendments:

Problem Areas in Guideline Application

Keeping track of our circuit case law, particularly when it comes to departure issues. The new ASSYST should be a big help.

It would probably reduce a lot of confusion if guideline 4A1.2(k)(1) made it clear that the sentence upon revocation of probation, supervised release, etc., is added to the original sentence only when the original sentence, standing alone, falls within the applicable time period.

Specific Suggestions for Amendments

Applying guideline 2F1.1 for convictions involving possession of false documents does not capture elements of the offense behavior: Neither the number of documents nor the frequency of possession is considered. A guideline for possessing false documents with an enhancement for possessing devices to produce the false documents, in addition to the guideline for trafficking in evidence of citizenship (2L2.1), would avoid this problem. Although the commentary to 2F1.1 addresses this issue, a departure is the only way to account for the behavior. Also, if the offense of conviction conduct is trafficking in false documents other than evidence of citizenship or a passport, the same problem arises; because 2F1.1 is the only applicable guideline.

Once the Sentencing Commission has sufficient data, guideline 2L1.1 needs specific offense characteristics for number of aliens and inhumane treatment.

Training Programs

We need to develop a conceptual structure by which probation officers can more readily determine departure issues. For those districts that provide specific recommendations to the court, we also need to train officers how to construct their justification section of a departure recommendation, as the court may wish to use this section of the probation officer's recommendation as the statement of reasons for the record. This is obviously a joint training issue for both the Sentencing Commission and the Probation Division.

Staff Working Groups

Prison capacity should be on the top of the list for the second set of working groups to parallel Commissioner Corrothers's study on alternative sentences.

As for the groups already approved, departures appear to be the most burning issue right now. The difficult aspects appear to be the determination of whether there should be a departure after an aggravating or mitigating factor not considered by the guidelines is identified, and secondly to what extent. Although developing case law is providing some structure, a working group might discuss whether the guidelines should address the issue of departure more comprehensively, in order to avoid a mechanistic approach to departures without regard for the purposes of sentencing.

Very truly yours,

Nancy Reims

Nancy Reims, Deputy Chief
U.S. Probation Officer

NR

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October 4, 1990

Ms. Nancy Reims
Deputy Chief Probation Officer
600 U.S. Courthouse
312 N. Spring Street
Los Angeles, CA 90012

Dear Nancy:

On behalf of the Commission, I thank you for your recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

We appreciate you taking the time to write and share your insightful comments.

Regards,

Paul K. Martin
Communications Director

P.S. I hope those killer goldfish in your cement pond are thriving.

ICRC-2591

UNITED STATES DISTRICT COURT
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CHIEF PROBATION OFFICER

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September 27, 1990

Ms. Phyllis J. Newton
Staff Director, U.S. Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, DC 20004

Re: **Guideline Suggestions**

Dear Phyllis:

In response to your request for guideline suggestions, I wish to comment on the following issues.

Chapter Two

Under Appendix A, a conviction of 26 USC 5861(a) refers to 2K2.3 only. It appears that a reference to 2K2.2 should be added as it would be the most often used guideline for this type of violation. I note that 26 USC 5861(a) is already one of the statutory provisions under the commentary to 2K2.2.

Also under Appendix A, 26 USC 5861(b)-(l) refers to guideline 2K2.2 only. It appears that violations of 5861(b), (c), (d), (h), (i), (j), and (k), are better suited to guideline 2K2.1, receipt and possession type offenses. The statutory provisions correctly note these violations under the commentary to 2K2.1.

Further, it seems that 2K2.1 and 2K2.2 are so closely related, why not incorporate the two into one guideline?

Under 2Q2.1(b)(3)(A), an enhancement is necessary if the specially protected fish, wildlife, or plants exceed $2,000 market value. I understand that it is the Commission's position that this enhancement should apply even if the violations involved smuggling plants or animals that are not otherwise protected under the law. If that is the case, it is recommended that the term "specially protected" be removed.

Chapter Three

Under 3B1.2, mitigating role, I rarely see probation officers using the minor participant adjustment but have seen some situations where I felt it would be appropriate. I suggest

some commentary as to the definition of minor participant. I think it would result in probation officers being more comfortable with the adjustment.

Chapter Four

I would like to resubmit my earlier recommendation pertaining to the reorganization of Chapter Four. I feel that from a training point of view it would be easier for probation officers to assess criminal history points under 4A1.1(a)-(e) if the time frames of 4A1.2(e) were included in the 4A1.1 guidelines. This would eliminate the need for 4A1.2(e). Also, by making this change, all of the time frame commentary in 4A1.1 could be eliminated. Further, it appears that much of the application notes for 4A1.1 are found in the guidelines of 4A1.2. Examples are juvenile offenses, offenses never counted, and foreign convictions. I think that if much of these two guidelines were consolidated, the section would be much easier to understand for the new probation officer.

Under 4A1.2, application notes, I would suggest adding some commentary as to the Commissions position on the assessing of points in bond forfeitures when applying 4A1.2.

Under 4A1.2(a)(2) in Application Note 3, the cases are related when consolidated for trial or sentencing. I have seen a number of instances where cases, although not consolidated, have been treated as if they were. The cases sentenced on different days by different judges to concurrent terms in effect receive the consolidated treatment. Some commentary in the application note pertaining to this issue would, in my opinion, result in a more consistent and fair application of the guidelines.

Chapter Five

Please eliminate the requirement that restitution be figured into the fine range. Most defendants can't pay and probation officers continue to have difficulty in computing fine ranges where the pecuniary gain to the defendant makes a difference. Even if a defendant has the ability to pay, I suggest that the judge be allowed to resort simply to a fine table, and if that is not enough, depart up to the statutory maximum in those instances where restitution exceeds the table.

Finally, I would suggest as a training measure that the Commission compile a heartland of caselaw, much as was done with the guidelines. The guidelines have created an abundance of sentencing law with respect to practically every guideline issue. There is no question that this caselaw is as important to each circuit as the guidelines themselves. Many districts are leaving it to the individual probation officers to track cases, and I can only see this as a source of frustration for the officers in those districts. Further, I feel that future training should address the issue of caselaw.

I am happy to say that, for the most part, the guidelines are working well here in the District of South Carolina. Our probation officers have adjusted well to them, and our judges are very supportive. It all makes for a smooth operation.

I hope that you are getting along well and enjoying your job as Staff Director of the Sentencing Commission.

Sincerely,

Thomas N. Whiteside
Deputy Chief U.S. Probation Officer

TNW/bl

cc CUSPO James W. Duckett, Jr.

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October 4, 1990

Mr. Thomas N. Whiteside
Deputy Chief Probation Officer
Room 1453, Strom Thurmond
Federal Building
1835 Assembly St.
Columbia, SC 29201

Dear Tommy:

On behalf of the Commission, I thank you for your recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

We appreciate you taking the time to write and share your insightful comments.

Regards,

Paul K. Martin
Communications Director

I HOPE ALL IS WELL WITH YOU AND YOUR FAMILY IN COLUMBIA

PM

PCL-2671

UNITED STATES DISTRICT COURT
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EASTERN DISTRICT OF TENNESSEE

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September 29, 1990

Ms. Phyllis J. Newton
Staff Director
U.S. Sentencing Commission
1331 Pennsylvania Avenue N.W.
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Washington, D.C. 20004

Dear Phyllis,

Attached you will find comments from U.S.P.O. Leslie Cory, written in response to your memo of August 9th in which you request feedback from the field regarding guideline sentencing.

The only other concern I would like to add relates to Guideline 2Q2.1, which deals with wildlife violations.

I do not believe that people in Washington are aware of the magnitude of the poaching problem in the national parks. Furthermore, most endangered species not in the national parks are at great risk and must have the government's protection to survive.

The base level of 6 in Guideline 2Q2.1 cannot even begin to act as a deterrence to those who hunt for sport and profit. Most of these defendants wind up with probation sentences or merely fines. To the U.S. Attorney's Offices, these cases simply do not have the sex appeal of a drug, fraud, or bank robbery case, and the defendants usually are allowed to plead to reduced charges and thus rarely get jail.

And if the Commission is contemplating changing the lower offense severity levels to allow even more probation sentences, these defendants will never be jailed.

Furthermore, the 2F1.1 fraud and deceit table used in Guideline 2Q2.1 (3)(A) requires many killings for the monetary "value" of the animals destroyed to add up to any real punishment. Perhaps a different table could be developed that did not rely on such enormous amounts of monetary loss to increase the levels.

On a final note, I would like to thank you for again requesting concerns from the field. The Commission's obvious receptiveness to feedback means alot to those of us "in the trenches".

Sincerely,

Roz

Rosalind Andrews, Chief
U.S. Probation Officer

RECEIVED
SEP 13 1990

Chattanooga, TN
September 12, 1990

MEMORANDUM TO: Rosalind Andrews
Chief U.S. Probation Officer

FROM: Leslie A. Cory LAC
U.S. Probation Officer

RE: Comments Solicited by Phyllis Newton, Sentencing Commission, August 9, 1990

In response to Ms. Newton's Memo I have the following comments:

Problem Areas in Guideline Application: USSG 1B1.8, Use of Certain Information, is apparently subject to serious misinterpretation. Application Note 1 might be revised in order to explain more clearly that the information provided by the defendant under a cooperation agreement is not to be used by anyone, including Judges and Probation Officers, in calculating the guideline range.

Issues Identified by the Commission for Staff Working Groups: The need for direction from the Sentencing Commission on probation and supervised release revocation is critical. Disparate sentences upon revocation are already resulting from the lack of direction.

Additional Issues for Commission Study: I believe that the Sentencing Commission should consider expanding the situations in which the courts are advised to consider the possible relevance of specific offender characteristics. The policy statements in 5H are extremely restrictive, and can be interpreted as prohibiting courts from even considering departures based upon the defendant's particular personal circumstances.

Specific Suggestions for Guideline Amendments: The four level increase provided in 3B1.1(a) covers an extremely wide range of organizational structure and leadership sophistication. How and when the increase is applied probably varies significantly, depending upon the location of the sentencing court. I would recommend the use of more precise language in the guideline and the limiting of 3B1.1(a) to networks involving ten or more individuals. I would recommend allowing 3B1.1(c) to cover the bulk of leadership role situations. This would greatly facilitate the courts' job in assigning offense levels for leadership and would decrease the volume of courtroom disputes over an issue that is frequently very difficult to resolve.

Adequacy of Current Training Programs: Guideline sentencing is largely an academic discipline. The Sentencing Commission has established a distinct vocabulary and set of assumptions, the grasp of which is essential to the proper application of the guidelines. Training, especially attorney training, should focus on the necessity of learning and applying these basic assumptions of guideline sentencing. Repeated errors are made on the part of attorneys who continue to attempt to force individual guidelines into the legal framework with which they are already familiar, rather than into the guideline framework designed for them by the Sentencing Commission.

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October 4, 1990

Ms. Rosalind Andrews
Chief U.S. Probation Officer
530 Gay Street S/W
First TN Bank Bldg.
Knoxville, TN 37902

Dear Roz:

On behalf of the Commission, I thank you for your recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

We appreciate you taking the time to write and share your insightful comments.

Regards,

Paul K. Martin
Communications Director

PCRL-2791

COMMENTS ON THE

SENTENCING GUIDELINES

Submitted by:

Wayne A. Budd
United States Attorney
District of Massachusetts

September 1990

OFFENSE CONDUCT

1.) In connection with robbery under §2B3.1, we suggest that the Commission consider amending the guideline to give an enhancement when the robber states that he has a firearm or dangerous weapon but no object is shown. In many cases of bank robbery, the robber hands the teller a note stating that he has a gun but no object is brandished or displayed. The guideline does not seem to cover this situation.

2(a). In connection with firearms offenses under §2K2.1, we suggest that the Commission consider lessening or eliminating the 6 level reduction for lawful sporting purposes or collection. In our experience, these cases are few and far between. Perhaps this could be covered by a departure.

2(b). Under §3D1.2(d), we suggest that the Commission eliminate firearms cases as those that get grouped together. Possession of firearms by convicted felons are for criminal purposes and are more akin to bank robberies, etc. Separate incidents should be treated separately.

OFFENSE CONDUCT

(1) §2D1.1(a)(3)(c)(16) Base offense level for "20 KG or more of Schedule IV substances."

Section 2 of the U.S.S.G. imposes a cap of 10 on the base offense level for schedule IV controlled substances. This means that a distributor of thousands or millions of diazepam (valium), a schedule IV substance, who may be charged in numerous counts of distribution under 21 U.S.C. 841(b)(2), can only be sentenced to 6-12 years. The offense level is too low in light of the fact that diazepam is a highly abused drug with a rampant illicit market.

(2) False Prescriptions

There is no appropriate guideline for the crime of creating false prescriptions, which is proscribed by 21 U.S.C. 843(a)(4)(A). Other §843 crimes are found in U.S.S.G §2D2.2 and §2D3.1. The crime of creating false prescriptions as set forth in §843(a)(4)(A) is generally committed by pharmacists and doctors desiring to cover shortages in a controlled substance supply. Hence, the crime is generally committed in connection with a distribution scheme. This should be reflected in the guidelines, either in offense level or in an application note to the "Regulatory Violations" section.

OFFENSE CONDUCT

The sentencing guideline base offense level for immigration violations does not adequately punish the crimes charged. In particular, the Sentencing Guidelines provide for a base offense level of 8 for violations of Title 8, United States Code, sections 1325 and 1326 -- illegal entry and reentry after deportation. While we do not have the same kind of border concerns as other parts of the country, we have a significant illegal alien problem. Some of these illegal aliens are also drug traffickers who deal at a level that generally escapes federal scrutiny. If arrested by the state for drug violations, they often default and are never brought to justice. A higher Sentencing Guidelines base offense level for alien cases would give federal prosecutors more of an incentive to take these cases. It would have the added benefit of materially aiding the prosecution, incarceration and deportation of illegal aliens who are also involved in the drug trade.

OFFENSE CONDUCT

With regard to 18 U.S.C. § 215, bank bribery, the applicable guideline is § 2B4.1.

It establishes a base offense level of 8 and then direct an increase in the offense level if the "greater of the value of the bribe or the benefit to be conferred" exceeds $2,000.

This guideline is ambiguous as it does not identify which benefit or which person is to be considered in increasing the offense level.

Consider this hypothetical:

P pays $12,000 in bribes to T, who is a bank officer, in connection with 10 loans which total $1.2 million.

P is a mortgage broker and obtains $10,000 from his clients in connection with these loans.

P's 10 clients have no knowledge that P is bribing the bank officer to obtain the loans.

What is the benefit to be conferred? Is it the $1.2 million in loans?

This is the benefit conferred on the borrowers, but the borrowers have done nothing wrong and are unaware of the bribes.

Is the benefit the $10,000 in mortgage broker fees which P received?

This seems like the most applicable interpretation to us. (Our office has a case which presents such issues.) Further clarification by the commission would be helpful.

OFFENSE CONDUCT

Some fine tuning needs to be done on the environmental guideline provisions. A few particular matters come to mind.

The commentary or language relating to "disruption of public utilities" in Section Q1.2(b)(3) should be supplemented in some way. This section should be clarified to make sure that it applies to the disruption of such public utilities as a publicly owned treatment works (i.e. a municipal sewage treatment plant). This is a type of public utility which is often disrupted by the types of crimes addressed to this section but it is unclear (at least to some judges) whether this subsection applies to the disruption of a POTW.

It would also be very helpful if the commentary or guideline provision in the next subsection, that is Section 2Q1.2(b)(4), was also supplemented or clarified. That subsection increases the offense level if offense involved transportation or disposal "without a permit or in violation of a permit". Under the environmental schemes set forth in the Clean Water Act and other provisions, the permits usually issued are State or local permits. The guidelines should make clear that this subsection applies to both Federal, State, and local permits and that the violation of any of those permits would necessitate an increase in the offense level.

These comments apply equally to Section 2Q1.3. Aside from these criticisms, we believe that offense levels for the environmental crimes are appropriate. In addition, the sentencing commission has wisely permitted some flexibility determining the specific offense characteristics by permitting judges to increase or decrease certain of the specific offense characteristics by two levels. For example, if a violation involved a "disruption of public utilities" which was significant but not poorly offensive or disruptive, the court may decrease the four level increase to only a two level increase. Likewise, the court also has the ability to increase the four level adjustment up to a six level increase.

In the environmental area in particular, many of the defendants are corporate defendants. Without the passage of sentencing guidelines for corporations, efforts to enforce the nation's environmental laws is greatly hampered. We would encourage the commission to do anything possible to obtain corporate sentencing guidelines.

ADJUSTMENTS

(Acceptance of Responsibility)

PROPOSED SENTENCING FACTOR: A two-point reduction for acceptance of responsibility should not be granted when the defendant fails to adequately account for funds, or proceeds from funds, obtained in the illegal scheme for which the defendant stands convicted.

RATIONALE: The public is rightly concerned that under the sentencing guidelines a defendant who obtains a large amount of money from an illegal scheme will hoard the money and face whatever custodial or noncustodial sentence is imposed by the court. Simply stated, a defendant would rather serve time, pay no restitution and come out rich, than serve time, pay restitution and come out poor. It seems inappropriate to reward the defendant with a reduced sentence for acceptance of responsibility, if he fails to account adequately for the money generated from his criminal conduct. While §5E1.1(a) provides that "restitution shall be ordered . . .," §3E1.1 (Acceptance of Responsibility) should make it explicit that restitution (if feasible) and a full accounting for funds or proceeds are conditions for granting the two-point reduction.

As with the other aspects of the sentencing guidelines, the defendant would bear the burden of proof by a preponderence of the evidence. The guidelines should create a presumption that illegal funds remain in the actual or constructive possession of the defendant. This would require the defendant to produce reliable evidence that the funds are no longer under his control. In this regard, the court should be encouraged to enlist the aid of the Probation Office, the victim(s) and law enforcement authorities to substantiate the location of the funds, which were obtained through the illegal scheme.

ADJUSTMENTS
(Acceptance of Responsibility)

It has been our experience that the District of Massachusetts routinely allows acceptance of responsibility whenever a defendant shows the remotest remorse. Both the courts and the probation department are very quick to assign acceptance of responsibility to any defendant before or after trial. Although we understand that acceptance of responsibility should be granted to a defendant who satisfies the application notes set forth under Section 3E1.1, even after trial, those application notes appear not to be needed. Perhaps the sentencing commission could in some way emphasize that a defendant who is convicted at trial does not obtain the credit for acceptance of responsibility, unless that trial was necessary to assert constitutional challenges or to challenge the applicability of the statute to his particular conduct. The Commission might even consider including a few examples in its commentary.

ADJUSTMENTS

Many public corruption cases are prosecuted under the mail fraud statute, 18 U.S.C. §1341. This has become even more common after the enactment of 18 U.S.C. §1346, which undid the impact of the McNally decision and statutorily included defrauding the public of its right to honest services within the scope of the mail fraud statute. However, the strange partnership of §3B1.1 (Aggravating role) with §3B1.3 (Abuse of Position of Trust or Use of Special Skill) results in certain public corruption cases losing two offense levels that common sense would dictate they deserve.

§3B1.1 provides for additional offense levels to be imposed depending on the role of the defendant in the criminal conspiracy. If the defendant is a public official who uses his official position to conspire with four private citizens to defraud a State Department of Education, and is the organizer of that activity, he would have four offense levels added to his total. However, this total is not increased at all under §3B1.3 for the defendant's abuse of official position, since that latter section declares that it may not be used in addition to §3B1.1. Consequently, a public official who organizes a scheme to defraud a State Department of Education is treated no differently than a private citizen who organizes a similar fraud. This runs counter to the expectation that a public official's abuse of trust is an aggravating feature of an offense no matter what his role in the conspiracy.

DEPARTURES

It is suggested that the Sentencing Commission determine whether a sentencing court may depart from the Career Offender Guidelines, using the very convictions which place the defendant within the Career Offender category as the basis for a departure. Particular note should be taken of two Eighth Circuit cases: United States v. Brown, No. 89-5346, (8th Cir. May 10, 1989) and United States v. Smith, 1990 WL 104618 (8th Cir. 1990).

In each of the Eighth Circuit cases, the sentencing court used its evaluation of the predicate offenses to determine that the ostensibly mandatory language of SRA Section 4B1.1 could be modified by post-sequential application of Section 4A1.3. That is, the offenses defining the defendant as a career offender were declared by the courts to have over-represented the seriousness of the defendant's criminal history.

Absent clarification from the Sentencing Commission, any court wishing to avoid the strictures of the Career Offender range is free to weight the criminal history so as to avoid the punitive consequences of repeat offenses. As a consequence, procedural difficulties and anomalies in sentences arise.

For example, there is no guidance as to the type of evaluation of the prior convictions the court may indulge. Once it is concluded that the objective record of the conviction is to be penetrated, the court may go behind the conviction to weigh evidence and assess the "correctness" of the result. In at least one instance, the sentencing court permitted current federal

defense counsel to call former state counsel as a witness to present a "review" of the state case presented at jury trial eight years previously. From that "review", the sentencing court concluded that a predicate assault conviction over-stated the defendant's criminal history because the jury "might" have convicted him on varying potential factual and legal theories. Cf. United States v. Robinson, 1990 WL 70889 (6th Cir. 1990)(court cannot adjust upward into career offender range upon court's conclusion that defendant was given a "break" in a prior offense).

If departure from the Career Offender Range is to be permitted on such speculation and the present weighing of previous convictions, the intended objectivity of the SRA in sentencing recidivists based specifically upon defined convictions is readily defeated. See United States v. Hawkins, No. 89-6192, (10th Cir. April 20, 1990)("One is either a career offender or one is not.")

Further, once the court can depart on the subject basis there is no real constraint on the degree of the departure. Since the Career Offender Category VI classification is intended at all offense levels to be greatly higher than an otherwise applicable range, the court may easily determine that the comments to SRA section 4A1.3 do not control where the "over-represented criminal record" has greatly increased the defendant's exposure. In a multiple-defendant case, the sentencing court can use this departure to match the recidivist's

sentence to that of non-career offender co-defendants. Cf. United States v. Ruiz, No.89-1815 (1st Cir. June 5, 1990); United States v. Sergio, No. SCR 89-41 (N.D. Indiana April 12, 1990); United States v. Richardson, No. 89-1066 (10th Cir. April 20, 1990); United States v. Smith, No. 89-2126 (7th Cir. March 21, 1990).

Finally, departure based on weighing the prior offenses which define the defendant as a Career Offender permits consideration of factors otherwise precluded. Compare United States v. Smith, 1990 WL 104618 (8th Cir. 1990)(career offender downward departure based on youth at time of prior convictions and proximity of time between separate convictions), with United States v. Williams, No. 89-1689 (1st Cir. December 15, 1989)(short time span of commission of offenses may not be basis for departure). See also SRA Section 5H1.1.

MISCELLANEOUS

1.) The provision in §4A1.2(a)(2) concerning the lumping of cases together based on the date of sentencing should be eliminated. Serious criminals often commit many different crimes on different dates and then "package" them for disposition on one date. The guidelines arbitrarily call them related cases and count them as one sentence. Judges then are reluctant to depart upward because it creates an appellate issue. This problem would be eliminated if the prior cases were viewed realistically as what they are - separate cases.

PCRI-27/91

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Paul L. Maloney (ex officio)

October 4, 1990

Honorable Wayne A. Budd
United States Attorney
1107 J.W. McCormack Post Office
and Courthouse
Boston, MA 02109

Dear Mr. Budd:

On behalf of the Commission, I thank you for your recent comments on proposed areas of study for the next guideline amendment cycle. Your submission has been copied and distributed to the Chairman, Commissioners, and members of the legal and drafting staffs.

We appreciate you taking the time to write and share your office's comprehensive and insightful comments.

Regards,

Paul K. Martin
Communications Director

PCRT-26191

United States District Court
District of Kansas

Earl E. O'Connor
Chief Judge

122 U.S. Courthouse
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Kansas City, Kansas 66101

October 29, 1990

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

Attention: Communications Director

Dear Sirs:

I am writing this letter pursuant to the request of the Honorable William W. Wilkins, Jr., Chairman of the United States Sentencing Commission, in his letter dated September 27, 1990. Specifically, Judge Wilkins requested the benefit of my thoughts on the top three guideline sections or policy statements that I believed needed review, amendment, or clarification. I wish to offer the following:

I.

(1) Acceptance of Responsibility. There exists a judicial philosophy in some courts that a plea of guilty automatically deserves a two-level reduction in the offense level regardless of any other circumstances in the case. The application notes of Section 3E1.1 indicates that a defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea and also emphasizes that a defendant who enters a plea of guilty is not entitled to a sentencing reduction under this section as a matter of right. Perhaps a person who pleads guilty is deserving of some automatic consideration for a reduction in the offense level, but the application notes under that section clearly indicate that there are other considerations that might be used which further substantiate the court's decision to grant acceptance of responsibility or provide justifiable reasons for denial of the two-level reduction for plea of guilty.

In an effort to support a judicial philosophy which would automatically award a reduction in the offense level for a plea of guilty and guard against punishing a defendant who exercises his Constitutional right to a trial, I suggest that there may be some merit in arriving at a total offense level

reduction for acceptance of responsibility which would address both issues. For instance, Section 3E1.1 could be changed to read as follows:

(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, the total offense level may be reduced by two levels through a combination of the following:

Plea of Guilty - reduce one level.

Voluntary termination or withdrawal from criminal conduct or association - reduce one level.

Voluntary payment of restitution prior to adjudication of guilt - reduce one level.

Voluntary and truthful admission to authorities of involvement in the offense and related conduct - reduce one level.

Voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense - reduce one level.

Voluntary resignation from the office of position held during the commission of the offense - reduce one level.

Any other factor which clearly demonstrates to the court the defendant has shown affirmative acceptance of personal responsibility for his criminal conduct - reduce one level.

II.

Chapter Four - Criminal History and Criminal Livelihood

Chapter Four provides instructions for determining the criminal history score. Section 4A1.2.(d)(2)(A) provides for the addition of two points for each adult or juvenile sentence to confinement of at least 60 days, and Section (B) adds one point for each adult or juvenile sentence not covered in (A). In the District of Kansas, we have not experienced problems in securing juvenile court records, so the awarding of points for offenses committed prior to age 18, as provided in the guidelines, has not proven to be a problem. However, there are districts in the country where juvenile court records are not available to the probation service. I also know that there are juvenile courts which tell juvenile defendants that their juvenile record will not be held against them in future circumstances.

The result is that defendants in Kansas face greater penalties because we have access to juvenile court records. Defendants in other states who may have very similar juvenile records may not face the same sentence in federal court because those juvenile court records are not available. This seems to violate the Sentencing Commission's precept that the guidelines are designed to insure that similar defendants with similar back grounds who commit similar offenses should receive similar sentences. If this is in fact the case, it may be appropriate that no points be awarded for juvenile records, but that where juvenile records are available to the court, they may be used in guiding the court in selecting the low, middle or upper limits of the established range.

III.

Part H - Specific Offender Characteristics

This section primarily deals with offender characteristics by indicating that such are not ordinarily relevant in determining whether a sentence should be outside the guidelines, or in determining the type of sentence to be imposed when the guidelines provide sentencing options. The Criminal Law and Probation Committee issued a report to the Chief Justice and members of the Judicial Conference in September 1990, suggesting that the judges need greater flexibility to consider some offender characteristics as a bases for sentencing. In that report, which I believe was approved by the Judicial Conference, the Committee suggested changes which would allow judges greater flexibility to consider offender characteristics present in unusual degrees or combinations. The Committee provided specific language for changing Part H of Chapter Five to allow that greater flexibility. I strongly endorse that report and the action of the Conference.

Thank you for soliciting my suggestions, and I hope my response will be helpful.

Sincerely,

Earl E. O'Connor

cc: Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission

PCRI - 29/91

MYRON H. BRIGHT
UNITED STATES SENIOR CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

POST OFFICE BOX 2707
FARGO, NORTH DAKOTA 58108

October 31, 1990

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

Re: Sentencing Guidelines

Dear Judge Wilkins:

I respond to your letter of September 7, 1990, asking that I give the benefit of my thoughts on three Guidelines sections or policy statements that I believe need review, amendment, or clarification. I deem it necessary to make a more general statement than focusing on only a few Guidelines sections. I should like to give you the benefit of my observation of the Guidelines, both generally and specifically, as I have seen them from the cases that have come before the Eighth Circuit, the court on which I predominantly sit.

First of all, the Guidelines unfortunately require the expenditure of a great deal of appellate judicial time, far more than we ever expended in limited review of sentences prior to the Guidelines. At least in the Eighth Circuit, we reviewed district court sentences only for gross abuse of discretion. Woosley v. United States, 478 F.2d 139, 147 (8th Cir. 1973) (en banc).

What is the present situation? The clerk of the Eighth Circuit advises me that in the past fiscal year we reviewed 527 criminal appeals. This represented a total of 19.7% of all of our appeals (2,681 new appeals, 527 criminal appeals). The breakdown of these criminal appeals show 88 pre-Guidelines cases, 176 pure Sentencing Guidelines cases, 71 cases solely on the merits, and 192 cases dealing with merits and the Guidelines. Thus, a total of 368 cases or nearly 70% of all criminal appeals in the Eighth Circuit presented Guidelines issues. That amounts to a tremendous additional workload for the courts of appeal.

According to the Statistics Division of the Administrative Office of the United States Courts, 9,493 criminal appeals were filed nationwide in the twelve United States Courts of Appeals during the past fiscal year. The breakdown of these appeals includes 2,174 pre-Guidelines cases, 1,745 pure Sentencing Guidelines cases, 948 cases solely on the merits and 3,641 cases dealing with merits and the Guidelines. Another 985 cases remain undesignated. Thus, at least 5,386 cases, or 56.7% of all criminal appeals presented Guidelines controversies. My own records show that nearly 22% of the cases that I heard as a federal appellate judge on the Eighth Circuit raised Guidelines issues.

The Guidelines cases are not necessarily easy cases. As you know, the Guidelines consist of an extensive manual amounting to a code plus Sentencing Commission commentary. In addition, the number of cases discussing Guidelines issues must, by now, number in the thousands.

For your information, I would like to review some cases that I think clearly demonstrate the deficiencies of the Guidelines as applied in the real world. Contrary to their Congressional mission, see 28 U.S.C. § 991(b)(1)(B) (1988), the Guidelines do not provide for certainty, fairness and equality. Nor do the Guidelines avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct, as the cases discussed below indicate.

1. United States v. Timothy John O'Meara, 895 F.2d 1216 (8th Cir.), petitions for cert. filed, No. 90-5215 (July 20, 1990) and No. 90-5468 (Aug. 13, 1990). In this case, the two defendants, Kost and O'Meara, could not have been more similarly situated. According to the Government's version, they both conspired to obtain the same amount of drugs from the same DEA agent, gave the same story to the police on the arrest, used the same defense at trial, were convicted of the same crime by the same jury, and admitted the same relevant conduct to the same probation officer following conviction. Yet, the probation officer computed Kost's sentence at 57-71 months, more than double than that for O'Meara at 27-33 months. O'Meara, however, was a far more dangerous criminal, his record showing eight previous infractions including three drug offenses and a juvenile conviction for sexual assault. By contrast, Kost's prior record consisted of an expunged drug possession charge and a $50 fine for a bad check. In my view, this happened because the probation officer, throughout the

ascertainment of the sentence, made judgments generally unfavorable to Kost and other judgments generally favorable to O'Meara. The subjective nature of these judgments allowed the more experienced offender, O'Meara, to manipulate the system to obtain a favorable result.

In a dissent, I said: "This case opens the window on the sometimes bizarre and topsy-turvy world of sentencing under the Guidelines," id. at 1221, and that the sentence "belies both common sense and reality," id. at 1222. The dissent further pointed out that if Kost's conduct had been evaluated in the light most favorable to him, that he would have received a far less severe sentence. Id. In that dissent, I also wrote:

> Whether the disparity in this case rests upon some inadvertent preference for personalities or because a more sophisticated offender successfully manipulated the system to his advantage, the end result is no less unsettling. Guideline sentencing "by the numbers" was supposed to eliminate such improper influences. As this case demonstrates, however, the Sentencing Guidelines do not reduce disparity and in my judgment have failed in that regard.
>
> The essential lie of the Sentencing Guidelines is that, by establishing "neutral criteria" which vastly restrict the district judge's discretionary powers, they will eliminate disparity in sentencing. In reality, the present guideline system merely replaces one system of subjective sentencing with another. Indeed, the Guidelines are an intricate and complex code of sentencing and, as such, require extensive construction. Needless to say, this construction is not conducted by computers -- much less by gods. Instead, the implementation of the present guideline system is highly dependent on the judgment calls of fallible human actors, who are no less susceptible to errors in judgment and differences in interpretation than their pre-Guidelines predecessors. Hence, where sentencing judges once applied their legal knowledge and life experiences to the facts of a given case, we now call on them to evaluate the defendant's circumstances according to the dictates of a complex and cumbersome code.

> Guideline sentencing is perhaps most disturbing, however, not because it continues to require subjective decision-making, but because these still-subjective determinations are in large part no longer conducted by the federal judiciary. Rather, due to the difficulty of mastering this complicated and ever-evolving guideline system, it seems to me that district courts have come increasingly to rely on the recommendations of the probation officer who prepares the presentence report. Consequently, it is a sad but true fact of life under the Guidelines that many of the crucial judgment calls in sentencing are now made, not by the court, but by probation officers to whose technical knowledge overworked district judges understandably, but all too often, uncritically defer. I cannot help but feel that we have lost something in this substitution of technical proficiency for the thoughtful exercise of discretion by the federal judiciary.
>
> Accordingly, I would remand this case to the district judge with instructions to reduce Kost's sentence using some common sense and an eye for consistency and just results.

Id. at 1222-23. Following publication of this opinion and dissent, a prominent district judge wrote the following to me:

> Enclosed please find a copy of an article from the Minneapolis Star Tribune of Wednesday, March 14, 1990. Hopefully, it is the first of many relating to the subject.
>
> Your dissent in the Kost - O'Meara case is the spark that ignited the same. Thank you. Sometimes a voice crying in the wilderness is heard.

2. United States v. Yellow Earrings, 891 F.2d 650 (8th Cir. 1989). In this case, Darla June Yellow Earrings pled guilty to assault resulting in serious bodily injury. According to the presentence report, the Guidelines dictated a sentence of 41-51 months. But the trial judge departed downward and imposed a sentence of 15 months, noting that the problem of the victim was brought upon at least in some part by his own sexual misconduct. The government appealed, asserting that the trial judge should

not have departed from the Guidelines. We rejected the appeal. Id. at 652-55. Thus, Yellow Earrings, a single parent with a small child to care for, will serve a sentence appropriate for her conduct and circumstances. Yet, a panel of this court recently heard another case where the district court, in a similar situation, refused to depart downward despite uncontroverted evidence of the victim's contributory sexual misconduct. See United States v. Sayers, No. 90-5056 (heard Aug. 14, 1990) (decision pending).

3. United States v. Creed, 897 F.2d 963 (8th Cir. 1990). In this case, the district court imposed a consecutive sentence for an escape conviction resulting from Creed's failure to return to custody while on a furlough due to a drinking binge. The district court refused to depart downward notwithstanding that the prison authorities had failed to follow Bureau of Prisons' recommendations to place Creed in an alcoholic treatment program. A panel of this court affirmed. Id. at 964-65. In another similar case, however, a different district judge imposed a concurrent sentence and departed below the Guidelines range. See United States v. Whitehorse, 909 F.2d 316, 317 (8th Cir. 1990). A panel of this court also affirmed. Id. at 317-20.

4. United States v. Miguel Cardenas, 896 F.2d 317 (8th Cir. 1990). Cardenas pled guilty to possession of an unregistered firearm and received a 21-month sentence under the Guidelines. On appeal, the sole question was whether the district court erred by denying Cardenas' request for a two-level reduction for acceptance of responsibility. Both the prosecutor and defense counsel agreed that the reduction for acceptance of responsibility was appropriate. The probation officer, however, made his own interpretation and recommended that the downward adjustment be rejected. The district court summarily denied the downward adjustment, and an Eighth Circuit panel affirmed under the standard of deference owed to district courts. Id. at 320-21. In my view, however, most district courts would have accepted the stipulation of the parties and, in all likelihood, most probation officers would have found the facts in conformity with the recommendation of the United States attorney. Moreover, for another court, the fact of Cardenas' guilty plea alone could have sufficed to warrant the reduction for accepting responsibility. Cf. United States v. Russell, 913 F.2d 1288, 1295 (8th Cir. 1990). Notably, the vast majority of defendants who plead guilty receive credit for acceptance of responsibility.

See United States v. Knight, 905 F.2d 189 app. at 194-95 (8th Cir. 1990).

5. United States v. Goebel, 898 F.2d 675 (8th Cir. 1990). The issue presented was whether the court should have granted a two-level reduction in the offense level for a defendant who claimed to be a minor participant. This proved to be a factual issue in which the probation officer made a determination, approved by the district judge, that the defendant did not serve as a minor participant. Our review of the record produced no clear evidence of error, and thus we affirmed. Id. at 677-78. Yet, in exactly the same situation, another probation officer and another judge could very well have reached a contrary conclusion. My concurrence in that case stated:

> I once again observe that the Sentencing Guidelines can and do produce disparate and unfair sentencing results among similar offenders where, as in this case, an essential factor in the application of the Guidelines rests upon a probation officer's subjective interpretation of a Guidelines section, which the sentencing court summarily adopts.

Id. at 679.

6. United States v. James O. Williams, 902 F.2d 675 (8th Cir. 1990). Williams received a more severe sentence because the district court determined that he acted as a leader or organizer of the underlying criminal conduct. We affirmed, noting that the issue was a fact-finding matter for the district court reviewable only under the clearly erroneous standard. Id. at 678. Nevertheless, another district court might have reached the opposite conclusion, in which case a lower sentence would have also been affirmed as not clearly erroneous.

7. United States v. Dobynes, 905 F.2d 1192 (8th Cir.), cert. denied, 111 S. Ct. 206 (1990). In this case, another aspect of disparity appears. Dobynes cooperated with the government's investigation of drug trafficking and sought a reduction of sentence for providing substantial assistance to authorities under § 5K1.1 of the Guidelines. The district court refused to depart from the Guidelines and did so properly. But the disparity appears in that if the government had moved for a

departure under that section, a defendant in similar circumstances probably would have received a downward departure.

8. United States v. Boult, 905 F.2d 1137 (8th Cir. 1990). In this case, Boult received a heavier sentence because of the vulnerability of the victim. However, another court interpreting the same set of factual circumstances might have declined to apply the vulnerable victim enhancement. Cf. United States v. Cree, No. 89-5611, slip op. at 3-5 (8th Cir. Sept. 25, 1990) (evidence fails to show that defendant knowingly exploited victim's vulnerability).

9. Finally, in two cases, United States v. Bolton, No. 89-2674 (8th Cir. June 6, 1990) (unpublished decision), petition for cert. filed, No. 90-5624 (Sept. 4, 1990), and United States v. Lawrence, No. 89-2602 (heard May 16, 1990) (decision pending), the sentence related to the inclusion of additional drug amounts under the Guidelines' relevant conduct provisions. In each case, the drugs had been counted by the probation officer and the probation officer made a judgment that the drugs were, for the most part, related to the offense. The question of what constitutes relevant conduct includable for the purposes of enhancing sentence, however, is frequently subject to differences of opinion. Cf. United States v. Lawrence, No. 90-1103, slip op. at 11-14 (8th Cir. Oct. 9, 1990) (evidence insufficient to support inclusion of drug quantities); United States v. North, 900 F.2d 131, 133-34 (8th Cir. 1990) (same). In my experience, these differences in interpretation can translate into large sentencing disparities.

The world of sentencing under the Guidelines is indeed a topsy-turvy world. Judges are critical of it. See, e.g., Eisele bucks federal sentencing guidelines, Arkansas Gazette, Oct. 12, 1990. I recently read that United States District Judge J. Lawrence Irving announced his resignation because he believes the Sentencing Guidelines are too harsh. Criticizing Sentencing Rules, U.S. Judge Resigns, N.Y. Times, Sept. 30, 1990, at 16. In addition, the Report of the Federal Courts Study Committee 135-39 (1990) notes that the Sentencing Guidelines are causing serious problems according to many judges, public defenders, private defense counsel, the organized bar and others. The Committee concluded that Congress, the courts, bar associations and scholars should give serious and close attention to the

Guidelines with a view to a careful and in-depth re-evaluation by Congress of federal sentencing policy and, in particular, the Sentencing Guidelines. Id. at 139-40.

I believe that the Sentencing Guidelines approach to sentencing has failed. It has not provided for fairness or equality in sentencing, nor has it reduced disparity. What it has done is substituted in large measure the probation officer for the sentencing judge. Since there are 2,067 probation officers but only 753 district judges, United States Sentencing Commission, Annual Report app. A (1989), this means that there are at least three times as many decision-makers as under the previous sentencing system. It also means that the "real" decision-maker likely possesses no legal training.

Moreover, the Guidelines represent a mishmash of rules and commentary constituting an intricate, complex and in some instances confusing code for federal sentencing. As a result, these decision-makers, whether probation officers or judges, will predictably differ in the construction and interpretation of the Guidelines and in the application of facts of the case to particular Guidelines sections. Thus, we have a world of sentencing where so much law exists that even the most erratic and unreasonable decision-maker can find support in this complex code.

In short, I think we have changed the sentencing procedures to a worse system than existed before promulgation of the Guidelines. I am now convinced that the prior method of sentencing might have been far more satisfactory. At least under the previous system, defendants were often entitled to have a parole commission periodically review their sentences, taking into account the offender, the offense and subsequent conduct within a jail or correctional institution. In any event, the Guidelines are far too complex. They need to be simplified, and they ought to serve as a recommendation, not a binding obligation on the district judges.

The Sentencing Commission ought to recognize the fallacy of the Guidelines' claim to reduce sentencing disparity. Popular opinion notwithstanding, we simply cannot continue to cloak our rulings in the false security that we are "objectively" sentencing offenders so long as we embark upon a course of "sentencing by the numbers."

Accordingly, the Commission should recommend to Congress a change in legislation so as to create a sentencing world in which fairness and reason predominate. That is not the situation under the Guidelines.

I urge the Commission to recognize the immense failure of the present system of sentencing in the federal courts and urge the Commission to take immediate action.

Sincerely,

Myron H. Bright

Myron H. Bright
MHB/ljs
CC: All Eighth Circuit Judges
U.S. Senator Quentin Burdick
U.S. Senator Kent Conrad
U.S. Congressman Byron Dorgan

PCRT-30/91

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

CHAMBERS OF
MICHAEL M. MIHM
DISTRICT JUDGE

October 31, 1990

Room 216, Federal Bldg.
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Peoria, Illinois 61602
Phone 309-671-7113
Phone FTS 360-7113

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

RE: GUIDELINE MODIFICATIONS/REFINEMENTS

Dear Chairman Wilkins:

In response to your communication of September 27, 1990, I have identified the following issues where modifications/ refinements of the Sentencing Guidelines may be appropriate.

I. Guideline 2B5.1 -- Offenses Involving Counterfeit Bearer Obligations of the United States

This guideline currently carries a base offense level of 9 and provides 2 increases for specific offense characteristics. Notwithstanding the fact that the specific offense characteristics provide potential increases, I believe that the current base offense level of 9 is inadequate when one considers the seriousness of this offense and its potential for undermining the monetary system and disrupting the Government.

When one considers the base offense level for Engaging in a Gambling Business (2E3.1) and/or Transmission of Wagering Information (2E3.2), both of which carry base offense levels of 12, as well as the guideline for Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity (2S1.2) and/or Failure to Report Monetary Transactions (2S1.3) which carry base offense levels of 17 and 13 respectively, the guideline for Offenses Involving Counterfeit Bearer Obligations of the United States (2B5.1), specifically the base offense level of 9, appears to be inadequate and should be increased to at least 12.

II. Guideline 3B1.3 -- Abuse of Position of Trust or Use of Special Skill.

I believe some clarifying language should be added to the guideline specifically regarding the abuse of position of

trust element where the trust that is abused is not directly related to the victim and/or the victim's loss. As an example, where a regulatory body grants an individual (defendant) the authority and/or requisite power to conduct certain types of financial transactions, i.e., credit transaction approvals and the individual then uses this authority/power to facilitate the commission of a fraud on a financial institution (victim). In such an instance, the regulatory agency from which the position of trust emanated is not the victim but rather is a third party. The financial institution is the actual victim and suffers the loss. Language should be added to the guideline indicating that the trust being violated does not have to be extended by the victim of the offense but rather can be trust extended by a third party.

III. Guideline 2D1.1 -- Unlawful Manufacturing Importing, Exporting, or Trafficking (Including Possession with Intent to Commit these Offense)

A specific offense characteristic at 2D1.1(b)(1) states, "If a dangerous weapon (including a firearm) was possessed during commission of the offense, increase by two levels." Neither the Commentary/Application Notes nor the definitions at 1B1.1 clarify what is meant by "possession of a dangerous weapon during commission of the offense." For instance, if during the drug trafficking offense, the drug distributor accepts a firearm in trade for drugs, is this considered possession of a dangerous weapon thereby triggering application of this specific offense characteristic? It would be helpful to have language added to Application Note No. 3 reflecting that such a drugs-for-gun trade would or would not trigger this specific offense characteristic. This is especially important if the firearm is not transferred simultaneously with the drugs. In such case, the possession is not contemporaneous with the handling of the drugs, Ergo, was there a "possession" during commission of the drug offense?

IV. Guideline 3B1.1(c) -- Aggravating Role

Where the terms "organizer," "leader," "manager," or "supervisor" are used, do these terms necessarily require that, to be designated as such, the defendant had to organize, lead, manage, or supervise at least one other "participant" or can the defendant's general degree of culpability be utilized to place him in one of these roles? In other words, can the quantity of drugs the defendant obtained from his source and subsequently distributed to others, the length of the defendant's involvement in the offense, and/or his use of sophisticated methods to commit the offense be utilized to place him in one of these roles.

Typically in drug offenses, a defendant buys drugs from his source, dilutes and repackages the drug into smaller quantities, and then resells it to his customers. Other than being a link in the distribution chain, he does not necessarily organize, lead, manage, or supervise any other participants. However, his relative responsibility/degree of culpability may be considered very high because of the quantity of drugs, the span of time involved, his profits, and/or his sophisticated methods. Under 3B1.1(c), can he be given a two level increase even though he did not organize, lead, manage, or supervise another participant? E.g., if he simply bought from a supplier and resold to a customer on numerous occasions? If a two level increase is applicable, it would be helpful to have appropriate language enlarging the definition of the terms organizer, leader, manager, or supervisor included in Application Note No. 3 under the Commentary to 3B1.1.

Sincerely,

Michael M. Mihm

Michael M. Mihm

PCRI-31/91

United States District Court
Eastern District of Michigan
Detroit 48226

Julian Abele Cook, Jr.
Chief Judge

November 1, 1990

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

Dear Chairman Wilkins:

I write to you in response to your letter, dated September 7, 1990. Although my colleagues and members of the Probation Department have expressed many concerns about the effectiveness of the Sentencing Guidelines, I shall attempt to limit my comments to three areas which have given us a great deal of concern.

The first problem area relates to Guideline Section 4A1.2(a)92) which states, in part, that "[p]rior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history."

The first sentence in Application Note 3 of this section provides that "[c]ases are considered related if they (1) occurred on a single occasion, (2) were part of a single scheme or plan, or (3) were consolidated for trial or sentencing."

Special attention should be given to Part (3) of this Application Note because it has caused confusion and inconsistency among the judges and probation officers within our District. The consolidation of offenses for sentencing purposes provides a mechanism by which those individuals, who have committed a series of unrelated crimes, are given an unwarranted "break" under the law. The fact that an individual is sentenced at the same time for an unrelated offense should not mean that the latter offense is not counted individually for the purpose of the Criminal History Category.

Although Application Note 3 suggests that a departure may be considered by the court, this situation provides a defendant with an ostensibly legitimate basis for an appeal if the sentencing judge elects to depart upward from the guidelines because his past

criminal record was taken into account. On the other hand, if unrelated offenses were considered individually, it would minimize the possibility of an appeal being based on an upward departure and would enable the sentencing judge to treat those individuals with prior records equally. Therefore, it is recommended that Part (3) of the Application Note ("were consolidated for trial or sentencing") be removed and each unrelated offense be counted individually for the purpose of the Criminal History Category.

Our second area of concern relates to Guideline Section 1B1.3, which reads:

> (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> > (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;
> >
> > (2) solely with respect to offenses of a character for which 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;
> >
> > (3) all harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions; and
> >
> > (4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Some of my colleagues do not agree with the concept of uncharged conduct being calculated into the guideline range. Judges, attorneys, and probation officers have varying interpretations of this concept and they generally believe that some additional clarification by the Commission is necessary in order to avoid an obvious disparity in sentencing.

The third area of concern involves Guideline 5K1.1, which addresses Substantial Assistance to Authorities and reads:

5K1.1 **Substantial Assistance to Authorities (Policy Statement)**

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosection of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

In our collective judgment, this policy statement lends itself to a disparity in sentencing. Upon the motion of the government, the court must decide if "substantial assistance" applies, and, if so, the magnitude of the departure to be applied.

The definition of "substantial assistance" is bound to vary among the several United States Attorneys. Some members of our Court have expressed the view that this policy statement shifts the discretion from the judge to the government. They believe that it offers the possibility for an abuse of discretion by the prosecutor-counsel. "Substantial assistance" and a reasonable departure in one district may bear no resemblance to a similar situation in another jurisdiction. Therefore, the Commission should consider establishing or defining degrees or categories of substantial assistance and suggest departure ranges based on the degree of assistance.

If you seek any further input on these itemized areas of concern or any other matter relating to the sentencing guidelines, I shall be pleased to respond to your inquiry.

Very truly yours,

JULIAN ABELE COOK, JR.
Chief Judge
United States District Court

JAC:pf

United States District Court
Eastern District of Michigan
Detroit 48226

Julian Abele Cook, Jr.
Chief Judge

March 18, 1991

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

Dear Commission Members:

This letter is in response to your request for the views of federal judges on proposed amendments to the sentencing guidelines. Unfortunately, your request came late in the comment period and the format used to present the proposed amendments has made them somewhat difficult to comprehend. Nevertheless, I shall attempt to respond as insightfully as possible under the circumstances.

In an effort to analyze the proposed amendments, the judges on our bench went through a deliberative process in considering the proposed amendments. We first asked our Probation Office to comment. Thereafter, the United States Attorney and Chief Federal Defender, as a surrogate for the defense bar, were solicited for their comments. Our Pretrial and Probation Committee then considered the proposed amendments in light of the views and opinions of the three groups. Copies of these comments are attached.

The United States Attorney frequently stated that the Department of Justice had not yet taken an official position with regard to the specific proposed amendments. This response was especially disappointing since the Guidelines have worked a substantial shift in discretion from the judges to the local United States Attorney. The Chief Federal Defender, who currently serves as the chair of the American Bar Association Committee, is directly involved with the Guidelines. Thus, he has acquired a superior knowledge about the proposed amendments as well as a developed particular view.

As a result of these collective opinions, our Pretrial and Probation Committee has reached the following conclusions:

1. A substantially better job could be done in presenting proposed amendments to the public for comment.

2. The proposed amendments are too complicated and lengthy for a detailed comment given the time constraints imposed.

3. A guidelines should be amended only (a) if there is a demonstrated need for change and (b) to clarify and simplify as well as to eliminate clear unfairness.

4. An amendment should not have the effect of lengthening a sentence or providing any additional limitation upon the discretion of a judge unless there is a good reason to do so. In general, the sentences under the current guidelines are too long and the discretion of the judge to consider offender characteristics, as well as the circumstances of the crime, are too limited.

5. Amendment 11 has merit. At the present time, there is too much of a reliance upon drug quantities in punishing drug offenders. In our judgment, Guideline 3B1.2 does not offer a sufficient basis for differentiating the hierarchy of culpability in multi-defendant conspiracies. The scale of drug quantities establishes a basis that is too simplistic for determining punishment in situations (a) where an offender's criminal expectations are unlikely or fulfillment and (b) when the offender is only a "mule."

Thank you for the opportunity to comment.

Very truly yours,

JULIAN ABELE COOK, JR.
Chief Judge
United States District Court

JAC:pf

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Attached are comments on various proposed amendments. For each proposal, the Probation Department's comments to the relevant amendment are included first, followed by the United States Attorney's Office's response and then the Federal Defender's Office's response.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 7A

From studies of the United States Sentencing Commission requested and received by this district, there appear to be no clear reasons for changing 2B3.1(b)(1), increasing the enhancement for the robbery of a financial institution. Why should the robbery of a financial institution be considered more serious or treated differently than any other robbery?

United States Attorney's Comment on
Proposed Amendment 7(A). Bank Robbery.

The Department of Justice has not yet adopted an official position on this proposed amendment.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 7(A)

We agree with the draft letter -- no clear reasons for changing 2B3.1(b)(1).

United States Probation Department
Eastern District of Michigan

Proposed Amendment 7B

An increase of two levels to the firearm offense characteristic appears to be the best alternative to lessen the disparity in those bank robbery cases where a firearm is used but due to prosecutorial discretion, an additional charge under 18:924(c) is not charged. Any larger increase in the enhancement would cause additional disparity in those cases of defendants in the higher criminal history categories.

United States Attorney's Comment on
Proposed Amendment 7(B). Bank Robbery.

The Department of Justice has not yet adopted an official position on this proposed amendment.

This office does take issue with the rationale behind the proposal. The reason the Commission gives for this proposed amendment is that the government has not been consistently prosecuting section 924(c) violations. The United States Attorney's Office in this district takes that obligation of consistency seriously. Although we do not have the data necessary to speak for other districts, we believe that we have been faithfully adhering to the policy of the Department of Justice not to bargain away section 924(c) charges that are "readily provable." On occasion a guidelines gun enhancement will apply even though the defendant has not pleaded to a section 924(c) violation. The reason is that the guidelines require proof by only a preponderance of the evidence (that a gun was used or possessed), but a section 924(c) violation must be proved by the higher standard of "beyond a reasonable doubt."

Federal Defender Office - Detroit, Michigan

Proposed Amendment 7(B)

We oppose the draft letter's support for a 2 level increase.

We concur in the U.S. Attorney's objection to the rationale provided by the Commission -- Justice Department shenanigans or ineptness.

Defender analysis:

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 it is clear from the cases sentenced that, notwithstanding the clear intent of the Justice Department's 'Thornburg Memorandum' on the plea bargaining, prosecutors are not consistently charging 924(c) when a weapon is possessed during a bank robber. 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 § 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 § 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%). 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%).

United States Probation Department
Eastern District of Michigan

Proposed Amendment 7C

This proposed amendment recognizes and accounts for multiple bank robberies in guideline calculations even if they are not charged. It provides some structure and guidance to the Court which could eliminate the need for an unguided and unstructured departures in cases such as these.

United States Attorney's Comment on
Proposed Amendment 7(C). Bank Robbery.

The Department of Justice has not yet taken an official position on this proposed amendment. It does appear, however, that this amendment will be supported by the Department. It will help to ensure that bank robbers are held accountable for the entirety of their criminal conduct.

Proposed Amendment 7C

We oppose the draft letter's support for this amendment for the following reasons:

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

> the guidelines may result in lower sentences in certain multiple robbery cases than under pre-guidelines 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.

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 pre-guideline 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, 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.[1]

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."[2] If the Commission wants to move to a real offense system, it should amend Chapter 1, part A(4)(a) and § 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).

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

The Commission staff menorandum 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 convcition (28.5% of cases with dismissed or uncharged counts versus 45.1% of cases with all robberies accounted for by conviction)." 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 case with uncharged or dismissed robberies (above = 9.5%; top = 11.9%).

2 See, United States Sentencing Guidelines, Chapter 1, part A(4)(a), intro. comment.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 11

There is a "gut" feeling in the field that greater differentiation is needed between leaders and less culpable members of large scale drug conspiracies. Leaders, having more knowledge of the criminal operation, are more apt to receive consideration for downward departure under Guideline 5K1.1. Less culpable members of a drug operation can end up serving more time because they do not have as much information to give authorities and therefore are not eligible for 5K1.1 departures. Although we are not sure that drug quantities are the area that should be targeted to correct or reduce this disparity, some means is necessary, besides departures, to recognize individuals who have little knowledge of and are less culpable members of large scale drug conspiracies.

United States Attorney's Comment on
Proposed Amendment 11. Comment on Drug Guidelines.

The Department of Justice has not yet determined what comment, if any, it will be offering with respect to the drug guidelines.

United States Probation Department
Eastern District of Michigan

Proposed Amendments 21 and 22

Due to the similar nature of these offenses, these amendments are being discussed together except for number 3 as noted below.

1. These proposed amendments simplify and consolidate the current Guidelines. They eliminate duplication and confusion in the application of the current ones, particularly with respect to multiple cross references and the potential application of more than Guideline to the same statute.

2. From the studies of the United States Sentencing Commission, the current sentencing patterns show that sentences for these offenses have generally been in the upper end of the guideline range which supports a raising of the offense level. In addition, the raising of the offense level is also supported by the new statutes which increase the penalty for these offenses.

3. For Guideline 2K2.1, the preferred option is "convictions for a violent felony or serious drug offense", as this language tracks the definition used in 18:924(c). For Guideline 2K1.1, the option of "or explosive offense" is preferred as it takes into consideration other offenses which wouldn't necessarily be captured under the term "crime of violence".

4. This proposed amendment changes wording from "if the defendant is convicted" to "if the offense conduct involved" which limits the potential disparity caused by prosecutorial charging patterns.

5. An offense level enhancement of four is preferred to reflect the seriousness of unlawfully possessing a firearm in a federal court facility.

6. In addition, these proposed amendments consider the number of firearms and amount of explosives for crimes such as Felon in Possession which was one of the concerns expressed by practitioners in the field.

United States Attorney's Comment on
Proposed Amendments 21 and 22. Firearms.

The Department of Justice is in favor of these proposed amendments. The proposals will help narrow the gap between defendants who qualify for treatment as armed career criminals and those that fall one or two serious crimes short of career criminal status. For these intermediate career criminals, the proposed higher offense levels will help to ensure proportionality.

With respect to the third proposed comment in the court's letter, the government prefers using the option using the language "convictions for a crime of violence or controlled substance offense." This language is found later in the career offender definitions section. (Section 4B1.2). It is preferable for the sentencing guidelines to use language found elsewhere in the guidelines so that consistency is maintained. We also favor having increases in the offense level for the number of weapons possessed by a felon. This reflects the greater seriousness of an offense which is committed by a felon with multiple weapons.

Federal Defender Office - Detroit, Michigan

Proposed Amendments 21 and 22

We oppose the draft letters support of these amendments for the following reasons:

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

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

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[24]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 N, appendix P.

[25]The 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

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

[26] 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 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 §

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[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

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[28]See id. at 28-32.

[29]The 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.

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

[31]There 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

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[32]For § 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

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[33]Even 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".

[34]The 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.

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

[36]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.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 29(c)

Option number one is preferred and 4A1.1(a)(b)(c) and (d) should apply to convictions pending appeal as the conviction stands until the Appellate Court rules. Since a defendant has been convicted, not awarding points in these cases creates a new area of disparity.

United States Attorney's Comment on
Proposed Amendment 29(C). Criminal History for Cases on Appeal.

Although the Department of Justice has not yet taken an official position on this proposal, it appears that the Department will be supporting the option that is favored by the court's letter. Defendants who have already been sentenced and are awaiting appeal should be treated the same as other defendants who have not been fortunate enough to have an appeal bond granted.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 29(C)

We oppose the draft letter's recommendation of option #1 for the reasons that follows:

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 form custody. Option one does not have the application problem.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 30

The awarding or not awarding of criminal history points for "related cases" has been a difficult area to interpret. However, the three options offered under the amendment seem to complicate the matter rather than simplify it. Additional study may be needed to present other alternatives to solve this problem. For example, option number one is limited to crimes of violence. Option number two requires additional investigation of prior convictions by probation officers in order to apply the grouping rules. Option three makes use of "time served" as a measure of seriousness which may reflect prison overcrowding, jurisdictional differences, and other unknown factors.

United States Attorney's Comment on
Proposed Amendment 30. Criminal History for Related Cases.

The Department of Justice favors the second option for dealing with related cases. Some amendment is necessary to deal with the situation where sentences for unrelated offenses are artificially combined together in a criminal history calculation based on their consolidation for sentencing purposes. Prior sentences should not be considered to be part of related offenses where the offenses were separated by an arrest. Furthermore, as option number two provides, where the offenses would not have been grouped under the guidelines they should not be considered related for purposes of determining criminal history. The grouping rules were written to distinguish between offenses which are serious enough that they should not be grouped together in calculating offense levels. The same rationale applies when the offenses are prior criminal convictions. The advantage of using the grouping rules in this context is that they are already developed and will not require the creation of an entirely new standard. The test can be applied without having to look into the underlying circumstances of the prior crimes.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 30

We agree with the draft letter's conclusion that additional study is needed, because all three options complicate rather than simplify.

The following analysis supports our position:

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

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

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

[39]U.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.

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[40] Id. ("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").

[41] See 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

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[42]The 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]

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

[44] Option 2 aplies only if there is an intervening arrest.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 31

It is our opinion that the Sentencing Commission should create another criminal history category, category VII. Option number three of this proposed amendment is preferred as it defines two additional criminal history categories and encompasses approximately 98% of the criminal history points of those defendants already sentenced under the guidelines. This would further reduce the need for departure for adequacy of criminal history. Career offenders should be sentenced under criminal history category VII because 28:994(h) requires those career offenders to be sentenced at or near the maximum term authorized.

United States Attorney's Comment on
Proposed Amendment 31. Criminal History Category VII.

The Department of Justice agrees with the endorsement of option number three. A defendant with 18 criminal history points should not be treated the same as a defendant with only 13 points. The third option follows the pattern established for other categories in that there is a three-point spread between criminal history categories. By authorizing upward departures for defendants who exceed 18 criminal history points, the option provides flexibility for judges at the time of sentencing.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 31

We oppose the draft letter's support for the creation of a Category VII. In addition to the analysis set forth below, we want to oppose the draft letter's assumption that career offenders would automatically come under Category VII. The Commission indicated, when hearing testimony, that such was not the case.

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

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]

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[45]See 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).

[46]Id. at 3.

[47]Id. 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.

[48]Commission 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.

[49]See 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." There is no evidence that a new category VII will enhance the predictive power of the criminal history score.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 33

This amendment deals with imposition of sentences for defendants serving an unexpired term of imprisonment. Option number two creating a policy statement is preferred as it provides for the most judicial discretion of any of the options. (See 18:3584).

United States Attorney's Comment on
Proposed Amendment 33. Consecutive versus Concurrent Sentencing.

The Department of Justice has not yet taken an official position on this proposed amendment.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 33

We object to the draft letter's recommendation of option number two. We prefer option number one for the following reasons:

Amendment 33 -- § 5G1.3 (Imposition of a Sentence on a Defendant Servicing 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

"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.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 37B

Guideline 1B1.2(a) should be amended to read that stipulations should be made a part of a formal written plea agreement. Such a practice would greatly assist the Court in determining the applicable guideline range.

United States Attorney's Comment on
Proposed Amendment 37(B). Stipulations.

The Department of Justice has not yet taken an official position on this proposed amendment.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 37B

It is our understanding that the Sentencing Commission has removed this proposal from consideration this year.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 11

We concur with the draft letter's support of a study relating to the Mitigating Role aspect of drug sentencing, given the reality that there is significant over-punishment due to over-reliance on the quantity of drugs.

We also believe that this study of mitigating roles should include other non-drug similar case scenarios, e.g., Ivan Boesky's secretary.

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.

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 U.S. Attorney has noted, "many drug defendants 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."

PCRT-[redacted]
32/91

U.S. Department of Justice

United States Attorney
Middle District of Florida

500 Zack Street, Suite 400 *813/225-7300*
Tampa, Florida 33602 *FTS/826-7300*

October 16, 1990

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

Attn: Communications Director

Gentlemen:

Re: Comments on Guideline Issues

This is our response to your solicitation, dated August 9, 1990, for comments on Guideline issues and recommendations for potential amendments.

(1) In the prosecution of United States v. Brumlik, Case No. 89-234-CR-Orl (M.D. Fl.), the defendant was prosecuted for illegal money laundering. The defendant was advised by the undercover agent that the money to be laundered was from cocaine sales. Sentencing guideline Section 2S1.1(b) provides for an increase of three levels if the defendant knew the funds were the proceeds of illegal activity involving the importation or distribution of narcotics or other controlled substances. In this case, the funds were government funds and not the proceeds of an unlawful activity. While the defendant fully believed that the funds were from an unlawful source, we were unable to increase the base offense level.

It is recommended that this specific offense category be amended to take into account "sting" operations. Accordingly, this paragraph should be changed to read: "If the defendant knew or believed the funds were the proceeds of illegal activity

involving the manufacture, importation or distribution of narcotics or other controlled substances increase by three levels."

(2) We also suggest a specific guideline for procedures to be employed in resolving controverted scores, to include which party has the burden of persuasion or proof, and what that standard may be in various circumstances. This guideline should also address what specific findings must be made by the court. It would be appropriate to require that all objections to guidelines applications be raised at sentencing or waived, as is the procedure recently enacted in the Eleventh Circuit in United States v. Jones, 899 F.2d 1097 (11th Cir. 1990).

We thank you for the opportunity to have input into these very important decisions.

Very truly yours,

Robert W. Genzman

ROBERT W. GENZMAN
United States Attorney

PCRI.331/91

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September 21, 1990

Communications Director
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, DC 20004

Dear Sir:

In response to your request for comments on areas the Commission might study, I ask that you consider providing the computer software program, Assyst, in a format making it usable on a Macintosh Computer.

Also, the Commission should consider deleting the sentence in §5H1.4 which states that drug dependency or alcohol abuse is not a reason for imposing a sentence below the guidelines. I think it is unfair to allow the courts to use drug dependency or alcohol abuse as grounds for going above the guidelines, while not allowing it to be considered as a factor which might support a downward departure.

Sincerely,

Richard Crane

RC/pc

recycled paper

PCRI-36/91

UNITED STATES DISTRICT COURT
Eastern District of Louisiana
500 Camp Street
New Orleans, Louisiana 70130

HENRY A. MENTZ, JR.
Judge

October 24, 1990

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

Dear ~~Mr. Wilkins~~ Wilkins:

As per your request for comments and developments regarding the Sentencing Guidelines, please find enclosed a copy of an opinion we recently released addressing Due Process issues under the Guidelines. I hope you find it helpful.

Sincerely,

Henry M.

HENRY A. MENTZ, JR.

HAM,JR.;bgh
Enclosure

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS

TIMMY COBBINS, ET AL

Mentz, J.

CRIMINAL DOCKET NUMBER:89-295

SECTION "I" (6)

ORDER AND REASONS

Before the Court is the motion of defendant, Timmy Cobbins, to declare the Sentencing Guidelines unconstitutional under the Fifth Amendment as a violation of his right to due process of law. The defendant further requests this Court to employ pre-existing law to his sentencing. Cobbins' co-defendants, Henry Lee and Fitzgerald Johnson, join in the motion. After reviewing the motion, memoranda of counsel, the record and the law, the Court denies the motion for the reasons set forth below.

Introduction

On November 17, 1989, after a trial by jury, defendant Timmy Cobbins and two of his three co-defendants were convicted of all three counts of the superseding indictment which were returned against them on August 18, 1989. These counts involved violations of Title 21 United States Code, Section 846 and Section 841(a)(1), possession with intent to distribute cocaine and conspiracy to distribute cocaine. Cobbins and his co-defendants were also convicted of violating Title 18 United States Code, Section 924(c)(1) and Section 2, using and carrying firearms in relation to a drug trafficking crime and aiding and abetting.

The Criminal Conduct

In June of 1989, a confidential informant working for the Drug Enforcement Agency ("DEA") contacted Henry Lee in an attempt to purchase a quantity of cocaine. The informant represented himself as a person who could regularly buy quantities of cocaine. The DEA considered Lee a middle man who, it was anticipated, would introduce the informant to others willing to sell kilogram quantities of the drug. Lee subsequently contacted Fitzgerald Johnson in an effort to locate two kilograms of cocaine. Johnson, in turn, contacted Timmy Cobbins. Cobbins, not a known dealer and without resources himself, reached Todd Cooper[1] who allegedly made the final arrangements for the informant to purchase two kilograms of cocaine from Brian Smith. The "buy" was set for June 29, 1989, at the Radisson Hotel in New Orleans.

On that date, the informant and Lee in one vehicle, and Johnson and Cobbins in another, drove to the Radisson. After the four arrived at the hotel, only Cobbins and the informant went in, leaving Johnson and Lee in their respective vehicles. According to DEA records and statements made by the defendants, Cobbins and the informant were admitted to the room by Cooper, who allegedly showed the pair a quantity of cocaine. According to testimony at the trial, Brian Smith, who was armed with a MAC-11 .9mm semi-automatic

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[1] Cooper, the fourth defendant at the trial, was inexplicably acquitted by the jury, despite what appeared to the Court to be very convincing evidence that Cooper was actually Brian Smith's assistant in this drug transaction. However, Cooper's acquittal in no way affected the Court's sentencing of the other defendants in this case.

pistol, watched the transaction while hiding in the bedroom. After the informant saw that there was cocaine in the room he told Cooper he would go get the money and return. Actually, this scheme had been devised by the authorities. Once outside the hotel, it was intended that the informant would give a prearranged signal and the hidden DEA agents would move in and make the arrests.

As Cobbins and the informant were leaving the hotel, Johnson, who was still waiting in a vehicle in front of the hotel told Cobbins he thought he had seen drug agents in the area and that the deal might be a setup. Johnson and Cobbins then left in that vehicle, while the informant entered the vehicle driven by Lee. Johnson and Cobbins were subsequently arrested a few blocks away and a .380 caliber semi-automatic pistol was found under the front seat of the vehicle. Cobbins later admitted to owning this weapon. Lee managed to evade capture until almost two months later, in August.

Meanwhile, agents moved in on the suspects still in the hotel room. Cooper was arrested without incident immediately after the agents entered the room. Smith, however, tried to escape by jumping from the balcony of his room to an adjacent one. He missed and fell nine floors to his death. The MAC-11 pistol was found near his body. The DEA agents seized the cocaine in the room, which totalled 2007.3 grams.

All parties interviewed indicated that the source of the cocaine was Brian Smith, and the others involved in the crime, Cooper, Cobbins, Lee, and Johnson, were only facilitators of the

offense. The jury, as noted previously, acquitted Cooper and convicted the other three defendants of all charges. Most notably, the jury convicted Cobbins, Johnson, and Lee of a conspiracy charge, resulting in all three parties being found guilty of all substantive offenses committed in furtherance of that conspiracy. See Pinkerton v. United States, 328 U.S. 640 (1946). In Lee's case, for example, that meant the jury could, and did, find him guilty of possession of cocaine and using and carrying firearms[2] in relation to a drug trafficking crime, even though Lee did not actually use and possess either the guns or the cocaine. The same is true of Johnson, even though Cobbins admitted the pistol found in their vehicle belonged to him, and even though Johnson was never near the cocaine. Cobbins, likewise, was found guilty of using and carrying the MAC-11 pistol found near Brian Smith's body although he never actually possessed it.

Sentencing Under the Guidelines

The probation officer responsible for the pre-sentence reports calculated the Sentencing Guidelines range for defendant Cobbins to be from 123 to 138 months. This calculation was based on a total offense level of 26 and a criminal history level of I, and includes the mandatory 60 month consecutive sentence for the gun charge. Under the Guidelines, this sentencing range is appropriate notwithstanding the fact that this is Cobbins' first

[2] The gun count included both the .380 semi-automatic pistol found in the Cobbins/Johnson vehicle and the MAC-11 semi-automatic pistol found near the body of Brian Smith.

and only felony conviction. Cobbins was sentenced to 130 months incarceration followed by a five year period of supervised release.

Defendant Henry Lee, conversely, had three prior felony convictions for possession of cocaine. It was noted that Lee also met the other requirements of a career offender. Probation calculated his guidelines range to be from 270 to 322 months. This calculation was based on a total offense level of 32 and a criminal history level of VI, and also includes the mandatory 60 month consecutive sentence for the gun charge. Lee was sentenced to 270 months incarceration followed by a five year period of supervised release.

Defendant Fitzgerald Johnson, like Cobbins, had no prior felony convictions. Probation calculated his guidelines range to be from 123 to 138 months. This calculation was based on a total offense level of 26 and a criminal history level of I, and includes the mandatory 60 month consecutive sentence for the gun charge. Johnson was sentenced to 130 months incarceration followed by a five year period of supervised release.

Discussion

The defendants maintain that the Sentencing Guidelines facially violate their Fifth Amendment right to due process of law. Defendants suggest that the Guidelines violate their right to due process of law as they were generally applied in this case, in the following ways:

A. The Sentencing Guidelines create a mechanical formula which ignores relevant mitigating factors;

B. The Sentencing Guidelines prohibit this court from properly exercising its discretion at a defendant's sentencing;

C. The Sentencing Guidelines provide no standard for weighing or comparing the factors that were mandatorily applicable when the defendants' sentences were determined, which has resulted in arbitrary, and unfair sentences.

Defendant Cobbins' Memorandum in Support, p. 3. Specifically, the defendants raise the following issues with respect to the constitutionality of their sentencing proceedings:

1. Whether the defendants' right to due process was violated because the government, through its charging decision to include the gun count, which carries a mandatory consecutive five year term, determined, at least in part, the defendants' sentences?

2. Whether the defendants' right to due process was violated because the government refused to move the Court for a downward departure from the Sentencing Guidelines as a result of the defendants' cooperation after their convictions?

The General Due Process Challenges

The Sentencing Guidelines were designed to limit the discretion of district judges in sentencing, so as to produce greater uniformity among the sentences imposed upon similar offenders convicted of like crimes. See United States v. Mejia-Orosco, 867 F.2d 216 (5th Cir.), cert. denied, 109 S. Ct. 3257 (1989). Defendants argue that the Guidelines create a "mechanical formula" which does not take into account relevant mitigating factors. They also state that the Guidelines prohibit a court from exercising its discretion at a defendant's sentencing. Furthermore, the defendants assert that the Guidelines provide no

standard for weighing or comparing the various factors which are applicable at sentencing. None of these general challenges rises to the level of a constitutional due process violation.

The notion that Congress can create a framework for the primary purpose of eliminating disparity in sentencing is not improper. See Lockett v. Ohio, 438 U.S. 586 (1978). The Guidelines are not, however, intended to be a mechanical formula. Rather, they provide the analytic framework needed to create uniform sentences, because justice cannot be meted out according to mathematical formulas. Mejia-Orosco, 867 F.2d at 219.

> The universe of potential factors that might affect the seriousness of a given offense is too broad to be refined to a mechanistic approach. The sentencing guidelines are not intended to cover all contingencies or rigidly bind district judges. The guidelines do not impose the sentence, they provide a framework for a district court to impose a sentence.

Id.

The district court is the fact finder in the sentencing proceeding and the Guidelines statute expressly insulates such fact finding against appellate attack. 18 U.S.C. § 3742(e) (endorsing the "clearly erroneous" standard). Therefore, a sentence will not be reversed if it results from a proper application of the Sentencing Guidelines to those facts. On the other hand, if the court applies the Guidelines to the facts found and departs from the resulting sentencing range, that sentence is also not subject to reversal if the court offers acceptable reasons and the departure is "reasonable." 18 U.S.C. § 3742(e). The Court finds that this approach, as applied in the present case, was not

mechanical; rather, it provided an appropriate framework that promoted uniformity in sentencing without eliminating this Court's fact finding role. The defendants were provided with an opportunity to review their respective pre-sentencing reports. Objections and corrections were noted in the record. The defendants were allowed the opportunity to offer evidence of mitigating factors. And, this Court, in its discretion, passed sentence within the calculated guidelines range.

Defendants also argue that the Guidelines prohibit a court from properly exercising its discretion at sentencing. This issue has been resolved by both the Fifth Circuit and the Supreme Court. Congress has the power to completely divest the courts of their sentencing discretion and to establish exact, mandatory sentences for all offenses. Lockett, 438 U.S. at 603-04 (1978); United States v. White, 869 F.2d 822, 825 (5th Cir.), cert. denied, 109 S. Ct. 3172 (1989). "If Congress can remove the sentencing discretion of the district courts, it certainly may guide that discretion through the guidelines." Id.

Finally, in their general challenges, the defendants assert that the Guidelines provide no standard for weighing or comparing the various factors which are mandatorily applicable at sentencing. This argument could be viewed in two ways. First, defendants could be asserting that a court's restricted discretion limits a defendant's ability to present evidence of mitigating factors prior to sentencing. Second, and more likely in this case, defendants could be asserting that the Guidelines do not permit the

Court to take into account the relevant factual context of an offense prior to the imposition of a mandatory and/or consecutive sentence. As noted above, because the defendants were convicted of a conspiracy charge, each defendant, regardless of whether he actually used or carried a firearm, received the mandatory five year sentence for the gun charge. In addition, defendant Henry Lee received a much longer sentence than the other two defendants because of his three prior felony convictions for possession of cocaine. The three prior felony convictions meant Lee's criminal history category was calculated at Level VI instead of Level I.[3]

Both of these arguments seem to imply that the defendants are entitled to individualized sentencing. There is, however, no such right guaranteed by the Constitution. Lockett, 438 U.S. at 602. By enacting the Guidelines, Congress returned to an earlier

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[3] The Court is not entirely insensitive to the plight of the defendants in this case. There is ample evidence in the record to indicate that these three defendants were only facilitators of the crimes charged. Indeed, Henry Lee, for example, may have been no more than a "lookout." However, Congress, in its discretion, has chosen to punish Lee not only for the offenses charged, but also for the totality of his criminal history--three prior felony convictions for cocaine possession. Lee has an obvious drug problem, but no real history of violent behavior. His crime was playing a very minor role in a major drug conspiracy. Yet, Lee received the longest sentence, 22 and 1/2 years. Were it not for the Guidelines, a person in a substantially similar position to Lee would likely have received a sentence from this Court of approximately nine years followed by a period of supervised probation. Since the current cost of incarceration is $1210.05 per inmate per month, the cost differential to the taxpayer between a Guidelines and a non-Guidelines sentence in Lee's case becomes readily apparent. See Advisory of May 11, 1989, Administrative Office of the United States Courts. And, of course, the indirect costs of imposing a Guidelines sentence in a case like Lee's, such as the possibility that an inmate's family will require government sponsored financial assistance, increases proportionately as well.

philosophy in federal sentencing that the punishment should fit the crime and that the main purpose of imprisonment is punishment. Mejia-Orosco, 867 F.2d at 218. To assure that the sentences imposed are fair and that sentencing is uniform, Congress restricted the discretion of district judges through the Guidelines and made sentences determinate by eliminating parole. Furthermore, any question of Congress' power to fix sentences or to delegate to the Sentencing Commission the authority to promulgate sentencing guidelines has now been resolved. Mistretta v. United States, 109 S. Ct. 647 (1989). Therefore, the defendants' general constitutional due process challenges to the application of the Sentencing Guidelines to their sentencing proceedings are without merit.

The Specific Due Process Challenges

I. The Discretionary Selection of Charges Issue

The defendants argue that the Sentencing Guidelines violate their due process rights because they gave the prosecutor an improper role in the sentencing decision. They assert that the prosecutor's decision to include the gun count, which carries a mandatory consecutive five year term, determined, at least in part, the defendants' sentences. This claim is based in large part on the decision in United States v. Roberts, 726 F. Supp. 1359 (D.D.C. 1989).

There are essentially two elements that determine a sentence: the charges filed against the defendant and the

discretion exercised in imposing the sentence. The Fifth Amendment does not require that federal judges have any control whatsoever over the charging phase of a prosecution; that decision is the sole domain of the executive branch. United States v. Smith, 727 F. Supp. 1023, 1026 (W.D. Va. 1990). Furthermore, the Constitution does not require that a district court judge have any discretion in sentencing. See Lockett, 438 U.S. at 603-04. But, as Judge Michael noted in Smith:

> [W]hen the two elements which determine a sentence are separated, no constitutional issue is apparent. However, when the two elements are forced together, as they are by the application of the Guidelines, a constitutional problem becomes visible. '[T]he de facto transfer of much of the responsibility for sentencing from impartial judges to prosecutors has had the effect of disturbing the due process balance essential to the fairness of criminal litigation.' Roberts, 726 F. Supp. at 1363.

Smith, 727 F. Supp. at 1026 (footnote omitted). This transfer of power occurs, at least in part, because of the wide range of criminal statutes under which a defendant may be charged given a particular set of facts, as well as the prosecutor's ability to introduced evidence of "relevant conduct"[4] under Guideline § 1B1.3

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[4] For a discussion of how the prosecutor's discretion in introducing "relevant conduct" affects the sentencing process, see Smith, 727 F. Supp. at 1027. Relevant conduct played little part in the present sentencings. It should be noted, however, that during the course of the investigation of this matter, defendant Lee admitted to playing an active role in the distribution of another approximately 1600 grams of cocaine on a previous occasion. While this evidence could have been used as relevant conduct in Lee's sentencing, Lee's prior felony convictions and the resulting criminal history enhancement made that unnecessary.

when determining the sentencing guideline range. Id.[5]

This "de facto transfer" of power undeniably results in the very disparity that the Guidelines were intended to eliminate. The fundamental problem is not only that disparity continues to exist under the Guidelines, but that under the Guidelines the discretion which leads to disparity is exercised "outside the system" and beyond the scope of judicial review. Id. at 1027.[6]

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[5] The Federal Courts Study Committee has noted the problem as well:

> [W]e have been told that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. . . .Given the extent and depth of [the disagreement over the federal sentencing scheme], we recommend immediate study of proposals to amend the Sentencing Reform Act to bring greater flexibility to the system while adhering to the central tenets of the Act.

Report of the Federal Courts Study Committee, pp. 138-39, April 2, 1990.

[6] See, Roberts, 726 F. Supp. at 1366. Disparity in sentencing is not the only potential problem. Because discretion is now exercised outside the system, there exists an enormous potential for improper plea agreements. Defendants may be coerced into pleading guilty depending on the selection of the charge, and judges may feel coerced into accepting pleas they would not otherwise accept. The Report of the Federal Courts Study Committee notes:

> [S]ome prosecutors (and some defense counsel) have evaded and manipulated the guidelines in order to induce the pleas necessary to keep the system afloat during this period of rapid criminal caseload increase. Some district judges report feeling enormous pressure to accept pleas even though they clearly do not comport with the guidelines. Critics of the guidelines charge that such practices occur regularly, despite the fact that many of them contravene the Attorney General's instructions to federal prosecutors, which state that departures from the guidelines 'should be openly identified rather than hidden between the lines of a plea agreement.'

This Court need not repeat Judge Greene's detailed example of the numerous charges that a prosecutor could bring based on the same set of facts. It is clear, however, that the possible range of sentences for essentially the same conduct, as set forth in Roberts, can vary from one year to a maximum of life imprisonment. Roberts, 726 F. Supp. at 1363-65. Judge Michael notes:

> In light of the fact that the Guidelines were supposedly designed to reduce discretion to a minimal amount, the fact that such a range of possible sentences for the same offense continues to exist is troubling. That such discretion continues exist may or may not, in the abstract, be a good thing; but that it exists is not a constitutional issue; it is a policy issue to be taken up by Congress. What presents the constitutional question is who exercises that discretion.

Smith, 727 F. Supp. at 1027-28.

To reframe the question: Does a defendant have a due process right to have his sentence determined by an impartial authority? We think the answer to that question is clearly no. Under Lockett the Supreme Court stated that Congress could, if it wished, entirely eliminate a federal judge's discretion in sentencing by enacting determinate sentences for all federal crimes. Lockett, 438 U.S. at 603-04. Such a system of determinate sentencing would necessarily transfer the entire responsibility for determining sentences to the United States Attorneys. Since Lockett declares that such a system would pass constitutional muster, the same must be true of the present system. Smith, 727 F. Supp. at 1029 (emphasis added).

Report of the Federal Courts Study Committee, p. 138, April 2, 1990.

Reframing the question once again: Does a defendant have a due process right to be sentenced by an impartial authority? We think the answer to that question is clearly yes. Historically, judges are, by the very nature of their positions in the system, generally fair and impartial. Roberts, 726 F. Supp. at 1367. On the other hand, prosecutors are advocates, and are not, therefore, predisposed to even-handedness. Id. Judge Michael again states:

> Intending no disrespect to the prosecution, it is not humanly possible to require the government's attorneys to prosecute a case vigorously yet then back off and sentence dispassionately, taking into consideration the needs of society and the requirements of the defendant and balancing them equitably. Due Process should not allow the system to require of the prosecution something which it perhaps cannot, and certainly should not, do.

Smith, 727 F. Supp. at 1029. Judge Greene states his concerns even more forcefully in Roberts:

> [U]nder the new sentencing scheme, prosecutors are not only performing their customary responsibilities of filing the charges and presenting the government's side in the course of criminal trials; their power over sentencing . . . often effectively constitutes them also as the authority which determines punishment. This change has in substantial measure eliminated the safety valve in terms of fairness and due process of an impartial judge exercising whatever sentencing discretion any particular criminal statute allows.

Roberts, 726 F. Supp. at 1367 (emphasis added).

Judge Greene's decision is well reasoned, and many of his concerns are certainly well founded. But this Court cannot follow Judge Greene's broad ruling, as discussed above, because the question of whether the judge should have the discretion to determine punishment, instead of the prosecutor, does not implicate due process. It is, instead, a policy choice which Congress has

the power to make. Indeed, Judge Greene did not base his decision in Roberts on so broad a ruling because he found that "the United States Attorney ha[d] skewed the process even further so as to introduce a special dimension of arbitrariness." Id. at 1368.

In Roberts, this arbitrariness resulted from a practice which is available only to the prosecutors in the District of Columbia. Id. at 1369 n. 54.[7] It involves "transferring" cases from the D.C. Superior Court to the District Court. If, for example, a defendant whose case has been pending in Superior Court refuses to plead, the prosecutor has the discretion to alleviate the Superior Court caseload by simply dismissing that case and securing a fresh indictment for the same violations in the District Court. Bearing in mind that the defendant may be incarcerated during this entire time, two potential problems become apparent. First, the Speedy Trial clock starts running all over again. Therefore, by means of charging selection, and hence, forum selection, the government is able to avoid adhering to the Speedy Trial Act. Second, the Superior Court does not sentence under the Guidelines; rather, sentences are imposed the old-fashioned way, by judges. Since sentencing under the Guidelines tends to be somewhat more harsh,[8] the prosecutor, by transferring the case to the

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[7] We note these specific abuses as illustrative only. Because the relationship between the D.C. Superior Court and the D.C. District Court is unique, these specific types of prosecutorial abuses are not possible here, nor are there allegations of these types of abuses in the present case.

[8] Judge Greene offers the example of a recent case in his court where an offender charged with possession of 5.5 grams of crack cocaine was subject to a mandatory minimum sentence of five

District Court, has the ability to selectively and determinately punish a defendant merely for not relinquishing his right to a trial by jury. Id. at 1368-73 (footnotes omitted). Judge Greene went on to specifically find that these abuses had occurred with respect to particular defendants in Roberts. Id.

This Court agrees with Judge Greene's narrower approach, which requires a specific finding of arbitrariness or bad faith. This narrower approach necessarily involves a due process analysis. First, sentencing must comport with the fundamental principles of due process. Gardner v. Florida, 430 U.S. 349, 358 (1977). For example, the defendant must be effectively represented by counsel during the sentencing hearing. Id. He must also be allowed to present evidence in his own behalf. Smith, 727 F. Supp. at 1028. However, the defendant has no substantive right to a particular sentence within the range provided for in the applicable criminal statute. Gardner, 430 U.S. at 358. But, more importantly in the context of the present sentencing scheme under the Guidelines, the sentencing process itself, including any discretion exercised by the prosecutor in selecting the charge or charges, must be free from arbitrariness or bad faith. See Roberts, 727 F. Supp. at 1370 n. 58 (citing United States v. Goodwin, 457 U.S. 368, 384 (1982). In this regard, a court has the constitutional obligation to oversee the sentencing process and make sure it comports with due

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years under the Guidelines. Under District of Columbia law applicable in the Superior Court, the same offense carries a maximum sentence of five years, no minimum of any kind, with probation available as well. Roberts, 726 F. Supp. at 1372 (emphasis in original).

process. To do this, the court must use its specifically designated role under the Sentencing Guidelines as fact finder and determine by the evidence offered if arbitrariness or bad faith figured into the determination of the defendant's punishment.[9] If the court should make such a finding, it must fashion a remedy that comports with due process, including a "reasonable" departure from the Guidelines. And, as a factual finding this determination is, of course, reversible only if found to be clearly erroneous.

In short, a defendant has a due process right to be sentenced by a judge, but no due process right to have that sentence determined by a judge. See United States v. McCord, 664 F.2d 60, 62 (5th Cir. Dec. 1981).[10] By "sentence" we mean that the proper role of the court under the Guidelines is to supervise the entire sentencing process, making factual findings where required to assure fundamental fairness, and finally, to pass sentence on the defendant. By "determine" we mean that the fact that a

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[9] See 18 U.S.C. § 3247(e). This Court is of the opinion that increasing the supervisory and fact finding role of the judge may be the best way to "bring greater flexibility to the system while adhering to the central tenets of the Act." See Report of the Federal Courts Study Committee, supra note 4, at 139.

[10] In McCord, there was a dispute regarding whether a particular government agent had been authorized to negotiate a plea bargain and whether government agents assured the defendant he would receive probation. The district court made certain factual findings and concluded that no such plea bargain or assurances were made. This finding was affirmed under the "clearly erroneous" standard on appeal. The Fifth Circuit panel added:

> Neither the FBI agents nor the government attorney has the power to "offer probation" to a defendant. Sentencing is the exclusive function of the judge.

McCord, 664 F.2d at 62.

prosecutor may implicitly exercise some discretion by choosing between several charges available in a given factual context does not, in and of itself, offend due process. However, if discretion is exercised or charges are chosen arbitrarily or in bad faith, due process is implicated and the court must act appropriately.

None of those circumstances exist in the present case. There is no evidence in the record, nor was any offered at the sentencings, that the government attorneys "skewed the process even further so as to introduce a special dimension of arbitrariness." Roberts, 726 F. Supp. at 1368. The defendants simply urge that their due process rights were violated because the government attorneys chose to include the gun count in their indictment, thereby determining, in part, defendants' sentences. However, there is simply no evidence that in so doing the government attorneys acted arbitrarily or in bad faith. Therefore, the Court finds that sentencing determination, insofar as that function may have been exercised by the prosecution in this case under the Sentencing Guidelines, did not violate the Fifth Amendment's requirement that no person be deprived of life, liberty or property without Due Process of law.

II. The Cooperation Issue

The defendants also argue in their motion that their right to due process was violated because the government refused to move the Court for a downward departure from the Sentencing Guidelines because of the defendants' cooperation. Section 5K1.1 of the sentencing guidelines provides:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

Sentencing Guidelines, Chapter 5, Part K -- Departure, Section 5K1.1 (1989) [hereinafter § 5K1.1] (emphasis added).

As noted previously, a defendant has a right to due process during the sentencing stage. Gardner v. Florida, 430 U.S. 349, 358 (1977); Shelton v. United States, 497 F.2d 156, 159 (5th Cir. 1974). It is also settled that a defendant is entitled not to be sentenced based on inaccurate information. United States v. Hodges, 556 F.2d 366, 369 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978). Additionally, a defendant must be allowed to question the facts presented or relied upon to support the criminal penalty. Townsend v. Burke, 334 U.S. 736, 741 (1948). In other words, both sides "should have an effective opportunity to rebut allegations likely to affect the sentence. . . ." United States v. Pugliese, 805 F.2d 1117, 1123 (2nd Cir. 1986), cert. denied, 109 S. Ct. 1344 (1989) (citing, 3 Standards for Criminal Justice, Sentencing Alternatives and Procedures, Standard 18-6.4 at 448 (1986 Supp.).

Some courts have ruled that these basic tenets have been violated because § 5K1.1 and its statutory counterpart 18 U.S.C. § 3553(e) provide that only the government may initiate a motion for downward departure based on cooperation. Roberts, 726 F. Supp. at 1374; United States v. Curran, 724 F. Supp. 1239, 1244 (C.D. Ill. 1989). Generally, these courts focus on the judge's loss of discretion to consider cooperation as being constitutionally problematic. The specific concern appears to be that a decision by

the prosecutor not to file a 5K1.1 motion is essentially unreviewable. Curran, 724 F. Supp. at 1244; Roberts, 726 F. Supp. at 1375; see also, United States v. Justice, 877 F.2d 664, 667 (8th Cir.), cert. denied, 110 S. Ct. 375 (1989) ("under the new guidelines there appears to be no right of review or remedy if the prosecutor refuses to file a [§ 5K1.1] motion"). Consequently, the Curran court held that § 5K1.1 and 18 U.S.C. § 3553(e) were unconstitutional because "once [§ 5K1.1] is made available to one party to the litigation, due process requires that it be made available to all parties to the litigation." Id. The Roberts court ruled likewise because:

> [w]hen a defendant has rendered substantial assistance to law enforcement but the government refuses to file the requisite motion, the sentence the Court is required under law to impose will not be based on true and accurate information: those factors that, because of the cooperation, would call for a reduction in the otherwise mandatory sentence will not be before the Court, and the Court will have to sentence as if the defendant had not rendered such assistance. The defendant is also precluded from questioning the proceedings leading to the imposition of the sentence or the facts relied on by the prosecution. Indeed, under the construction of section 3553(e) of Title 18 and section 5K1.1 of the guidelines espoused by the government, the prosecution could arbitrarily or for an unconstitutional reason (e.g., racial or sex discrimination) decide not to file the motion called for by these provisions, and the court could not intervene even if the defendant were able to demonstrate to it--should he be able to reach the ear of a court--that he had rendered massive assistance to law enforcement . . . .

Roberts, 726 F. Supp. at 1374-75.

Two other courts considering the issue have found that while § 5K1.1 and § 3553(e) are not unconstitutional, these provisions do not preclude the district court from considering a

departure notwithstanding the government's refusal to move for such departure if the defendant can establish the fact of his substantial assistance. Justice, 877 F.2d at 668-69; White, 869 F.2d at 829. In Justice, the court relied on several factors for this conclusion:

> First, this arrangement places discretion that has historically been in the hands of a federal judge into the hands of the prosecutor. Under the guidelines the prosecutor has the discretion whether to file a motion in a particular case. Second, whether the prosecutor has abused this discretion in refusing to file a motion in a particular case is a question that appears to be unreviewable. If a judge is powerless to depart in the absence of a motion, the prosecutor is able to exercise far greater discretion than has historically been vested in the district judge. While a district judge's actions were subject to some degree of appellate review in the pre-guidelines cases, under the new guidelines there appears to be no right of review or remedy if the prosecutor refuses to file a motion. Third, the issue of whether a defendant has provided substantial assistance to authorities may be a disputed factual issue. Section 5K1.1 basically gives the prosecutor the role of the trier of fact in resolving this issue.

Justice, 877 F.2d at 667. The panel in White looked to the § 5K1.1 Policy Statement and found that, in accord with the statutory directive in 28 U.S.C. §994(n), 5K1.1 requires the government to file a motion when substantial assistance is rendered:

> Congress directed the Commission to 'assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.' 28 U.S.C. § 994(n). To implement this directive, the Commission drafted a policy statement to assist district judges if they chose to depart from the guidelines in appropriate cases. Guideline 5K1.1, policy statement. This statement places substantial weight upon the government's evaluation of the defendant's assistance and requires that the government file a motion reciting the assistance given. . . . The requirement of guideline 5K1.1 that the

> government file a motion is predicated on the reasonable assumption that the government is in the best position to supply the court with an accurate report of the extent and effectiveness of the defendant's assistance and that it would be the rarest of cases in which the government would be unwilling to recognize that assistance. This policy statement obviously does not preclude a district court from entertaining a defendant's showing that the government is refusing to recognize such substantial assistance. The provision accords with the statutory directive.

White, 869 F.2d at 828-29.[11]

Most courts addressing the issue, however, have ruled that § 5K1.1 and § 3553(e) are constitutional, and that the availability of these provisions only upon government motion is constitutional as well. United States v. Ayarza, 874 F.2d 647, 653

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[11] But see, United States v. Ortez, 902 F.2d 61, 64 (D.C. Cir. 1990). The Ortez court stated:

> The plain language of § 5K1.1 is very clear: the provision allows for a departure for substantial assistance to authorities '[u]pon motion of the government stating that the defendant has made a good faith effort to provide substantial assistance . . .' (emphasis added). Absent such a motion by the government, the guidelines do not authorize the sentencing court to depart below the applicable guidelines range in recognition of substantial assistance.

Id. Attempting to distinguish White, the Ortez court found that "[t]he Fifth Circuit's conclusion . . . that § 5K1.1 does not preclude a district court from entertaining a defendant's showing that the government is refusing to recognize substantial assistance, conflicts with the plain language in § 5K1.1."

We think this extremely narrow and literal reading of § 5K1.1 and the 5K1.1 Policy Statement is unfounded. As discussed elsewhere in this opinion, a court, by virtue of its fact finding authority, has a constitutional obligation to remedy arbitrary or bad faith conduct on the part of the prosecutor. Due process demands as much, notwithstanding the "plain language" of § 5K1.1.

Although not an issue in the present case, we also note that the "good faith" language of § 5K1.1 was eliminated as of November 1, 1989.

(9th Cir. 1989), cert. denied, 110 S. Ct. 847 (1990); United States v. Huerta, 878 F.2d 89, 91 (2nd Cir. 1989), cert. denied, 110 S. Ct. 845 (1990); United States v. Musser, 856 F.2d 1484, 1487 (11th Cir. 1988), cert. denied, 109 S. Ct. 1145 (1989); United States v. Ortez, 902 F.2d 61, 64 (D.C. Cir. 1990). In Huerta, for example, the court stated that a due process challenge to § 3553(e) and § 5K1.1 "rests on the faulty premise that judicial sentencing discretion cannot be circumscribed." Huerta, 878 F.2d at 94.[12] In Musser the substantial assistance provisions were challenged as unconstitutional "because [they] delegate[] to prosecutors unbridled discretion to decide who is entitled to a sentence reduction." Musser, 856 F.2d at 1487 (footnote omitted). The Eleventh Circuit rejected this argument noting that "the only authority 'delegated' by the rule is the authority to move the district court for a reduction of sentence in cases in which the defendant has rendered substantial assistance. The authority to

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[12] But see, Curran, 724 F. Supp. at 1243. As has been noted previously, Congress' ability to restrict or eliminate a federal court's sentencing discretion is well settled. See Lockett, 438 U.S. at 603-04. The Curran court recognized Congress' power to statutorily shift discretion, "[h]owever, when Congress, either directly by statute or indirectly through the Commission's Guidelines, gives the power to initiate the exercise of that discretion to one party and only one party, then something more significant than just a circumscription of the court's discretion has occurred." Curran, 724 F. Supp. at 1243 (emphasis in original).

However, this concern misconstrues the dynamics between due process and the Guidelines. This Court does not believe that vesting the power to initiate a 5K motion solely in the government is a due process problem because the power to initiate a 5K motion does not preclude a defendant from attempting to introduce evidence to show that the government is refusing to recognize substantial assistance. White, 869 F.2d at 829.

actually reduce a sentence remains vested in the district court. . . ." Id (emphasis in original). Furthermore, underlying this conclusion, the reason the prosecution is delegated the authority to move the court is because the prosecution is in the best position to know what and how much assistance was given. See e.g., Huerta, 878 F.2d at 93.[13]

Roberts also acknowledges this reason for the wording of 5K1.1, and the resulting delegation of authority to initiate 5K motions to the government. Judge Greene notes:

> [The concerns raised regarding the prosecutorial decision whether to make a 5K motion do not] mean[] that a court may or should substitute its judgment for that of the prosecution on the issue of defendant cooperation. Obviously the prosecutor has superior sources of knowledge on that score.

Roberts, 726 F. Supp. at 1375. The distinction Judge Greene makes is clear as he continues:

> [A court] has the authority to inquire so as to enable it to make a determination, based on facts adduced by both parties, whether the prosecution has made a decision that was not arbitrary, and that the procedures leading to that decision were not unfair.

Id (emphasis added).

Judge Greene proceeded to specifically find that the decision-making apparatus used by the U.S. Attorney's Office in Roberts led to both arbitrary and unfair results. In one instance,

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[13] See United States Sentencing Guidelines Manual, p. 5.41 n. 3 (1989):

> Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

the U.S. Attorney assigned to a particular defendant in that case could not advise the court why the defendant's claim of substantial cooperation was insufficient. In another instance, the prosecutor had actually concluded that the defendant's efforts were sufficient to call for a sentence reduction. In both cases, however, a "Departure Committee" composed of individuals other than counsel prosecuting the case, evaluated the assistance given. They concluded, in secret and under standards not made known to the court, that the assistance given was not of a sufficient value to warrant the filing of a 5K motion. Id. Furthermore, in one of the cases the reason the government did not file the 5K motion was not because the defendant failed to provide substantial assistance, but rather, because the enforcement agencies did not pursue the information provided since "something bigger, in their eyes more pressing, came up." Id. at 1376 (footnote omitted).

This Court agrees with Judge Greene's standard highlighted above that a court has the authority in a particular case to make a specific determination as to whether the government acted arbitrarily or in bad faith in its decision not to file a 5K motion. We do not agree, however, that the availability of the 5K procedure solely to the government is so fundamentally unfair or procedurally unfair as to violate due process. We noted in Section I above that a court has the constitutional obligation to oversee the sentencing process. In Section I we also stated that if a court found arbitrary or bad faith conduct on the part of a prosecutor in selecting charges to file against a defendant, the

court must fashion a remedy that would comport with due process. The same is true with respect to the government's decision not to file a 5K motion. If in not filing such a motion, the prosecutor is found by the court to have acted arbitrarily or in bad faith, the court must fashion a remedy that comports with due process. In other words, anyone who exercises discretion in connection with the sentencing process, tending to deprive a defendant of life, liberty, or property, must do so without acting arbitrarily or in bad faith. See United States v. La Guardia, 902 F.2d 1010, 1016 (1st Cir. 1990) (citing United States v. Galan, 1989 WL 63110 (S.D.N.Y. June 8, 1989), a case where the government did not move for a downward departure, but the court, under Fed. R. Crim. P. 32(c), nevertheless directed the prosecutor to make in camera disclosure as to defendant's cooperation).

We believe this opinion adopts and incorporates the reasoning of most courts that have addressed the issue of cooperation and the government's obligation to file 5K motions. Our view recognizes that Congress may vest sentencing discretion, either expressly or implicitly, in the prosecution. However, the prosecution must exercise that discretion without arbitrariness or bad faith. This opinion also follows those courts that adhere to the "plain language" of § 5K1.1, which provides that the procedure is available "[only] upon motion of the government." However, we also recognize that this plain language must take into account that the intent of § 5K1.1 is to provide the government with a method for giving credit where credit is due, and not to purposefully

inhibit a defendant's access to the court. In other words, restricting the initiation of a 5K motion to the government passes constitutional muster as long as a court exercises its fact finding and supervisory role over the sentencing process as a whole. Our approach, therefore, necessarily entails the participation of the defendant who must be allowed to introduce evidence at the sentencing hearing which would tend to show the government's arbitrariness or bad faith in not filing the 5K motion. We believe that the burden in such a case should be on the defendant to overcome the presumption that the government "is in the best position to supply the court with an accurate report of the extent and effectiveness of the defendant's assistance." White, 869 F.2d at 829. Additionally, our opinion follows the well reasoned ruling of our own Fifth Circuit, namely that "[5K1.1] obviously does not preclude a district court from entertaining a defendant's showing that the government is refusing to recognize such substantial assistance." Id. Furthermore, we also note that this methodology serves the strong government interest of promoting and encouraging cooperation, the other intent of § 5K1.1.

Applying this standard to the present case, the Court finds that there is no evidence that the government acted arbitrarily or in bad faith. The defendants merely assert that they cooperated and that the government refused to move the Court for a departure from the Sentencing Guidelines. Defendants do not claim that their cooperation amounted to "substantial assistance." Indeed, the defendants do not claim that the evaluation of their

cooperation by the government was improper at all. Although not dispositive, the Court notes that the defendants state they cooperated after they were convicted but before they were sentenced. Therefore, it is difficult to imagine, and the record is silent, how the defendants rendered substantial assistance while they were in custody between the time they were convicted and the time they were sentenced.

Accordingly,

For the reasons stated, the motion of defendants to declare the Sentencing Guidelines unconstitutional as a violation of their Fifth Amendment right to due process is DENIED.

New Orleans, Louisiana, this 24th day of October, 1990.

/Henry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

VCRS/19 1

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CHAMBERS OF
JAMES L. OAKES
CHIEF JUDGE
BRATTLEBORO, VERMONT 05302-0696

October 29, 1990

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

Dear Judge Wilkins:

In reply to your letter of September 12, 1990, while I believe that you and the commission have done a very good job with what you were required to do, to my mind the mechanistic and artificial nature of the sentencing guidelines makes for as much inequity in sentencing, or more, than did our former system. I am one of those who thinks that guidelines should be guidelines and not mandatory or semi-mandatory requirements.

Very truly yours,

James L. Oakes
Chief Judge

mfr

FCRL-38/9,

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

CHARLES CLARK
CHIEF JUDGE
245 EAST CAPITOL STREET, ROOM 302
JACKSON, MISSISSIPPI 39201

October 24, 1990

~~(601) 350-0911~~
601-965-4445
FTS 490-4445

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

Dear Billy:

When I received your letter of September 7, I solicited the views of all Fifth Circuit circuit and district judges (the latter through the chief district judges). I had only two circuit judge responses. They are attached. The chief district judges advise me that their judges are responding directly to the Commission.

Thank you for a yeoman's effort on the Commission.

Sincerely,

Charles

Thank you, too,
for the help with
Senator Thurmond
and his staff.

CC

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

DATE: October 4, 1990

TO: Chief Judge Clark

FROM: John M. Duhé Jr.

SUBJECT: Sentencing Commission's Request for Comments on the Guidelines

---

The interpretation of guidelines sections 1B1.3(a)(2) and 1B1.8(a) has created some confusion in this circuit. One recent case, *United States v. Kinsey*, is being remanded to the district court for further development of the facts. Although the court may be able to decide the case on another ground, it may be forced to resolve the apparent tension between these sections.

Section 1B1.3(a)(2) instructs a judge, "[u]nless otherwise specified," to consider "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction" in determining the base offense level.

Section 1B1.8(a) provides:

> Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and the government agrees that self-incriminating information so provided will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

I have the following questions concerning application of the two sections:

> (1) Is information provided to a probation officer in a presentencing interview part of the information that shall not be used against the defendant in determining the guideline range? In other words, is a probation officer part of "the government" as that phrase is used in the section, or is a probation officer only an official of the court--as distinguished from "the government"?

(2) What if a defendant reveals in a presentencing interview self-incriminating information that does not concern "unlawful activities of others"? May the judge consider this information in determining the applicable guideline range?

(3) Must a plea agreement specifically mention the court's ability to consider the defendant's disclosures during debriefing or during the presentencing interview before a court may consider them in determining the appropriate sentencing range? Suppose the government includes a broad statement that "there are no agreements regarding what sentence the defendant will or should receive." Is this statement sufficient to preserve the judge's ability to consider self-incriminating disclosures by the defendant?

Referring to the conflict as "an important issue of first impression under the Federal Sentencing Guidelines," the Tenth Circuit has recently resolved the third question. *See United States v. Shorteeth*, 887 F.2d 253, 254 (10th Cir. 1989). The court in that case held that "the language and spirit of *Guidelines* § 1B1.8 require the agreement to specifically mention the court's ability to consider defendant's disclosures during debriefing in calculating the appropriate sentencing range before the court may do so." *Id.* at 257.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO: Chief Judge Clark

FROM: John R. Brown

DATE: October 11, 1990

SUBJECT: Sentencing Commission Letter

My dear Chief:

On the Sentencing Commission request for recommendations, as a Senior Judge I have such little exposure to the problems that I cannot contribute much. One thing not commented on is the atrocious method of the internal system of citations. It is neither Dewey Decimal, alphabetical or numerical, just a jumble of all three.

Sincerely yours,

cc: All Judges

PCRI-39/91

United States District Court

Eastern District of Kentucky

Chambers of
Joseph M. Hood
Judge

P. O. Box 278
Pikeville, Kentucky 41502
(606) 437-7338

October 26, 1990

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

Dear Judge Wilkins,

In response to your letter dated September 21, 1990, I am afraid that I am too new to offer much of substance regarding the sentencing guidelines.

I am surprised to learn that the guilty plea rate has remained unchanged under the guidelines when compared to pre-guideline sentencing practices. I seem to think that the four-point swing (the two point deduction for acceptance of responsibility and the two-point increase for testifying falsely) would operate as an incentive to plead guilty,

I am aware that the sentencing commission is reviewing the guidelines and will gladly share my views if I encounter a situation which I believe needs clarification.

Very truly yours,

Joseph M. Hood

Joseph M. Hood

JMH/sue

PCRT-40/91

United States District Court
United States Courthouse
101 East Post Road
White Plains, NY 10601

Chambers of
Judge Gerard L. Goettel

September 25, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W. - Suite 1400
Washington, D.C. 20004
Att: Communications Director

Dear Sir:

I have received the Chairman's letter asking that I give you my thoughts on the three top guideline sections or policy statements in need of review, etc. I do not believe those things are the significant problems we are encountering with the sentencing guidelines. Judge Wilkins says that in only 5.8% of cases is there a downward departure for substantial assistance to the government. In my experience, the number is many times that. Because of the inflexible harshness of many of the guidelines, the departure letter has become the most significant prosecutorial tool of modern times. It is no longer merely a question of admitting involvement in the indictment offense and offering to testify as a government witness. Many of these departure letters are written because of assistance given with respect to unrelated cases and even to making of new cases.

I do not necessarily believe that this development is contrary to the public interests. I am certain, however, that it was not the intention of the sentencing guidelines to produce this situation. The major purpose of the guidelines was to eliminate disparity in sentences. To do that, the judges' discretion in sentencing was severely reduced. Because of the importance of departure letters, a very substantial discretion has been vested in the prosecutor. This has, in effect, created in many cases a greater disparity than ever existed under the previous system. I have had cases recently where defendants received sentences of ten, twenty or even more years while equally guilty co-defendants received only a few years because they had been of such great assistance to the government in other prosecutions. Again, I note that this is not necessarily a bad development but it is certainly an unexpected one. There is little sense in worrying about fine-tuning guideline sections or policy statements when the system is functioning so differently from the manner in which it was intended.

Very truly yours,

Gerard L. Goettel

Gerard L. Goettel
U.S. District Judge

PCRI-41/91

United States District Court
Western District of Washington

William L. Dwyer
U.S. District Judge
502 U.S. Courthouse
Seattle, Washington 98104

Telephone
(206) 442-0103
FTS 399-0103

September 26, 1990

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

Dear Judge Wilkins:

Thank you for your letter of September 12, 1990, inviting comments about guidelines sections or policy statements.

Your letter mentions that the Commission has urged Congress not to enact additional mandatory minimum sentences. While you have not asked for comments in that regard, I would like to give you my thoughts.

Mandatory minimum sentences, in my view, are a throwback to earlier times when punishments were imposed by rigid formulas and without regard to individual justice. They cause many gross injustices in sentencing. I respectfully urge the Commission to recommend that Congress repeal the mandatory minimum sentence provisions now on the books. This need not be an unpopular position. Any supposed need for the mandatory minimums has been eliminated by the sentencing guidelines now in place.

Sincerely,

William L. Dwyer

WLD/pg

PCRI-42/91

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA
P. O. BOX 11877
FEDERAL BUILDING
HARRISBURG, PA. 17108-1877

WILLIAM W. CALDWELL
JUDGE

September 26, 1990

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

Dear Judge Wilkins:

I am responding to your letter of September 7, 1990, soliciting comments on guideline sentencing. I am no fan of this process but thus far the main problems I've encountered fall in two or three areas.

The first is acceptance of responsibility. Many times a defendant pleads guilty but does not cooperate with or render assistance to the prosecutor, or provide a statement of accountability in connection with the pre-sentence report, etc. The guidelines in 3E1.1.(c) provide that a guilty plea does not earn the credit "as a matter of right." Numerous appellate decisions are casting doubt on the validity of this provision in light of the Fifth Amendment, etc. This area needs to be made more specific and defined more clearly, so that appeals and hearings can be avoided in connection with determining acceptance.

Second, the guideline sentences in drug cases should be reviewed. In many instances the penalties in this field seem unnecessarily harsh, and out of proportion to penalties for other offenses. This may be the result of overkill in our efforts to wage "war" on drugs. In my experience, unsophisticated conspirators, such as street dealers or distributors, sometimes as young as 19 or 20 years of age, are being sentenced to terms of 20 or 30 years. The usefulness of such sentencing has to be questioned.

Finally, the need in certain cases for a downward departure sometimes presents a problem. In some cases there may not be "a mitigating circumstance of a kind, or to a degree not adequately taken into consideration ....", but the sentence

called for by the guideline seems excessive or unnecessary in the total circumstances. While the goals of disparity or consistency are recognized, consideration should be given to this area. Although difficult to define, there are those cases where application of the guidelines do not accomplish justice.

I appreciate the opportunity to submit these comments.

Very truly yours,

William W. Caldwell

PCRI-43-91

United States District Court
District of Connecticut
United States Courthouse
450 Main Street
Hartford, Connecticut 06103

Chambers of
Peter C. Dorsey
U.S. District Judge

(203) 240-3224
(FTS 244-3224)

September 26, 1990

Hon. William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

In response to yours of September 12, 1990, I would make the general observation that the difficulty that I have found in sentencing has been a perceived need for greater flexibility in a relatively small number of cases.

I do not disagree with the figures quoted in your letter of September 12th that the great bulk of sentencing has seemingly and appropriately been accommodated by the guidelines. If I had a sense of higher sentences being generally imposed by me, it would perhaps suggest that, in the overall question of disparity, I might have been on the low side and, of course, sentencing disparity is an inappropriate characteristic in the entire system.

What has been troublesome, however, has been the situation in which deviation from the guidelines has seemed appropriate but not, in reality, permitted. It is interesting to note that in the number of cases in which I have departed, without really being able to point to particular factors not considered by the Commission, the government has not appealed. For example, a wife involved in drug distribution came before me on a plea to a charge of use of a telephone in relation to drug distribution, whereas the husband had pleaded to a conspiracy to possess for the purposes of distribution. Her guideline range was 10 to 16 months and his minimum was something in the range of 8 years. In reality there was very little difference in their respective criminal conduct. A different offense charged was the sole distinguishing factor which resulted in the guideline range difference.

Unfortunately, I have not kept tract of the individual cases in which I have deviated, perhaps without justification in strict compliance with the guidelines. I am not sure that this can be rectified by either specific guideline section or policy statement amendments. What would perhaps be worthwhile would be to

accumulate reports flagging specific cases in which sentencing judges found factors appropriate to warrant departure which was not apparently permitted by the guidelines. As part of the gathering of data, the Commission perhaps could use such reports to educate judges as to how incorrect interpretations of the guidelines would in some of the reported cases provide the kind of flexibility for which the sentencing judge might seek but not have found. Secondly, it might produce specific fact-patterns that could then be utilized to make the kind of adjustments in the guidelines that would prove constructive.

At the present time, the reporting system requires sentencing judges to report on the reasons why they do things and what I am suggesting would produce reports as to why they did not feel authorized to do certain things.

I am sorry that I am unable to cite specific instances, but I simply have not kept tract of the cases in which I have felt obliged by the guidelines, usually at a higher level of sentencing, but being convinced that there were factors that ought to be considered. One thought does come to mind and that is of a woman who probably became pregnant in order to be so at the time of sentencing, or at least I believe such was likely to be the case. However, she had no real family available to take care of the child whose birth was imminent. We are all aware that child nurturing over the first year is extremely important in the development of the infant. Family dependence is not usually to be considered in imposing incarceration. § 5H1.6. My suggestion would perhaps permit development of some greater flexibility to be built particularly into § 5H.

Very truly yours,

Peter C. Dorsey
United States District Judge

PCD/pj

PCRI-44/91

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

PATRICK F. KELLY
JUDGE

UNITED STATES COURTHOUSE
WICHITA, KANSAS 67202

September 27, 1990

Mr. Paul Martin
Communications Director
United States Sentencing Commission
1331 Pennsylvania Ave. N.W., Suite 1400
Washington, D.C. 20004

Dear Mr. Martin:

This will acknowledge Chairman Wilkins' letter of September 21 inviting comments with regard to the sentencing guidelines.

As a prefacing note, you should know that I remain one who believes these guidelines are a product of political rhetoric wherein the sentencing judge is Congress' scapegoat. If disparity among judges' sentencing is a root cause for these guidelines, having compared notes with my colleagues I am satisfied at least that there is more disparity in sentencing now than there was before. Given a range within the guidelines, the sentence is predictable depending on the judge. For sure, some can be counted on to sentence at the top of the range while others sentence at the bottom. This can, and often does, represent the difference of a year or so. One judge will routinely add on the defendant's cost of care, even to the extent of $100,000; others -- myself included --ignore this provision entirely.

It is probably true that on balance the rate of guilty pleas has remained essentially unchanged. This is not to say, however, that the guidelines have not impacted our dockets. Motions and trial settings are up. Presently, many of these cases are eventually settled because the United States has come to agreement on a workable and sensible plea bargain which the defendant can accept. Moreover, if the government does not come to grips with plea bargaining and reach some reasonable solution, our dockets will be inundated. If you do not understand this to be a fact, then you are entirely naive.

Momentarily, my biggest problem is the Probation Office, which, for all purposes, sets the sentence. Much discretion lies with this person as he assesses the points. In my view, some of them approach the task as if it is their responsibility to assess as much punishment as can possibly be supported. To be sure, I carefully review the presentence report, ask many questions of the probation officer, and often often reassess and reevaluate the

report. In sum, the question is not whether I will depart, but is how I interpret probation's findings, i.e., is this more than the minimal planning, has defendant cooperated, am I sentencing the defendant for an offense for which he is not charged and stands innocent, etc.? I often find disparity between what the defendant and the government have agreed upon at the time of the plea and what the probation officer has recommended. By example, it may be understood that I will sentence at the low end of the guidelines but everyone has overlooked the defendant's criminal history, etc. I seriously doubt if anything can be done about these situations, but since you ask I am pleased to express my views.

Respectfully,

Patrick F. Kelly

PFK:br

FCRI-45/91

United States Court of Appeals
Eleventh Circuit

Stanley F. Birch, Jr.
Circuit Judge

56 Forsyth Street, N.W.
Atlanta, Georgia 30303
TEL. 404-331-4313
FTS 841-4313

September 28, 1990

Mr. Paul Martin
Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, DC 20004

Dear Mr. Martin:

Pursuant to a letter I received dated September 7, 1990 from Mr. William W. Wilkins, Jr., I enclose a recent opinion of our circuit with regard to the Sentencing Guidelines. I thought that you might be interested in reviewing our local disagreement in this matter.

Cordially,

Stanley F. Birch, Jr.
Circuit Judge

Enclosure

UNITED STATES of America, Plaintiff–Appellant,

v.

Jackie D. LONG, Robert F. Money, Defendants–Appellees.

UNITED STATES of America, Plaintiff–Appellant,

v.

Keith A. GRIFFIN, Defendant–Appellee.

Nos. 89–3942, 89–4007.

United States Court of Appeals, Eleventh Circuit.

Aug. 28, 1990.

The United States District Court for the Northern District of Florida, Nos. 89–03084–02/03–RV, 89–03084–01/RV, C. Roger Vinson, J., sentenced defendant convicted of interfering with civil rights based on Sentencing Guidelines offense level of 13, rather than level 17 as urged by Government. Government appealed, after receiving permission of Deputy Solicitor General, acting on behalf of Solicitor General. Defendant moved to dismiss. The Court of Appeals, Johnson, Circuit Judge, held that statute authorizing appeal by Government of sentence allegedly below Sentencing Guidelines did not impose jurisdictional requirement that appeal be authorized by Attorney General or Solicitor General personally; approval by Deputy Solicitor General, acting on behalf of Solicitor General, was sufficient.

Motion to dismiss denied.

Birch, Circuit Judge, dissented and filed opinion.

Criminal Law ⇐1024(9)

Statute requiring that permission of Attorney General or Solicitor General be obtained before Government appeals sentence below Sentencing Guidelines did not impose jurisdictional requirement for appeal; statute was sufficiently complied with if permission of Deputy Solicitor General, acting for Solicitor General, was obtained. 18 U.S.C.A. § 3742.

Appeals from the United States District Court for the Northern District of Florida.

Before JOHNSON, HATCHETT and BIRCH, Circuit Judges.

JOHNSON, Circuit Judge:

This case comes to us on defendant Griffin's motion to dismiss the government's appeal.

FACTS

The defendants, Keith Griffin, Jackie Long and Robert Money ("the defendants"), pled guilty to conspiracy to interfere with civil rights after they were indicted for burning a cross in front of a black family's home. The district court sentenced Long and Money on October 6, 1989, and Griffin on October 27, 1989. The district court rejected the government's argument that the defendants' sentences should be enhanced under the Sentencing Guidelines. *See* United States Sentencing Commission, *Guidelines Manual* § 2H1.2. Accordingly, the district court found that the defendants' offense level was thirteen,

Synopsis, Syllabi and Key Number Classification
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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

rather than seventeen as the government urged.

The government appeals the sentence under 18 U.S.C.A. § 3742. In accordance with the approval requirements of Section 3742, the government recommended appeals of Long's and Money's sentences to the Solicitor General on November 2, 1989.[1] The November 2 request did not ask for permission to appeal Griffin's sentence because the transcript from Griffin's sentencing hearing was not yet complete. The November 2 request was accompanied by a memorandum outlining the facts of the case, the district court's ruling, and the issues for the proposed appeal against each defendant, including Griffin. The Solicitor General signed an authorization slip for appeal of Long and Money's sentences on November 6, 1989. On November 15, 1989, after reviewing the sentencing transcript in Griffin's case, the government submitted a second memorandum to the Solicitor General, asking for permission to appeal Griffin's sentence. The Deputy Solicitor General, acting on behalf of the Solicitor General, signed an authorization slip for appeal of Griffin's sentence on November 17, 1989.[2]

ANALYSIS

Griffin now moves to dismiss the government's appeal, arguing that under section 3742(b)'s requirement that the government obtain personal approval of appeals from the Attorney General or the Solicitor General, the Deputy Solicitor General's approval of the present appeal is invalid. The consequence of accepting Griffin's argument would be to disrupt the internal operations of the Department of Justice by prohibiting the Attorney General and the Solicitor General from transferring these tasks to their subordinates when they are occupied with other business. Accordingly, we reject Griffin's interpretation of Section 3742(b).

Section 3742 creates for the first time a comprehensive system for appellate review of sentences. S.Rep. No. 225, 98th Cong.2d Sess. 155, *reprinted in* 1984 U.S. Code Cong. & Admin.News 3182, 3338. Congress designed the statute to focus the appellate courts' attention on those sentences for which review is crucial to the proper functioning of the sentencing guidelines and to provide a means to correct erroneous and clearly unreasonable sentences. *Id.* Congress determined that government appeals of sentences below the applicable guideline range were necessary to this system. Congress found:

> If only the defendant could appeal his sentence, there would be no effective opportunity for the reviewing courts to correct the injustice arising from a sentence that was patently too lenient. This consideration has led most Western nations to consider review at the behest of either the defendant or the public to be a fundamental precept of a rational sentencing system, and the Committee considers it to be a critical part of the bill's sentencing structure. The unequal availability of appellate review, moreover, would have a tendency to skew the system,

1. 18 U.S.C.A. § 3742(b) provides in part:
"Appeal by the Government.—The Government, with the personal approval of the Attorney General or the Solicitor General, may file a notice of appeal in the district court for review of an otherwise final sentence...."

2. The Solicitor General was in San Francisco attending a conference at the time that the Deputy Solicitor General signed the authorization slip on the Solicitor General's behalf.

> since if appellate review were a one way street, so that the tribunal could only reduce excessive sentences but not enhance inadequate ones, then the effort to achieve greater consistency might well result in a gradual scaling down of sentences to the level of the most lenient ones. Certainly the development of a principled and balanced body of appellate case law would be severely hampered.

Id. at 151, 1984 U.S.Code Cong. & Admin. News at 3334.

Congress imposed the restriction at issue in the present case in order to assure that appeals are not routinely filed for every sentence below the guidelines. *Id.* at 154, 1984 U.S.Code Cong. & Admin.News at 3337. This policy may be fulfilled, however, without interpreting the personal approval requirement as jurisdictional. By directing the Attorney General and Solicitor General to approve appeals personally, section 3742(b) provides for centralized decisionmakers who will screen proposed appeals. Regardless of whether the Attorney General and Solicitor General or their delegates actually sign the authorization, the Justice Department's present procedures ensure that proposed appeals will be reviewed for consistency with Congress's policy directives.

Two other circuit courts have considered this issue and determined that section 3742(b)'s personal approval requirement is not jurisdictional. In *United States v. Gurgiolo,* 894 F.2d 56 (3d Cir.1990), the Third Circuit held the following:

> When the Solicitor General is unavailable, it is sufficient for section 3742(b) purposes for the government ... to secure the approval of the Deputy Solicitor General acting in the Solicitor General's place. Second, the fact that the government's notice of appeal failed to indicate this notice of approval in its text does not dictate dismissal. *See* Fed.R.App.P. 3(c) ("[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal.").

Id. at 57 n. 1. In *United States v. Smith,* No. 89–2346, slip op. —— F.2d —— (6th Cir. Aug. 6, 1990), the Sixth Circuit held:

> Section 3742(b) does not require the personal approval of the Attorney General or Solicitor General to be in writing or that the approval be filed in the Court of Appeals. However, it is undisputed that Congress intended that such permission be obtained.
>
> It is the view of this panel that proof of the personal approval is not of jurisdictional dimensions in the sense that a timely notice of appeal in a criminal case is jurisdictional.

Id. slip op. at ——.[3]

The regulations governing the Department of Justice and describing the responsibilities of the Deputy Solicitor General support the conclusion that the authorization of the present appeal was proper. The regulation regarding exercise of authority in the absence of a department head provides:

3. The Sixth Circuit went on to state that because there was no statute or rule governing proof of personal approval, the court would, in the exercise of its supervisory authority, prospectively require that the government file proof of approval no later than the filing of the government's brief. This proof was to be dated no later than the day on which the notice of appeal was filed. *Smith,* slip op. at ——. *Smith* repudiates contrary dictum in *United States v. Hays,* 899 F.2d 515, 517 n. 1 (6th Cir.1990).

> The head of each organizational unit of the Department is authorized, in case of absence from office or disability, to designate the ranking deputy (or an equivalent official) in the unit who is available to act as head. If there is no deputy available to act, any other official in such unit may be designated.

28 C.F.R. § 0.132(e). In its response to the Court's inquiry, the Department of Justice stated that Deputy Solicitor General Roberts, who signed the authorization in the present case, is designated as the ranking deputy in accordance with 28 C.F.R. § 0.132. This statement is supported by the official job description of the Deputy Solicitor General, which states that "[i]n the absence of the Solicitor General, [the Deputy Solicitor General] acts for him in certain matters." [4] Accordingly, under established Department of Justice procedures, Deputy Solicitor General Roberts had the authority to act as Solicitor General in authorizing the present appeal.

Forbidding the Attorney General and the Solicitor General to transfer authority to approve appeals while the Attorney General and the Solicitor General are occupied with other duties would interfere with the internal operations of the Department of Justice. This result is undesirable for both the Department of Justice and the Court because it forces the Court to scrutinize the day to day decisionmaking of the Attorney General, the Solicitor General, and their subordinates. The Supreme Court previously has rejected arguments that courts should probe the decisionmaking process of a high public official in order to determine whether he exercised his independent judgment or relied on the advice of his subordinates. *Compare Citizens of Overton Park v. Volpe*, 401 U.S. 402, 408–09, 91 S.Ct. 814, 819–20, 28 L.Ed.2d 136 (1971) (Marshall, J.) (statute requiring Secretary of Transportation to approve purchases of park lands for highways); *with id.* at 422, 91 S.Ct. at 827 (Brennan, J., concurring) (criticizing Secretary of Transportation for failing to hold hearing under statute).

CONCLUSION

We DENY Griffin's motion to dismiss the appeal.

BIRCH, Circuit Judge, dissenting:

I respectfully dissent from the majority opinion, and for the reasons that follow, I would grant appellee's motion to dismiss the government's appeal. Appellee Griffin's motion to dismiss the government's appeal of his sentence, pursuant to 18 U.S.C. § 3742(b), presents an issue of first impression for this court.

I. BACKGROUND

Griffin, together with two co-defendants, Jackie D. Long and Robert F. Money, were jointly indicted for their participation in a cross-burning at a black family's residence near Holt, Florida. All three co-defendants pled guilty to conspiracy to interfere with civil rights and were sentenced by the same district judge. Long and Money were sentenced together on October 6, 1989, and Griffin was sentenced on October 27, 1989. The district judge ruled with respect to each co-defendant, based upon the same rationale, that the "arson" and "vulnerable victim" provisions of the Sentencing Guidelines were inapplicable, and that the appro-

4. The job description further provides, "In the Solicitor General's absence, [the Deputy Solicitor General] represents the Solicitor General's Office in meetings with the Attorney General, Deputy Attorney General and others for the purpose of formulating policy and strategy."

priate offense level was, therefore, 13 rather than 17.

The United States has filed notices of appeal with respect to each co-defendant challenging the sentences imposed. Given the requirements specified in 18 U.S.C. § 3742(b), the government submitted a written appeal recommendation to the Solicitor General on November 2, 1989. The memorandum accompanying the recommendation discussed the facts of the case, the proceedings in the trial court, and the appealable issues with respect to each co-defendant, including Griffin. The government, however, requested authorization to appeal only with respect to Long and Money.[1] On November 6, 1989, the date the time for appealing Long and Money's sentences was due to expire, Solicitor General Kenneth W. Starr signed an "authorization slip".[2] A notice of appeal was filed on the same day, and was assigned "No. 89–3942".

On November 15, 1989, 11 days prior to the expiration of the time for appeal of Griffin's sentence, the government submitted a one-page memorandum to the Solicitor General noting the earlier appeal recommendation and authorization, and confirming that, with respect to Griffin, the district court had also ruled, for the same reasons stated at Long and Money's sentencing hearing, that the "arson" and "vulnerable victim" guidelines were inapplicable. The government stated that the issues in the requested Griffin appeal would be identical to those in the previously authorized appeal. On November 17, 1989, nine days prior to the expiration of the appeal time on Griffin's sentence, Deputy Solicitor General John G. Roberts, Jr. signed an "authorization slip".[3] Based upon that document, a notice of appeal was filed on November 22, 1989, four days prior to the expiration of the time for the government's appeal.

On February 7, 1990, Griffin's counsel made a telephone request of the government seeking a copy of the document signed by the Solicitor General personally authorizing the appeal of Griffin's sentence. Copies of both "authorization slips" theretofore signed (Appendices A and B) were provided to Griffin's counsel. Also provided to counsel was a copy of an "authorization slip" dated February 7, 1990, personally signed by Solicitor General Starr.

II. DISCUSSION

1. *The Positions of the Parties.*

Griffin's motion to dismiss is straightforward and relies on the clear and unambig-

1. At page four of "Response Of The United States To Griffin's Motion To Dismiss Appeal No. 89–4007" (Government's Brief) the government states: "We indicated that our representations regarding Griffin's sentencing were subject to confirmation upon receipt of the transcript; that we did not plan to file a notice of appeal with respect to Griffin until we had received and reviewed that transcript; and that we were therefore, for the moment, requesting appeal authorization *only* with respect to Long and Money." (emphasis added) (footnote omitted)

2. Attached here as Appendix A is a copy of what the government identifies as an "authorization slip" ... "authorizing a government appeal of the sentences imposed on Long and Money." A review of the document discloses very little information since it only contains the word "Appeal", the caption of the case, the date, and the Solicitor General's signature and signature block. No reference is made to 18 U.S.C. § 3742(b) or to the fact that it is the sentences which are being appealed. A stamped "expedite" also appears on the face of the document.

3. A copy of that document is attached hereto as Appendix B.

uous language of 18 U.S.C. § 3742(b), which provides in pertinent part as follows:

> § 3742. Review of sentence
>
> ....
>
> (b) Appeal by the Government.—The Government, with the personal approval of the Attorney General or the Solicitor General, may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
>
> ....
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines.

Griffin's argument is that the authorizing statute means what it plainly states; that is, that the Attorney General or the Solicitor General must give his "personal approval" before a notice of appeal may be filed. Griffin contends that personal approval was not timely given in this case.

The government states: "It was not then and it is not now the government's position that a written authorization slip signed by the Solicitor General himself is a prerequisite to this or any similar appeal." [4] In amplification of its position, the government advances three arguments: (1) the signature of the Deputy Solicitor General on the "authorization slip" satisfies the "personal approval" requirement of the statute; (2) in the total context of the appeal authorization events in this case the Solicitor General himself "personally approved" the appeal within the meaning of the statute; and, (3) if there was no "technical compliance" with the "personal approval" requirement of the statute, dismissal of the appeal would not be the appropriate "sanction".

2. *The Substitute Signature Argument.*

The government represents that on November 17, 1989, Deputy Solicitor General John G. Roberts, Jr. was acting as Solicitor General while Mr. Starr was "out of the office for a legal conference in San Francisco during the pertinent time period." [5] In support of this conclusory statement the government cites 28 C.F.R. 0.132(e), which in pertinent part [6] provides as follows:

> The head of each organizational unit of the Department [of Justice] is authorized, in case of absence from office or disability, to designate the ranking deputy (or an equivalent official) in the unit who is available to act as head.

The government contends that "[u]nder 28 C.F.R. 0.132(e), ... the official designates another individual to exercise the official's *own authority* in his absence; the designee thus acts *as the official* in all respects,

4. Government's Brief at 5. We note that the Sixth Circuit disagrees with this conclusion. In *United States v. Bogas*, 899 F.2d 1222 (6th Cir. 1990) (table) (text in WESTLAW), that court asserted that: "[t]his Court is without jurisdiction to hear the government's appeal under 18 U.S.C. § 3742(b) without a written authorization of the Solicitor General or Attorney General."

5. Government's Brief at 4, n. 2.

6. The government contends that its quotation from the C.F.R. cite is the pertinent part. However, 28 C.F.R. 0.130 ["Functions common to heads of organizational units"] sets out four broad categories of functions to be performed by heads of organizational units (including personnel, administration and budgetary matters and special assignments from the Attorney General). When this section is read in combination with 28 C.F.R. 0.132(e) the "authority" and capacity in which the delegatee acts is thus confined and clearly does not encompass action as an alter ego on matters that Congress intended to be "personal" to the Solicitor General (or Attorney General).

when (and only when) the official is himself unavailable to exercise that authority." [7]

Nowhere in the original record before the court is there any evidence that the Solicitor General *exercised* his authority under 28 C.F.R. 0.132(e) to designate Mr. Roberts as acting department head. Moreover, after the clerk of the court made a specific request for the government to supplement its brief by submission of any such evidence, nothing definitive was forthcoming.[8] Accordingly, even if we were to read the regulation as expansively as the government urges, there is nothing to indicate that the Solicitor General affirmatively designated Mr. Roberts as head of his office. Moreover, we are unable to conclude that Deputy Solicitor General John G. Roberts, Jr. was, in fact, on November 17, 1989, acting for the Solicitor General. From a review of the face of the "authorization slip" executed by Mr. Roberts, it is not at all clear in what capacity he was acting when he signed the document. No words such as "acting organizational unit head" or "designated Solicitor General" appear on the document.

More importantly, the foregoing analysis relative to delegation is not the controlling question. The pivotal issue is whether the Solicitor General (or Attorney General) may delegate his appeal-authorizing authority under the controlling statute. It is my view that he may not.

In *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568, 97 S.Ct. 1349, 1352–53, 51 L.Ed.2d 642 (1977), the Supreme Court confirmed the general rule: "It has long been established that the United States cannot appeal in a criminal case without express congressional authorization. (citations omitted) ... Therefore, unless barred by the Double Jeopardy Clause of the Constitution, appeals by the Government from the judgments of acquittal entered by the District Court under Rule 29(c) are authorized by [18 U.S.C.] § 3731." In the case at bar, the express congressional authorization is embodied in 18 U.S.C. § 3742(b). That statute, unlike section 3731, specifically provides for the "personal approval" of the Attorney General or the Solicitor General.[9] In this case there is no indication that the requisite *personal* approval was given *before* the filing of the appeal.

In support of its position, the government directs our attention to *United States v. Gurgiolo*, 894 F.2d 56, 57 n. 1 (3d Cir. 1990) which suggests the result sought by the government. However, the conclusion asserted by that court in a footnote is unsupported by discussion or authority. The only other reported case that addresses this issue appears to be *United States v. Hays*, 899 F.2d 515 (6th Cir.1990) wherein the Sixth Circuit stated:

> We note that the government belatedly has submitted to the court an authorization of this appeal executed *prior to* the

7. Government's Brief at 6, n. 5 (emphasis in original).

8. A copy of the government's response to the clerk's inquiry is attached hereto as Appendix C.

9. As originally enacted, section 3742(b) had at the very end of that section, after itemizing the various circumstances in which such an appeal could be taken, the following language: "... and the Attorney General or the Solicitor General personally approves the filing of the notice of appeal." The current version of the section, enacted in 1988 (Public Law 100–690 § 7103(a)(5)(B)), includes the operative language in the text at the beginning of the section. The import of both versions is manifestly the same; the Attorney General or the Solicitor General must give his personal approval for the filing of an the appeal.

notice of appeal by the then-acting Solicitor General, as is required under 18 U.S.C. § 3742(b). This court would have been without jurisdiction to hear the government's appeal had such an authorization by the Solicitor General or Attorney General not been filed. The authorization should have been filed with the notice of appeal.

Id. at 517 n. 1 (emphasis added).

The government also directs our attention to 18 U.S.C. § 2516(1) which requires the personal authorization of the Attorney General for initiation of certain wiretaps. However, that statute specifically contemplates and authorizes delegation. The instant statute does not provide for delegation. Moreover, courts construing 18 U.S.C. § 2516(1) have been strict in interpretation of the personal approval requirement. *See United States v. Robinson,* 496 F.2d 225 (5th Cir.1974).

3. *The Total Context and Ratification Argument.*

The thrust of the government's alternative argument [10] is that in the total context of the appeal approval process in this case, the court should find that the Solicitor General himself has "personally approved" the appeal of Griffin's sentence. After a selective quotation from the legislative history germane to 18 U.S.C. § 3742(b),[11] the government concludes: "It is inconceivable that the Solicitor General, having deemed these determinations [i.e., those by the district court in refusing to apply the "arson" and "vulnerable victim" guidelines] worthy of challenge, could have intended to allow the challenge only with respect to Long and Money, and not with respect to their equally-affected co-defendant Griffin." [12] This is, at best, speculation—albeit speculation with logical appeal. There is nothing in the record occurring *before* filing of the notice of appeal to substantiate or indicate the Solicitor General's approval. Here we have not only the absence of a written authorization slip, the method and procedure adopted by the Solicitor General's Office to evidence and communicate his authorization, but a lack of any personal consent or approval *before* the appeal was initiated.

Finally, the government argues that Mr. Starr's signing of the "authorization slip" on February 7, 1990, over two months after the expiration of the period allowed for the filing of an appeal by the government in Griffin's case, is a "ratification" of his deputy's approval of the appeal or, alternatively, of his own earlier purported approval of the appeal. Where personal approval is mandated ratification will not suffice. Inherent in the taking of an appeal are the

10. As a predicate to advancing this argument, the government assumes that the document signed by Deputy Solicitor General Roberts does not satisfy 18 U.S.C. § 3742(b).

11. Completely quoted, the legislative history of the Comprehensive Crime Control Act of 1984, Pub.L. No. 98–473, 1984 U.S.Code Cong. & Admin.News 3182, 3337–38, states:

> The government may petition for review of a sentence *only* with the personal approval of the Attorney General or the Solicitor General in order to assure that such appeals are not routinely filed for every sentence below the guidelines.... The Committee believes that section 3742 creates for the first time a comprehensive system of review of sentences that permits the appellate process to focus attention on those sentences whose review is crucial to the functioning of the sentencing guidelines system, while also providing adequate means for correction of erroneous and clearly unreasonable sentences.

(emphasis added).

12. Government's Brief at 8.

time limitations and "grace periods" for excusable neglect.[13] These mandates cannot be ignored or circumvented through an after-the-fact "ratification" theory of action. Accordingly, I reject the government's alternative argument.

4. *The Nunc Pro Tunc Argument.*

The government's final argument suggests that dismissal is an inappropriate "sanction" should the court determine that there has been no "technical compliance" with the "personal approval" requirement of 18 U.S.C. § 3742(b). It is also suggested that the court should afford the government an opportunity to "cure the defect by obtaining *nunc pro tunc* the authorization required by 18 U.S.C. § 3742(b), and should dismiss the appeal only if such authorization is not forthcoming." [14] This argument ignores the general rule that the government may appeal a judgment in a criminal case only when expressly authorized by Congress. *United States v. Martin Linen Supply Co., supra,* at 5043, ——; Fed.R. App.P. 4(b). Congressional authorization is explicit. Accordingly, an appeal of a sentence under the Sentencing Guidelines may *only* be initiated when the personal approval of the Attorney General or the Solicitor General is timely given. Absent such authorization the notice of appeal is defective and improperly filed. Under such circumstances dismissal is mandated. I respectfully suggest that this court's constitutional role is to interpret law and is not to make it. Should Congress' mandate be administratively burdensome, Congress should be petitioned to change it.

13. Fed.R.App.P. 4(b) ("When an appeal by the government is *authorized by statute* ... [u]pon a showing of excusable neglect the district court may, before or after the time has expired, ... extend the time for filing a notice of appeal...." (emphasis added)).

14. Government's Brief at 10–11.

APPENDIX A



U.S. Department of Justice

Office of the Solicitor General

NOVEMBER 6, 1989

RE: UNITED STATES v. LONG & MONEY
(N.D. Fla.)

APPEAL

EXPEDITE

KENNETH W. STARR
Solicitor General

Mr. Bryson

APPENDIX B

U.S. Department of Justice

Office of the Solicitor General

NOVEMBER 17 , 1989

RE: UNITED STATES v. GRIFFIN - N.D. Fla.

APPEAL

John W. Robert, J. FOR
KENNETH W. STARR
Solicitor General

Mr. Bryson

APPENDIX C



U.S. Department of Justice

Civil Rights Division

JRD:DKF:LAL
DJ: 175-17-41

Appellate Section
P.O. Box 66078
Washington, D.C. 20035-6078

July 24, 1990

Miguel J. Cortez, Clerk
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303-2295

Re: No. 89-4007, United States v. Keith A. Griffin; No. 89-3942, United States v. Jackie D. Long & Robert F. Money

Dear Mr. Cortez:

This is in response to the Court's inquiry, via telephone call yesterday from Kembra Smith of your office, regarding the Response of the United States to Griffin's Motion to Dismiss Appeal No. 89-4007. The Court has inquired whether there is any written document supporting our assertion, on page 7 of that Response, that Deputy Solicitor General Roberts is authorized to act as Solicitor General in Solicitor General Starr's absence and, in that capacity, to give his personal approval to government appeals.

There is no written document in which Mr. Starr explicitly designates Mr. Roberts, by name, to serve this function. However, we attach a copy of the position description for the position of Deputy Solicitor General and Counselor to the Solicitor General, the position Mr. Roberts has held since October 24, 1989. In accordance with 28 C.F.R. 0.132(a) (quoted at page 6 of our Response), the incumbent of this position is designated as the ranking deputy. The position description states that "[i]n the absence of the Solicitor General," the Deputy Solicitor General and Counselor to the Solicitor General "acts for [the Solicitor General] in certain matters" (Position Description at 2). Because the Solicitor General himself is occasionally unavailable to authorize an appeal within the time allowed, it has long been the practice in the Solicitor General's Office to include the authorization of appeals among the matters so delegated to the ranking deputy. When Mr. Roberts assumed this position, Mr. Starr instructed him orally as to the matters delegated to him in the Solicitor General's absence, and explicitly empowered Mr. Roberts to act on the Solicitor General's behalf, in his absence, in the matter of authorizing appeals. Mr. Roberts is prepared to execute an affidavit to that effect, should the Court feel this is necessary.

APPENDIX C—Continued

At the Court's request, we are telefaxing a copy of this letter and the attached position description to FTS 841-3785. We trust that this will satisfy any concerns the Court may have. However, if anything further is needed, please call the undersigned attorney at FTS 514-4126.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

By: Louise A. Lerner

Louise A. Lerner
Attorney
Appellate Section

cc: Joel C. Fanning, Esquire
Stephen E. Sutherland, Esquire
E. Brian Lang, Esquire
Stephen P. Preisser, Esquire

APPENDIX C—Continued

POSITION DESCRIPTION (Please Read Instructions on the Back)

1. Agency Position No.									
2. Reason for Submission: ☐ Redescription ☐ New ☐ Other; ☐ Reestablishment; ation (Show any positions replaced)	3. Service: ☐ Hdqtrs. ☐ Field	4. Employing Office Location	5. Duty Station						
		7. Fair Labor Standards Act: ☐ Exempt ☐ Nonexempt	8. Financial Statements Required: ☐ Executive Personnel Financial Disclosure ☐ Employment and Personal Investment						
		10. Position Status: ☐ Competitive ☐ Excepted (Specify in Remarks) ☐ SES (Gen.) ☐ SES (CR)	11. Position is: ☐ Supervisory ☐ Managerial ☐ Neither	12. Sensitivity: ☐ 1—Non-Sensitive ☐ 2—Critical-Sensitive ☐ 3—Noncritical-Sensitive ☐ 4—Special-Sensitive					
6. CPDF Certification No.									
9. Subject to IA Action: ☐ Yes ☐ No									
13. Competitive Level Code									
14. Agency Use									

15. Classified/Graded by	Official Title of Position	Pay Plan	Occupational Code	Grade	Initials	Date
a. U.S. Office of Personnel Management						
b. Department, Agency or Establishment	Deputy Solicitor General and Counselor to the Sol. Gen.	ES	905			
c. Second Level Review						
d. First Level Review						
e. Recommended by Supervisor or Initiating Office						

16. Organizational Title of Position (if different from official title)

17. Name of Employee (if vacant, specify)

18. Department, Agency, or Establishment: Department of Justice

a. First Subdivision: Office of the Solicitor General

b. Second Subdivision

c. Third Subdivision

d. Fourth Subdivision

e. Fifth Subdivision

Employee Review—This is an accurate description of the major duties and responsibilities of my position.

Signature of Employee (Optional)

20. Supervisory Certification. I certify that this is an accurate statement of the major duties and responsibilities of this position and its organizational relationship, and that the position is necessary to carry out Government functions for which I am responsible. This certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds, and that false or misleading statements may constitute violations of such statutes or their implementing regulations.

a. Typed Name and Title of Immediate Supervisor		b. Typed Name and Title of Higher-Level Supervisor or Manager (Optional)	
Signature	Date	Signature	Date

21. Classification/Job Grading Certification. I certify that this position has been classified/graded as required by Title 5, U.S. Code, in accordance with standards published by the U.S. Office of Personnel Management or, if no published standards apply directly, consistently with the most applicable published standards.

Typed Name and Title of Official Taking Action

Signature — Date

22. Position Classification Standards Used in Classifying/Grading Position

Information for Employees. The standards, and information on their application, are available in the personnel office. The classification of the position may be reviewed and corrected by the agency or the U.S. Office of Personnel Management. Information on classification/job grading appeals, and complaints on exemption from FLSA, is available from the personnel office or the U.S. Office of Personnel Management.

23. Position Review	Initials	Date	Initials	Date	Initials	Date	Initials	Date	Initials	Date
a. Employee (optional)										
b. Supervisor										
c. Classifier										

Name: ES-DSGC
Eff. Date Typed 3/89

25. Description of Major Duties and Responsibilities (See Attached)

NSN 7540-00-634-4035 — Previous Edition Usable — 5008-108 — OF 8 (Rev. 1-88) U.S. Office of Personnel Management 5 CFR Chapter 300

APPENDIX C—Continued

POSITION SUMMARY

As Deputy Solicitor General and Counselor to the Solicitor General, (1) advises the Solicitor General on policies and procedures governing the work of the office; (2) supervises attorneys in the handling of a variety of appellate matters; (3) performs the final review of appellate matters prior to action by the Solicitor General; (4) counsels with the Solicitor General on cases other than those falling within his direct supervisory responsibility; and (5) personally prepares or argues selected cases before the Supreme Court.

MAJOR DUTIES AND RESPONSIBILITIES

Serves as the principal assistant to the Solicitor General with respect to appellate matters involving particular subjects (other than tax work generally) assigned by the Solicitor General. In this connection, supervises appellate attorneys who review appeal and certiorari recommendations and drafts of briefs and petitions submitted to the office by other departments and agencies, and by components of the Department of Justice. Advises and consults with members of the staff of the Solicitor General's Office and consults with the draws upon the services of top officials of this and other agencies in formulating recommendations for or against Supreme Court review and in preparing and reviewing the Government's briefs on the merits. Reviews memoranda recommending for or against appeal by others and submits to the Solicitor General recommendations for the disposition of the matters. Personally performs the initial review of selected matters.

In the Solicitor General's absence, represents the Solicitor General's Office in meetings with the Attorney General, Deputy Attorney General and others for the purpose of formulating policy and strategy.

Personally prepares or argues before the Supreme Court cases of the highest order or complexity and importance.

In the absence of the Solicitor General, acts for him in certain matters.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

FCRI. 4619

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
UNITED STATES COURTHOUSE
1929 STOUT STREET
DENVER, COLORADO 80294

DAVID M. EBEL
JUDGE

FTS 564-3800
(303) 844-3800

October 1, 1990

Paul Martin, Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenuw, N.W., Suite 1400
Washington, D.C. 20004

Dear Mr. Martin:

I would like to see the Sentencing Commission provide further guidance for situations when the sentencing court determines to depart upward from Criminal History Category VI. We have several cases suggesting that the trial judge does not have unfettered discretion once he or she has made the determination that Criminal History Category VI does not adequately reflect the true criminal history of the defendant. See United States v. Gardner, 905 F.2d 1432, and United States v. Dean, 908 F.2d 1491. Those cases both suggest that there should be some articulable adherence to the guideline policy of uniformity and proportionality, although we eschew any rigid formula once departure is determined to be appropriate.

We have experienced many cases in this circuit involving upward departure from Criminal History Category VI, and I think we would all profit from further guidance as to any restraints that should be imposed to guide discretion of the sentencing judge in those situations.

Very truly yours,

David M. Ebel

DME:ts

PCRI-47/91

United States District Court
Southern District of Alabama
United States Courthouse
113 St. Joseph Street
Mobile, Alabama 36602-3695

Alex T. Howard, Jr.
Chief Judge

October 4, 1990

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

Re: Comments Regarding Suggested Guideline Changes

Dear Sir:

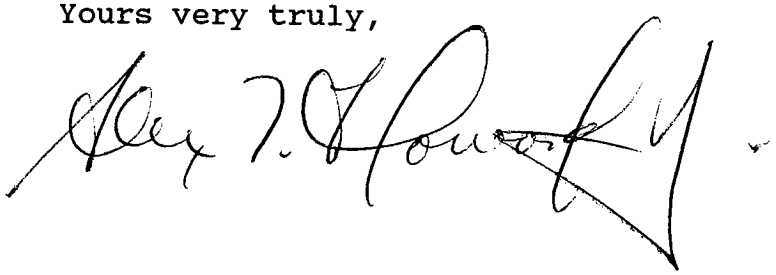
This letter is in response to the letter of Chairman William W. Wilkins, Jr., of the United States Sentencing Commission dated September 21, 1990, requesting my thoughts on guideline changes. The following is submitted for the Commission's consideration:

1) When defendants have demonstrated a violent nature, such as, the use of threat or force made by the defendant utilizing knives, firearms, or the mere physical threat of the defendant themselves, the sentence should be enhanced to a greater degree than is presently the case. It is felt that an adjustment for violence be made a CHAPTER III ADJUSTMENT, which could then be applied to any offense, whether or not it was a Specific Offense Characteristic. In the same regard, the Criminal History Section (Chapter IV), should carry additional point increases for convictions involving crimes of violence. I feel that defendants who have shown themselves to be of a violent nature should face substantially greater penalties.

2) In regard to Relevant Conduct (Section 1B1.3), I disagree with the practice of holding defendants accountable for information contained in counts for which they have been acquitted. I also object to holding defendants accountable for information contained in dismissed charges.

3) I am aware that the guidelines do not limit the Court upon revocation of probation or supervised release. This limitation is by statute. I disagree with the limitation made on revocations, however, especially the restriction on probation revocations, in that the Court is only authorized to impose the sentence that was available at the time of the initial sentence. At the time of the initial sentence, the Court feels the guidelines have been satisfied by the sentence imposed. When a violation occurs, the Court should be free to impose any sentence it feels appropriate, within reason, up to the statutory maximum.

Yours very truly,



ATHjr/cac

PCRT-48/91

United States District Court
Southern District of California
940 Front Street
San Diego, California 92189

Chambers of
Judith N. Keep
Judge

October 3, 1990

TO: U.S. Sentencing Commission

FM: Judge Judith N. Keep JNK

RE: Guideline Sections or Policy Statements Which Need Review

What follows are my thoughts re: three guideline sections/policy statements which need review.

(1) High speed chases in alien smuggling cases. I understand your current proposal is that a high speed chase will increase the base offense level by 2 points. I suggest this is too low and the court should have the discretion to increase the base offense level by from 2 to 4 points depending upon the length of the chase and the severity of the threat to the aliens in the vehicle and other drivers (including the law enforcement) on the road. The base offense level for alien smuggling is quite low. For a nonchase case, that is ok. However, for a case involving a chase, two points is negligible, depending upon the nature of the chase. Let me give you two examples both of which are typical here.

a. The defendant refuses to stop at the checkpoint, accelerates to 80-90 mph, and drives in a dangerous fashion in moderate traffic for 30 miles, with police pursuing.

b. The defendant refuses to stop, accelerates in heavy traffic, forces several cars off the road, rams a pursuing border patrol car causing damage to the vehicle, and when traffic causes his car to slow, he jumps out of the vehicle, leaving it in gear and runs on foot. The aliens in the trunk of the car are clearly in a life-or-death situation and many may be injured if the vehicle careens off the road and smashes into a guard rail.

Also, we have many alien smugglers who have not only engaged in a high speed chase in the current case, but have done so in the past. Their response is not one of panic but calculated, and I think repetition of a chase should be a factor in computing points for a chase regardless of the severity of the chase.

(2) I suggest you compare the base offense level of attempted murder with that for sales of drugs. I recently had a case where the defendant attempted to kill a DEA agent after the agent attempted to arrest the defendant during an undercover drug sale. Because the base offense level for the drug charges was so high and the base offense level for attempted murder was over 12 points lower, the defendant received no guideline consequences for attempted murder. This is appalling.

(3) We need a clarification of "relevant conduct" for determining the base offense level and "related conduct" for determining whether a defendant is entitled to acceptance of responsibility points. I realize they are separate items, but they are related.

As to "relevant conduct" for purposes of determining the base offense level, our circuit has gone back and forth on this. United States v. Restreppo has again been scheduled for another en banc hearing.

As to related conduct, for purposes of determining an acceptance of responsibility deduction, some circuits point only to the count of conviction and not the related conduct. However, this forces defendants to lie and be evasive. I personally believe such a construction perpetuates a feeling the criminal justice system is phony and hypocritical. A defendant is urged to lie and be evasive, yet still gets -2 if he/she is somewhat honest about the count of conviction. What are we fostering by such gamesmanship? I believe it is important for a defendant, at sentencing, to be honest to the court and in turn to himself/herself and his or her family. Many psychiatrists report such honesty is a necessary first step in any rehabilitation. I appreciate rehabilitation is not the chief goal of sentencing today, but our procedures should not be counter-productive to it.

PCRI-49/91

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
ALBERT J. ENGEL
GERALD R. FORD FEDERAL BUILDING
GRAND RAPIDS, MICHIGAN 49503

October 5, 1990

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

Dear Chairman Wilkins:

Your good letter of September 12 was not received by me until September 28, while I was in court in Cincinnati.

First, I very much agree with your letter to Congressmen Brooks and Fish concerning the 1990 Crime Bill and particularly the increase in the number of mandatory sentences. It is my observation that your suggestion conforms with at least a substantial majority of the federal judiciary.

I do not have specific recommendations at this time concerning the efficacy of the existing guidelines. While my position at the time was that there were better and less cumbersome ways to achieve sentence reform than through the complicated sentence guideline procedure, I was and remain very much very anxious to give them every opportunity to prove their merit and effectiveness and it seems to me, to some extent at least, generalized opposition to them is diminishing with the exception to opposition to excessive use of mandatory sentences.

Without going excessively into my own philosophy, let me say that I believe that the careful use of computers in the collection and analysis of sentencing data throughout the country can be a highly useful tool in understanding the collective judgment of federal judges concerning the appropriateness of sentences under varying circumstances. Of course this is largely frustrated by mandatory sentences which really cannot give the Commission or other persons studying the subject any intelligent feedback. It is also my opinion that as a group, trial judges generally are best equipped to determine the general appropriateness of sentences under the circumstances of the case before them. Although I am an appellate judge, I would be very reluctant to pass judgment on the basis of my much more limited recent experience. I do not feel anywhere as competent of my own expertise as I did when I was actually a state and federal trial judge. In fact, many years ago now I participated in a joint meeting of trial judges and probation officers in which each was given a series of pre-sentence reports and asked to make an independent evaluation of an appropriate sentence. The probation officers, in Michigan at least, are highly qualified and most of them possess Master's Degrees, usually in sociology, psychology, or penology of some form. Nevertheless, to the surprise of all of us, the trial judges had much greater uniformity in sentencing than did the probation officers. Another surprising circumstance which was shown to be true not only with me but with my predecessor on the federal district court was that very often judges who have a conservative record or who have a

reputation as "hanging" judges in fact are shown statistically to be just the opposite in practice. The reason had some logic in it. Armed with such a reputation, a judge can afford to take the risk of placing a defendant on probation because his reputation as a tough judge was more likely to discourage violations. As a trial judge, I found that running a more formal, punctual court with appropriate attention to the details of constitutional requirement actually left me with more room to be imaginative and effective in the sentencing process. Most defendants have little sense of self-discipline and even less respect for social institutions. A proper sentencing procedure can be of immense value in turning them around and starting the great majority of them on the affirmative road toward rehabilitation.

Again, I am sorry I cannot give you more specific language for amendment of the guidelines but express the hope that you will listen very carefully to the views of the trial bench which is considerably more knowledgeable than I in such matters.

Sincerely,



Albert J. Engel
Senior Circuit Judge

AJE/ymc

PCRI-50/91

Judge's Chambers
United States District Court
Middle District of Tennessee

L. Clure Morton
Senior Judge

228 U. S. Courthouse
Cookeville, Tennessee 38503

October 9,1990

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

Dear Sir:

In response to your soliciation of my experience as to the effectiveness of the guidelines and whether there should be additional mandatory minimum sentences, I submit to you that after having had experience with the guidelines set forth by the Commission, it is my belief that the guideline ranges are too low. I realize that the Commission will not and Congress will not require the Commission to increase the sentences set forth in the guidelines. Therefore, the only alternative is for Congress to increase the number of mandatory minimum sentences. I am totally in accord with the opinion expressed by some members of Congress that the number of mandatory minimum sentence should be increased.

The above opinion is based on approximately 20 years as a district judge and 35 years before that as a trial lawyer.

Very truly yours,

L. CLURE MORTON
Senior U.S. District Judge

LCM/jwp
cc: Hon. Hamilton Fish, Jr.
Hon. Jack Brooks

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
272 UNITED STATES COURTHOUSE
ROCHESTER, NEW YORK 14614-1368

CHAMBERS OF
MICHAEL A. TELESCA
CHIEF JUDGE

(716) 263-5780
FTS 963-5780

October 26, 1990

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

Dear Mr. Wilkins:

I appreciate the opportunity to comment upon the Sentencing Guidelines. I feel, and have always felt, that as Judges, we are in the best position to assess whether they are indeed serving the purpose to which they were intended. By the time of sentencing, we have learned much about the defendant beyond that relating to the crimes for which he has been convicted. It is because of this peculiarly unique position that judges, including myself, have become frustrated with the Guidelines and their limiting effect on our discretion. In this regard, I feel that perhaps the provisions governing departure constitute the area most in need of revision.

First, those two portions of the Guidelines governing departures, Parts 4A and 5K, should be consolidated into one independent section for purposes of clarity. That section should have as its governing policy statement that judges have the discretion to depart outside a given Guidelines range as long as they clearly articulate their reasons for doing so and those reasons have not otherwise been taken into account by the Guidelines themselves. The policy statement should also make clear that any departure is to be reviewed on appeal under an abuse of discretion standard and that allowance must be made for the judge's assessment of the defendant's character as he perceives it given his experience with the defendant during the course of the proceedings before him.

Second, the specific offender characteristics in Part H of Chapter 5 should explicitly allow for departures based on age, family circumstances, and education or vocational experience that the defendant has acquired between the time of his arrest and the date of sentencing. From my experiences on the bench, I found that these factors often indicate the likelihood of rehabilitation as

well as a defendant's feelings of contrition and remorse concerning his past illegal conduct. I recognize that this suggestion departs radically from your present policies under Part H but I feel that the potential for abuse of such a revised approach could be alleviated, if not eliminated, by strictly limiting the manner in which those characteristics can be taken into account. This could be accomplished by explicitly listing the factors that can be considered - such as the defendant's responsibility for the care and well-being of children (especially if the defendant is a female), stability of home life, etc. - and permitting only a certain degree of departure if they are found to be present. If nothing else, there should be some allowance for the Court to impose supervised probation based on these factors.

Third, since the advent of the Guidelines, I have noticed that its structure effectively permits the Government to determine the length of sentence either through the control of relevant sentencing information, or through its selection of the crimes with which the defendant is to be charged. See Federal Sentencing Reporter, Judicial Impressions of the Sentencing Guidelines, at 94 (Sept. 1989). I realize that you have been aware of this problem from the beginning and that attempts to alleviate it through a real offense system proved unworkable. Perhaps the better way to approach it, however, would be to develop a policy statement governing disclosure of material facts similar in content to § 6B1.4 pertaining to plea agreements. Such a statement should make clear that prosecutors are to fully reveal the facts and circumstances underlying the actual offense conduct and offender characteristics. Although the Department of Justice has already begun implementing this policy, see Thornburgh Memo: Plea Bargaining under the Sentencing Reform Act, at 5, making it more explicit in the Guidelines themselves would surely further discourage the U.S. Attorney's Officer from attempting to influence sentencing by inhibiting the informational flow. It would also presumably alleviate the tension that has developed under the Guidelines between the U.S. Attorney's Office and Probation.

Very truly yours,

Michael A. Telesca

Michael A. Telesca
Chief Judge
United States District Court

MAT/jc

PCRI -50/91

United States District Court
For the District of Oregon
United States Courthouse, Room 224
211 E. 7th Avenue
Eugene, Oregon 97401

Chambers of
Robert E. Jones
United States District Judge

October 2, 1990

Hon. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Judge Wilkins:

Thank you for your letter of September 21 and the opportunity to comment upon changes I perceive to be desirable in the existing sentencing guidelines. As you are aware, I am relatively new to the federal bench and have therefore not had the extent of exposure to the guidelines as have my peers. Nonetheless, during my subsequent "baptism under fire" wherein I have sentenced a number of drug offenders, I have identified what I believe to be problems and inequities as follows:

To date, I have found that presentence reports prepared by our probation office frequently include larger amounts of drugs, specific offense characteristics and Chapter III adjustments which are not a part of the parties' stipulations or plea agreements. While I am reasonably satisfied that the probation officer's computation is usually an accurate one based upon the guideline instructions, the government frequently enters into a very specific agreement (presumably to elicit a guilty plea) which is less than reported in the presentence report. The parties, of course, have little interest in seeing that agreement disturbed. I then must conduct a hearing which, in effect, "tries" that aspect of the case in which the probation officer and the parties are not in agreement. Needless to say, this is a "catch-22" situation for all of us. Summarily, I question whether we should devote the time and resources to conduct these "mini-trials" in the manner envisioned by the drafters of the guidelines but, if we don't, the potential for disparity evolving from the prosecutors' bargains may well be greater than the previous system wherein the Court retained substantially more discretion.

Turning now to specific guidelines, please refer to guideline 2D1.1. The footnote at the conclusion of the drug quantity table (page 2.45) instructs us to treat each marijuana plant as the equivalent of one kilogram of marijuana if the offense involved 50 or more plants. (Otherwise, each plant is to be treated as 100 grams.) I presume this instruction is intended to differentiate between those who grow marijuana for commercial purposes as opposed to their own consumption. Nonetheless, I believe this formula is very excessive for two reasons. First, from a pragmatic perspective, it is extremely unlikely that one plant

would produce a kilogram of marijuana. It is my understanding that the previous Parole Commission formula provided for 1/4 pound per plant which is fairly consistent with the 100 gram per plant formula (i.e. - 1/4 lb = 113 grams). Perhaps that estimate was too modest, but it occurs to me that increasing the formula ten-fold is unrealistic and unnecessarily punitive. In fact, it may be subject to a valid constitutional challenge as lacking a rational relationship to fact. Secondly, the current formula places the defendant in the same category as other offenders who I view as posing a distinctly more serious threat to the community. For example, an offender who grows 100 marijuana plants is placed in the same offense category as an individual who distributes up to 399 grams of heroin or methamphetamine, or up to 1.9 kilograms of cocaine. While relative societal harm is often difficult to measure, I believe this is clearly inequitable.

In view of the foregoing, may I suggest that consideration be given to the following formula:

1-50 plants = 100 grams per plant;

50-300 plants = 226 grams (1/2 lb.) per plant; and,

300 plants upward = 1 lb. per plant

I suggest that the proposed revision would better reflect the relative seriousness of the offense and, further, would more clearly differentiate between offenders who cultivate marijuana for their own consumption, the small commercial and the more sophisticated large-scale enterprises.

I also find guideline 3B1.2 (Role in the Offense/Mitigating Role) to be troublesome. That is, I do not believe that the present guideline provides for an adequate distinction between those offenders who constitute the "average" drug dealer and those individuals who serve simply as errand or messenger boys, bottle washers, etc. in conspiracy cases, for example, the relevant conduct guideline requires that all participants be held accountable for the total amount of drugs involved in the conspiracy. Yet, this guideline provides for no more than a four level reduction for those least involved. Conceivably then, an individual with no prior criminal record who washed the glassware at a methamphetamine laboratory which produces 1-2.9 kilograms would receive a minimum 6-1/2 year prison term. While such a sentence appears overly punitive to me, the more important issue is that his codefendant - the average dealer who was selling the methamphetamine in the community - would receive a sentence which is only 3-1/2 years more. Again, I suggest that a greater distinction be made possible concerning the various roles, particularly those involving mitigating and aggravating circumstances.

More specifically, I would suggest the following:

1) Minor role - decrease by 2 levels;

2) Minimal role - decrease by 4 levels;

3) Peripheral role - decrease by 6-10 levels; and

4) Major role - increase by 6 levels (if 5 or more).

Accompanying application notes would also be necessary to more succinctly define each of the aforementioned roles.

I was very involved in the development of the sentencing guidelines which now govern our state system here in Oregon and therefore have some understanding of the difficulty and complexity of your task. The foregoing is offered in the spirit of constructive criticism and, again, I appreciate this opportunity to express my views.

Sincerely,

Robert E. Jones
U.S. District Judge

PCRI 53/91

United States District Court
Post Office and Courthouse Building
Boston, Massachusetts 02109

CHAMBERS OF
ROBERT E. KEETON
DISTRICT JUDGE

October 3, 1990

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

Dear Judge Wilkins:

Thank you for your letter of September 21st, inviting comments on guideline sections and policy statements that may need review, amendment, or clarification.

By far the most pressing problem, in my view, is that in practical impact the guidelines have sharply reduced the effect of guilty pleas in the more serious cases. I am aware of reported data of early experience under the guidelines that have been interpreted as indicating no such effect has occurred. That is distinctly contrary to my own experience and that of most other judges with whom I have had conversations on this subject, both in my own district and in many others. Moreover, the difference in percentage of pleas increases as the charges grow more severe. As a consequence, we are trying more cases, and especially more of the cases involving the most severe charges and longer trials. My recommendation is that a principle of proportionality be adopted, so the credit for acceptance of responsibility is stated in percentage or proportional terms rather than a fixed number of two points.

Second, I recommend that the sentencing judge have discretion, within the proportional point limit established by a revised guideline, to allow a different number of points (within the lower and higher limits set by a revised guideline), depending on the judge's assessment of the degree to which the defendant has moved toward <u>fully</u> accepting responsibility. A case in which the defendant had already turned his life around before being apprehended and charged, and then freely admits his guilt, is very different from a case in which remorse, even if perceived by the judge as genuine, is expressed only after he has been caught and realizes that the evidence of guilt is overwhelming.

Perhaps both of these problems would be addressed by a draft along the following lines:

> §3E1.1(a):
> If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by a number (rounded to the nearest whole number) not less than 15 percent and not more than 40 percent of the Adjusted Offense Level.

Of course, other figures might be used where I have suggested 15 percent and 40 percent. The central ideas I recommend are adopting a principle of proportionality and giving the sentencing judge some range of discretion to take account of different circumstances of acceptance of responsibility.

Third, I would recommend reconsideration of the instances in which guidelines require a judge to choose one or the other of two categories of classification that are many points apart. An example that has troubled me is the 14-point break in relation to arson offenses of nonresidential property, depending on whether "the defendant recklessly endangered the safety of another," §2K1.4(b)(2). I have in mind a case of arson of restaurant premises at night, in circumstances in which defendant would reasonably believe no person was present. The inevitable endangerment of firefighters appears not to be the basis for a finding that defendant "recklessly endangered" safety of another, since a lesser increase is prescribed for "destruction of a residence," which would be equally likely to involve danger to firefighters. I am sensitive to the fact that the guidelines direct us to consider crimes by type rather than holding extensive evidentiary hearings and making findings about details of the particular offense. I fully agree with that general approach. My concern is that trying to fit all the range of offenses involving arson of nonresidential premises into just one or the other of a 6-point type and a 20-point type (6 + 14) seems to me to allow less leeway than is needed.

This matter might be addressed by a revision such as the following:

> §2K1.4(b), add (4):
> (4) If the defendant negligently endangered the safety of another, increase by 7 levels.

I hope these comments will be useful, and I would be pleased to respond if you or a member of the Commission staff wish further explanation from me.

I emphasize that my recommendations do not spring from dissatisfaction generally with guideline sentencing. I believe the guidelines have brought us dramatically closer to consistency in sentencing, and I firmly support the system.

Best regards.

Sincerely,



Robert E. Keeton

RCRI-5419

United States District Court
Middle District of Florida
Post Office Box 53135
Jacksonville, Florida 32201

Susan H. Black
Chief Judge

October 1, 1990

Mr. Paul Martin
Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Ste. 1400
Washington, DC 20004

Dear Mr. Martin:

In response to Mr. Wilkins' recent letter, except for the attached and my views concerning the guideline range for armed robbery being too low, which views have been expressed to the Commission members, I have no other recommendations.

I appreciate your inquiry as to my recommendations. Please let me know if I can be of any further assistance.

Sincerely,

SUSAN H. BLACK

SHB/shs

United States District Court
Middle District of Florida
Post Office Box 53135
Jacksonville, Florida 32201

Susan H. Black
United States District Judge

January 10, 1990

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

Re: Randy Ivan Brown
Case #89-73-Cr-J-14

Dear Commission Members:

I have sentenced numerous defendants under the guidelines, but this is the first time I have felt a need to write to the Sentencing Commission.

On November 21, 1989, I sentenced Randy Ivan Brown to seventy-one months incarceration after he had been found guilty by a jury of the use of an interstate commerce facility while attempting to commit a murder for hire, in violation of Florida Statutes, Section 782.04, and 18 U.S.C. 1958. The offense involved the defendant's recruiting of another individual to murder his ex-wife. The scheme was foiled when the accomplice notified the authorities and assisted in the defendant's arrest and conviction. The accomplice stated that he never intended to murder the ex-wife, but initially went along with the plan in an attempt to obtain money from the defendant.

Based on Section 2E1.4 of the guidelines, the base offense level was determined to be twenty-three. I added a two-level adjustment pursuant to 3B1.1(c), as the defendant was considered to be the organizer of the murder for hire scheme. I made this adjustment despite the defense's objection that the defendant's accomplice was not criminally responsible for the commission of the offense, and, therefore, not a "participant" as described as application note one of 3B1.1. I am of the opinion that Section 3B1.1 of the guidelines does not adequately take into consideration cases of this nature where a co-offender is an undercover officer or an informant. According to the strict application of Section 3B1.1 and the definition provided for "participant," a role adjustment might not be warranted.

In computing the applicable guidelines in this case, I found that the aggravating role adjustment was appropriate even though the accomplice was not "criminally responsible for the commission of the offense." Furthermore, I believe that the United States Sentencing Commission, in the formulation of the guidelines, needs to consider the grave and serious nature of this type of offense described in 2E1.4 of the guidelines, and the base offense level of twenty-three might be insufficient.

Sincerely,

SUSAN H. BLACK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
FEDERAL BUILDING
100 EAST HOUSTON STREET
POST OFFICE BOX 1499
MARSHALL, TEXAS 75671

SAM B. HALL, JR.
U.S. DISTRICT JUDGE

October 22, 1990

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

Attention: Communications Director

Gentlemen:

In answer to Judge Wilkins' letter dated September 12, 1990, I submit the following:

In the past I am presently assigned all of the Marshall and Texarkana dockets and have previously had part of the Beaumont docket all in the Eastern District of Texas. These divisions are somewhat different in the type cases they have and I will present to you for your consideration some of the problems that have arisen in these three divisions.

U.S.S.G. §2G2.2 - Transporting, Receiving or Trafficking in Material Involving Sexual Exploitation of a Minor.

In the Beaumont Division we have recently had several cases involving individuals receiving child pornography material through the mail -- all totally shocking and disturbing. As you know, the producers of this material forced children to engage in both natural and perverted sex acts. Reason would indicate that forcing children to become involved in such actions could be psychologically devastating both in the immediate and distant future.

Currently, the base offense level for an individual receiving this type of material is 13. If the material involved a pre-pubescent minor, or a minor under the age of 12 years, there is a 2 level increase. For the persons involved in the distribution of

this material for pecuniary gain, there is a minimum of a five level increase. The cases we have had thus far involve only the receipt of the material, and most of the material involves pre-pubescent minors or children under the age of 12 years. As such, these individuals have a total offense level of 15. Due to the fact that most accept responsibility for their actions, they receive a two level decrease pursuant to U.S.S.G. §3E1.1. This results in a total offense level of 13. Most of the individuals that have been sentenced in this district have no prior criminal history and as such, the guideline imprisonment range is 12 to 18 months. I personally feel that this period of imprisonment is too lenient and should be increased. As such, I suggest that the base offense level be increased at least four levels. This would result in a guideline imprisonment range of 24 to 30 months for the individuals who receive the pornographic material involving a pre-pubescent minor and who have no prior criminal history. Twelve to eighteen months is entirely too lenient.

U.S.S.G. §4A1.2 -- Application Note #3 indicates 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. I suggest that criteria #3 be omitted in its entirety. I submit the following as my reasoning.

Because of criterion #3, an individual may commit a burglary on one occasion and three or four months later commit a drug offense. Should that individual appear on the same day before the same district judge for sentencing, these cases are considered related and he receives only one set of criminal history points. On the other hand, if the offenses occurred in different counties, that individual may appear for sentencing on the same day before different judges and would receive criminal history points for each of the convictions. It is my feeling that by applying criterion #3, the seriousness of the defendant's criminal history is under-represented.

Application Note #3 references the fact that related cases may result in a criminal history score that under-represents the seriousness of the defendant's criminal history and that a departure may be warranted subject to U.S.S.G. §4A1.3. By eliminating this criterion #3, the need for departure in some cases will be eliminated as the calculated criminal history category will more adequately reflect the seriousness of the criminal history.

U.S.S.G. §1B1.3 **Relevant Conduct (Factors that Determine the Guideline Range**

Much concern has been voiced about this section of the guidelines. This section has the effect in many cases of nullifying the benefits of what has been perceived by the defendant and his lawyer as the benefits of a plea agreement. I realize that this issue has wide ranging implications, however, I would certainly be in favor of in some way narrowing the scope of this particular section, if nothing more than to charged offenses.

I do not think it unwise to delete §1B1.3(a)(2) "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction". This section provides for including alleged criminal conduct in determining a base offense level. Relevant conduct in the majority of the cases is limited to the offense of conviction. In my opinion, it is contrary to the underlying philosophy of the Sentencing Commission and the constitutional premises of "innocent until proven guilty" to include quantities for which there was no conviction to enhance a sentence. Relevant conduct that is not ordinarily criminal conduct will continue to be considered in the "specific offense characteristics" and the **Chapter Three - Adjustments.** Conduct that is ordinarily criminal conduct requires a conviction or stipulation on record before it can be considered in determining the offense level and thus the sentence to be imposed.

Since I helped work on the original plan while in Congress, I have always maintained that the "probation window" in the guidelines is much too narrow. This has resulted in the unnecessary incarceration of numerous offenders who pose no real threat to society. Specifically, I would like to see the probation eligibility increased to the minimum term of imprisonment level of 10.

Another area that bothers this Court is **Chapter Five - Determining the Sentence; Sentencing Table.**

In Criminal History Category I only, I would suggest change imprisonment range for offense levels 7 through 9 to 0 to 6 months. This would provide non-imprisonment alternatives to the Court in sentencing the first offender. Such alternatives could

reduce the burden and expense of overcrowding in the Bureau of Prisons and its contract facilities. Such an adjustment to the sentencing table continues to be compatible with the statutory considerations for sentencing in 18 USC §3553 and 28 USC §994. Due to the severe overcrowding of the federal prison system and the fact that many first offenders charged with relative minor offenses fall within this category, probation, without any conditions of confinement, should be an additional option available to the court.

Chapter Seven -- Violations of Probation and Supervised Release

Guidelines should be developed for sentences to be imposed when there is a violation of probation or supervised release. These guidelines should use the original total offense level as the base offense level with two levels added for revocation due to new petty offense behavior or technical violations. If the revocation is for criminal behavior that could be classified as a Class A or B misdemeanor or a felony, then the total offense level is computed for the offense that is the basis for the revocation. The higher offense level (the original total offense level from the sentence to probation or supervised release, or the total offense level from the new offense that is the basis for revocation) is used to determine the sentence from the sentencing table in Chapter Five. The criminal history category should remain the same.

This letter is probably longer than it should be, but it sets out some of the matters that have faced the Court in working with these problems in the Eastern District of Texas.

Yours very truly,

Sam B. Hall, Jr.

skj/

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAMBERS OF
DAVID A. NELSON
CIRCUIT JUDGE

TELEPHONE
(513) 684-3162

October 15, 1990

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

Dear Mr. Martin:

This is in response to Chairman Wilkins' recent call for comments on guideline sections or policy statements that may need review, amendment or clarification. As requested, I shall identify three areas where I think review might be appropriate. In addition, I should like to offer a thought about instructing defendants on pre-sentence investigations.

1. *Departures Based on Specific Offender Characteristics.* The Introductory Commentary on Chapter Four of the *Guidelines Manual* makes this statement: "To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered." The Commentary goes on to state, however, that for unspecified policy reasons some factors most indicative of the likelihood of recidivism -- age, *e.g.* -- are not included "at this time." In Part H of Chapter Five, accordingly, such specific offender characteristics as age, education, vocational skills, employment record, family ties and responsibilities, and sex, among other things, are said to be either irrelevant in the determination of a sentence, or not ordinarily relevant.

Perhaps it is time to re-examine the policy of ignoring characteristics that could be indicative of the likelihood that a particular defendant will engage in future criminal behavior. To illustrate the sort of thing that concerns me, suppose that a judge is called upon to sentence a woman of mature years who has strong family ties and responsibilities and whose offense seems to have been a one-shot affair. I should have thought, in such a case, that it would be appropriate for the sentencing judge to consider the defendant's age, sex, and family situation in deciding whether to depart from the guideline range. Under the current version of the guidelines, however, these factors appear to be either irrelevant or presumptively irrelevant. Would it not be desirable to give the sentencing judge a little more room for the exercise of judgment as to the likelihood that the individual who is being sentenced will repeat her mistake?

2. U.S.S.G. §4A1.3. *Adequacy of Criminal History Category* (Policy Statement). Under certain circumstances, as I read this policy statement, sentencing courts are invited to consider upward departures on the basis of such factors as "prior similar adult criminal conduct not resulting in a criminal conviction." The guidelines do

not say what standard of proof is to be used here, but many courts, I suspect, would use a preponderance of the evidence standard. Would it not be appropriate for the guidelines to require the use of a "clear and convincing" standard instead? Courts should not be encouraged, I think, to increase a person's sentence on the basis of a crime of which the person cannot be said to be clearly guilty.

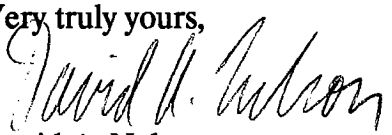
3. U.S.S.G. § 2Q1.2(b)(1)(B). *Mishandling of Hazardous or Toxic Substances*. This sub-section mandates a four level increase in the base offense level "if the offense . . . involved a discharge, release, or emission of a hazardous or toxic substance or pesticide." Application Note 5, however, says that the sub-section "assumes a discharge or emission into the environment resulting in actual environmental contamination." The note goes on to suggest that a two level departure, up or down, may be appropriate depending on, among other things, the degree of harm resulting from the discharge.

It is not entirely clear to me what the sentencing judge is supposed to do if the offense in question involved a hazardous substance discharge not resulting in any actual environmental contamination. It might make sense to revise § 2Q1.2(b)(1)(B) to require a four level increase "if the offense . . . involved a discharge, release, or emission of a hazardous or toxic substance or pesticide resulting in actual environmental contamination." Application Note 5 could then be revised to suggest consideration of a downward departure where the actual environmental contamination is minimal, and an upward departure where it is severe.

Now for my thought on the pre-sentence investigation. I have been somewhat concerned, as have others, about the fact that defendants are occasionally encouraged to bare their souls to probation officers without having been told of their right to counsel at this stage and without having been told how statements given to the probation officer will be used in the pre-sentence report and in the calculation of the guideline range. Perhaps some suggested language could be developed for district courts to use in instructing defendants before their pre-sentence interviews. This may be outside the Commission's bailiwick, but I think there is a problem here that the courts need to address.

I appreciate your consideration of these random comments, and I applaud the Commission for its initiative in soliciting suggestions for possible improvements in the sentencing system.

Very truly yours,



David A. Nelson

DAN:llb

United States District Court
District of Nevada

Chambers of
Philip M. Pro
United States District Judge

United States Courthouse
300 Las Vegas Boulevard South, Room 341
Las Vegas, Nevada 89101

October 15, 1990

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

Re: Judge Wilkins' Letter of September 27, 1990

Dear Sentencing Commission:

In response to Judge Wilkins' letter of September 27, 1990, I would offer the following comments.

1. Although I have not conducted a statistical survey, I believe the guideline sentences imposed by the Judges in the District of Nevada are consistent with the latest nationwide figures cited in Judge Wilkins' letter. However, my experience suggests that there has been an increase in the number of defendants who choose to proceed to trial rather than plead guilty under the sentencing guidelines. This experience is particularly apparent with regard to drug cases. However, I do not know whether to attribute this phenomenon to the impact of the sentencing guidelines or the impact of the mandatory minimum sentences recently legislated by Congress.

2. I suggest one change, or clarification, of guideline section 5K2.

Recently, I encountered a case, United States v. Betty Jean Keene, CR-S-88-229-PMP, in which a defendant was before me for sentencing for the crime of Use of an Unauthorized Access Device in violation of Title 18, United States Code, Section 1029(a)(2). In this particular case, the defendant, a travel agent, had made illegal charges to the credit cards of various of her customers to keep her business afloat. The victim was a Nevada bank to which the defendant made complete restitution prior to the commencement of any criminal investigation by the United States Secret Service. The guideline range in the defendant's case provided for a sentence of from 10 to 16 months even though the 50-year-old defendant had no prior criminal record and was otherwise stable in the community both with regard to her family and business life.

The defendant's attorney persuasively argued that unlike the situation wherein a defendant makes restitution after the commencement of a criminal investigation, or otherwise agrees to do so as part of a sentence following conviction, the guidelines

should treat a defendant more leniently where that person has made full restitution before any form of criminal investigation has even commenced. Indeed, as the defendant's attorney argued, many cases similar to that of Defendant Keene are simply resolved civilly between the parties and never result in any form of criminal investigation or prosecution. While not minimizing the seriousness of the defendant's conduct, I agreed that a departure was warranted. However, the Chapter 5 provisions of the sentencing guidelines were silent in this area except for the general provisions of Guideline 5K2, upon which I relied.

I would therefore suggest that section 5K2 be amended to include a policy statement which specifically addresses the situation in which a defendant has made restitution to a victim prior to the commencement of any criminal investigation.

3. I concur with the Commission's unanimous decision to encourage Congress not to enact additional mandatory minimum sentences. I am persuaded that current mandatory minimum sentences result in far too many 2 and 3-day trials which are little more than "slow pleas of guilty" by defendants who have nothing to lose by running the risk of trial.

I look forward to reviewing the policy statements pertaining to revocation of probation and supervised release in the near future. I hope the Commission will keep the guidelines, when finally promulgated, as flexible as possible so as to preserve the full range of discretion on the part of the sentencing judge in dealing with such revocation matters.

Sincerely,

PHILIP M. PRO
United States District Judge

PCRT 58-91

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
581 HUGO L. BLACK U.S. COURTHOUSE
1729 5TH AVENUE NORTH
BIRMINGHAM, AL 35203

CHAMBERS OF
ROBERT B. PROPST
JUDGE

October 11, 1990

Mr. Paul Martin
Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, DC 20004

Dear Mr. Martin:

In response to Judge Wilkins' letter of September 27, 1990, I enclose a copy of a memorandum prepared by a probation officer whose opinions I respect and concur in.

Yours very truly,

Robert B. Propst

RBP:lyt

enclosure

UNITED STATES GOVERNMENT

memorandum

DATE: October 11, 1990

REPLY TO ATTN OF: Oscar J. Stephenson, Jr. OJS
Supervising U.S. Probation Officer

SUBJECT:

GUIDELINE AMENDMENTS

TO: Honorable Robert B. Propst
U.S. District Judge

I appreciate the opportunity to share my thoughts regarding guideline amendments or changes. Basically, I believe the guidelines are well written and functional in actual practice.

I have selected three guideline sections which I believe need some additional consideration by the Commission. These sections are outlined as follows:

Chapter 3 Part B - Role in the Offense

3B1.3 Abuse of Position of Trust or Use of Special Skill

This guideline needs to be broadened by deleting everything in Application Note 1 after the word crime in the first sentence. Application Note 1 would then read, "The position of trust must have contributed in some substantial way to facilitating the crime."

Chapter 4 Criminal History Category

4.A1.2 Application Note 6 - Invalid Convictions

How to use uncounseled misdemeanors that did not result in imprisonment in the criminal history calculation is confusing. General Counsel for the Probation Division indicates such convictions are not to be counted, but reported under "Other Criminal Conduct" in the presentence report, with an explanation as to how the criminal history score would be changed if they were counted.

The Commission, in application Note 6, states that if the use of such convictions results in the imposition of a sentence of imprisonment under circumstances that would violate the U.S. Constitution, then such convictions are not counted but may be considered under adequacy of the criminal history category. This seems vague and difficult to implement. A clearer explanation as to the Commission's intent is needed, especially if there is agreement with the Probation Division on this matter. Basically, the Commission needs to determine if they are to be counted or not, and go with whichever position it wants the court to apply.

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

* U.S. GPO: 1988-201-760

Chapter 5 **Part E - Restitution, Fines, Assessments, Forfeitures**

Section 5E1.2(c) and (i)

Fine calculations are burdensome and time-consuming under the present guideline. The Commission should use the Fine Table only without referring to the gain or loss associated with the offense. This is often difficult to determine, and it very seldom applied. The alternative fine section in 18 U.S.C. § 3571(d) is so infrequently used it is not worth using it in any aspect of the fine calculations.

The additional fine for the cost of supervision and incarceration sounds good, but it is infrequently used and it punishes those who have monetary resources that may not have been illegally obtained. This section should be deleted.

I hope this input helps with any response you may be making to Judge Wilkins. If I can provide additional information, please let me know.

OJS/mb

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

October 11, 1990

ROBERT BOOCHEVER
CIRCUIT JUDGE
125 S. GRAND AVE
P.O. BOX 91510
PASADENA, CA 91109-1510

(818) 405-7200
FTS 961-7200

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

Dear Judge Wilkins:

Receipt is acknowledged of your letter of September 7, 1990, requesting my thoughts on guideline sections or policy statements that I believe need review, amendment or clarification.

One troublesome issue is the standard of proof required for uncharged conduct affecting a sentence under the guidelines. In McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986), a pre-guideline case, the Supreme Court held that a preponderance of the evidence standard satisfied due process for the post-conviction determination by a state judge that a firearm was used in commission of a crime, resulting in imposition of a mandatory sentence. McMillan did not deal with guideline sentencing, nor did it address the appropriate federal standard. Nevertheless, all courts of appeals considering this issue under the guidelines, many explicitly relying on McMillan, have used a preponderance of the evidence standard. See United States v. Wilson, 900 F.2d 1350 (9th Cir. 1990); United States v. Frederick, 897 F.2d 490, 492 (10th Cir. 1990); United States v. Alston, 895 F.2d 1362, 1372-73 (11th Cir. 1990); United States v. Gooden, 892 F.2d 725, 727-28 (8th Cir. 1989); United States v. Silverman, 889 F.2d 1531, 1535 (6th Cir. 1989); United States v. White, 888 F.2d 490, 499 (7th Cir. 1989); United States v. McDowell, 888 F.2d 285, 290-91 (3d Cir. 1989); United States v. Guerra, 888 F.2d 247, 251 (2d Cir. 1989); United States v. Urrego-Linares, 879 F.2d 1234, 1237 (4th Cir.), cert. denied, 110 S. Ct. 346 (1989); United States v. Wright, 873 F.2d 437, 441-42 (1st Cir. 1989).

Despite this substantial authority, I believe that "clear and convincing evidence" is more appropriate in view of the serious consequences of the findings. McMillan should not control the appropriate federal standard given the significant differences between pre- and post-guideline sentencing. Accordingly, I suggest the Commission amend the guidelines by specifying a standard of proof. As an example:

Standard of Proof for Uncharged Conduct Relied upon to Enhance a Sentence

"Clear and convincing evidence" shall be the standard of proof for uncharged conduct relied upon to upwardly adjust, upwardly depart or otherwise enhance a sentence.

If the Commission prefers the "preponderance of the evidence" standard, the standard should be defined in the guideline. In the cases cited above, there is scant consideration of the definition of "preponderance of the evidence." Specifically, I recommend adopting one of the more rigorous formulations of the standard:

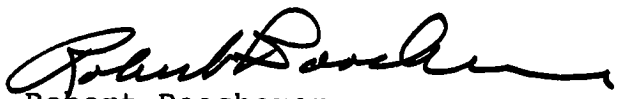
Standard of Proof for Uncharged Conduct Relied upon to Enhance a Sentence

"Preponderance of the evidence" shall be the standard of proof for uncharged conduct relied upon to upwardly adjust, upwardly depart or otherwise enhance a sentence. "Preponderance of the evidence" when used in this context shall be evidence of sufficient weight to convince a reasonable person of the probable existence of the fact relied upon to increase the sentence.

This matter was addressed in United States v. Restrepo, 903 F.2d 648 (9th Cir. 1990), an opinion authored by me, which has had the mandate recalled pending consideration by an en banc court. The en banc court apparently will consider an appropriate definition of "preponderance of the evidence" as well as the possibility of applying a higher standard of proof such as "clear and convincing evidence," or "beyond a reasonable doubt."

The reasoning of the en banc panel may well give guidance in this important matter, but in any event, I believe it would be helpful if the Commission spelled out the appropriate standard and definition of that standard.

Sincerely yours,



Robert Boochever

ICRJ-60/91

United States District Court
DISTRICT OF CONNECTICUT
UNITED STATES COURTHOUSE
915 LAFAYETTE BOULEVARD
BRIDGEPORT, CONN. 06604

T.F. GILROY DALY
DISTRICT JUDGE

October 11, 1990

Dear Judge Wilkins:

I have your letter of September 12, 1990 and I am listing herein certain matters which I think may be responsive. They are some of the areas where I think the guidelines need considerable clarification.

1. Acceptance of Responsibility - Section 3E1.1
The question of acceptance of responsibility has become a virtual Pandora's box. Initially it appeared to some that the Commission expected this to be interpreted so as to benefit the defendant. It seems, however, within the past two years the scope of its application has narrowed considerably. It continues to be a judgment call, depending a great deal on the philosophy of the one deciding. In addition, the application of the guideline after trial appears to create a possible constitutional conflict. A defendant who, having exercised his right to trial, continues to maintain his innocence after conviction is effectively punished by the guideline. This may be unfair as well as unjust.

2. Guideline Range Regarding Firearms and Other Weapons-Section 2K
The Guideline for firearms is, in my judgment, manifestly low in relation to other offenses the Commission has rated. It ought to be, if everything else is to remain in place, increased significantly.

3. Substantial Assistance - Section 5K
This area needs to be reviewed with an eye to reinstating something along the lines of the old Rule 35 procedure. The Government has too much control under present circumstances with an obvious interest in how things are reported to the Court, if they are reported at all, and thus there is often considerable agency drive of the judicial process. The situation appears somewhat out of balance.

4. Drug Offenses - Section 2D
It makes little sense to me that a person who steals or commits a fraud of over $80,000,000 is at precisely the same guideline level, other things being equal, as a person who possess a kilogram of cocaine.

5. Criminal History - Section 4A
As presently written the section is skewed against most inner-city inhabitants since by definition they are more likely to be arrested than a person in a different (higher) socio-economic level and thus is unfair.

6. Corporation Guidelines
The corporate guidelines obviously need work. My own view is that the previous method of sentencing corporations was preferable and the use of the old presentence report in that regard made more sense.

I realize that I have gone beyond the limit of the three matters that you asked me to comment upon. I hope the above is of some help.

Yours sincerely,

/efm

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

PCRI-6/19/91

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

CHAMBERS OF
JUDGE GERALD W. HEANEY
FEDERAL BUILDING
DULUTH, MINNESOTA 55802

September 25, 1990

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

Gentlemen:

Pursuant to Judge Wilkins' request, I submit four suggestions for improvement of the Guidelines.

1. I believe that the Guidelines should be amended to make clear that a district court may depart downward without a motion by the government when it finds that a defendant has given substantial assistance to authorities in their law enforcement efforts. I am aware that some courts have followed the policy statement of section 5K1.1 and will not give credit for substantial assistance unless a motion is made. I believe that this policy is difficult to defend, particularly because the Department of Justice has not articulated the standards it will use in determining whether substantial assistance has been given.

At the very least, a thorough review should be undertaken by the Sentencing Commission to determine the circumstances under which prosecutors recommend a departure for substantial assistance and those in which they refuse to make such recommendations. My own experience is that motions for departures are made only when a defendant agrees to participate actively in <u>future</u> illegal transactions. Rarely, if ever, is a motion made to reduce the sentence of the defendant who has cooperated by fully revealing all of the information he knows about <u>past</u> illegal activities.

2. It appears that district court policies with respect to granting a two-level reduction for acceptance of responsibility vary greatly as between districts.[1] I believe that the Commission

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[1]In the Eighth Circuit, for example, some district courts appear to grant the reduction for acceptance of responsibility to nearly every defendant who pleads guilty, while other courts clearly require more than a guilty plea for the reduction. In the Western District of Missouri, 94% of defendants pleading guilty in 1989 received the two-level reduction, while only 70% of defendants

should make it clear that ordinarily, defendants should be given a two-level reduction for acceptance of responsibility if they plead guilty, and the reduction should only be denied in those cases where, notwithstanding the guilty plea, a defendant has continued to refuse to acknowledge the wrongfulness of his actions.

3. The Guidelines should encourage district courts to inform defendants fully at the time a guilty plea is taken of the probable consequences of a plea under the Guidelines. At the present time, the practice is to inform a defendant only of the Guideline range for the offense charged. In most cases, this information is meaningless, because it does not reflect additional relevant conduct that may be used to increase the sentence. It is true that defense counsel will ordinarily discuss with a defendant the sentence he can expect to receive under the Guidelines, but in many cases appointed counsel is not knowledgeable about the Guidelines and in others, the advice given is not a part of the record. Obviously, there are some cases where the information needed to compute the probable Guideline sentence is not available at the time of the guilty plea hearing. In my experience, that is the exception rather than the rule.

4. The Sentencing Commission should exercise the power granted to it by 28 U.S.C. § 995(a)(19) and study the feasibility of developing guidelines for the disposition of juvenile delinquents. Under the present system, juvenile delinquents are sentenced under 18 U.S.C. § 5037, which gives courts little guidance regarding the appropriate length of juvenile sentences. Our court has recently held that although the Guidelines do not themselves apply to juveniles, the phrase "maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult" in 18 U.S.C. § 5037(c)(1)(B) means the maximum sentence a juvenile could have received under the Guidelines but for his age. United States v. R.L.C., No. 90-5048 (8th Cir. Sept. 12, 1990). The Ninth Circuit has interpreted the same statutory language to mean the statutory maximum sentence prescribed for the offense in question. United States v. Marco L., 868 F.2d 1121 (9th Cir.), cert. denied, 110 S. Ct. 369 (1989). The formulation of dispositional guidelines for juvenile delinquents would obviate such conflicts. Until the creation of such guidelines, however, the Sentencing Guidelines should be amended to state explicitly that they do not apply to juveniles.

---

pleading guilty in the Eastern District of Missouri in 1989 received the reduction.

I would be pleased to discuss any of these suggestions with personnel of the Sentencing Commission.

Sincerely,

GERALD W. HEANEY

GWH:bn

United States District Court
For the District of Oregon
United States Courthouse
620 S.W. Main
Portland, Oregon 97205

Chambers of
James A. Redden
United States District Judge

October 22, 1990

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

Dear Judge Wilkins:

In response to your request, the judges of this court feel very strongly that:

1) The role in the offense guidelines (3B1.1 and 3B1.2) should be expanded to afford the court greater discretion in imposing less onerous sanctions on those offenders who are only peripherally involved in the offense, and

2) The footnote in 2D1.1 which requires the court to treat each marijuana plant as the equivalent of one kilogram of marijuana in those cases in which more than 50 plants are found should be substantially modified.

Both of the above provisions require punishments that do not fit the crime.

The judges of this court also endorse the recommendations made in a recent report of the Criminal Law and Probation Committee of the Judicial Conference. I am certain that you and the other members of the Commission have the report of that Committee in your possession.

We would also comment on the increasing disparity in sentencing. Although the Commission may disagree, practical experience has indicated to us that there is as much disparity today as there was prior to the passage of the Guidelines. The discretion has passed from the court to the prosecution and charge bargaining, plea bargaining and fact bargaining continue. This creates an unfortunate conflict between the United States Probation Office and both the prosecution and defense.

This disparity occurs, in large measure, because in many instances the sentences are draconian compared to the offense charged and the record of the particular defendant. In an effort to arrive at a "just" sentence, negotiations frequently result in the complained of disparity. We believe that the system was far more just when the judges had the limited discretion, rather than the prosecutors.

Very truly yours,

James A. Redden, jp

James A. Redden

JAR:jp
DICTATED BUT NOT READ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
UNITED STATES COURTHOUSE
515 RUSK STREET
HOUSTON, TEXAS 77002

CHAMBERS OF
JUDGE SIM LAKE

October 17, 1990

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

ATTENTION: Communications Director

Gentlemen:

Pursuant to Judge Wilkins' letter of September 21, 1990, I recommend the following changes to the Sentencing Guidelines:

(1) Add a new § 2L1.1(b)(4), which would state:

> If the offense involved smuggling, transportation or harboring of multiple unlawful aliens, increase by one level for each 2 additional aliens involved.

The current Guidelines are too lenient toward professional alien smugglers. With a base offense level of 9 a defendant rarely faces more than a year in prison, even if his total offense level is increased for his role in the offense and even if he has a prior smuggling conviction resulting in a two-level increase under § 2L1.1(b)(2). Professional alien smuggling is a serious crime in this part of the country and should be treated as such for sentencing purposes.

(2) Delete the word "dwelling" from § 4B1.2(1)(ii) and Application Note 2 and substitute instead the words "building or structure."

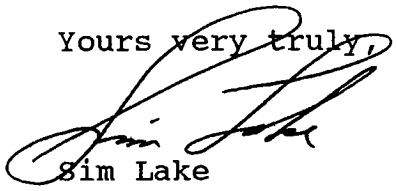
This would bring the definition of a crime of violence into harmony with the definition of a "violent felony"

found in 18 U.S.C. § 924(e)(2)(B)(ii) as construed in Taylor v. United States, 110 S.Ct. 2143, 2158-2160 (1990).

(3) Expand the sentencing table to include two or three more criminal history categories with commensurate increases in the range of imprisonment for each category. Category VI currently includes defendants with an offense level of 13 or more. It is not unusual to see defendants with an offense level of more than 15. To fairly sentence these defendants I must either use the level VI sentencing range or depart upward on the basis that the criminal history category inadequately represents the true offense level. Departures require greater elaboration and are more likely to prompt an appeal. Increasing the number of criminal history categories avoids these problems and would probably prompt more pleas since a defendant and his lawyer would be able to calculate more accurately the defendant's guideline sentence.

Thank you for giving me the opportunity to comment on the proposed revisions to the Guidelines. If you have any questions about these suggested revisions, please do not hesitate to call me at (713) 226-4177.

Yours very truly,



Sim Lake

SL/bma
\1990A\640

cc: Honorable William W. Wilkins, Jr.

JAMES E. BARRETT
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
P. O. BOX 1288
CHEYENNE, WYOMING 82001

October 11, 1990

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

Dear Judge Wilkins:

I am grateful for your kind letter of September 78, 1990, wherein you requested my input on top Guideline sections or policy statements which I believe need review, amendment or clarification.

Under Chapter Four of the Guidelines, the Criminal History Category of a defendant ranges from Category I to Category VI. These categories do, of course, reflect Criminal History Points of "0 or 1" for Category I to "13 or more" for Category VI. The problem is that the criminal history category of two very different defendants weighs the same. Thus, the career or habitual offender is treated the same as the offender who barely makes it into Category VI for the first time. In my view, the criminal history categories should be expanded to at least Category X in order to reflect the seriousness of the criminal history of the career/habitual offender. I believe this would also be in sync with the Congressional objective of honesty, uniformity and proportionality.

A second problem, I believe, under Chapter Four involves the treatment of "related cases." U.S.S.G. § 4A1.2(a)(2) provides that "Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history." Related cases are broadly defined so as to include cases which "were consolidated for trial or sentencing." Thus, a defendant who has been tried and convicted on one count and who receives three criminal history points has the same criminal history under the Guidelines as the defendant tried and convicted on six counts in those instances where the counts are consolidated for trial or sentencing. In my view, conviction under each count should be considered and treated as a separate case. The "related case"

definition does not permit convictions on separate counts in these cases "consolidated for trial or sentencing." Every conviction should be considered for purposes of determining a defendant's criminal history, irrespective of whether the cases were consolidated for trial or sentencing.

Sincerely,

James E. Barrett

JEB/b

United States Court of Appeals

Eleventh Judicial Circuit

Gerald Bard Tjoflat
Chief Judge
Jacksonville, Florida 32201

October 12, 1990

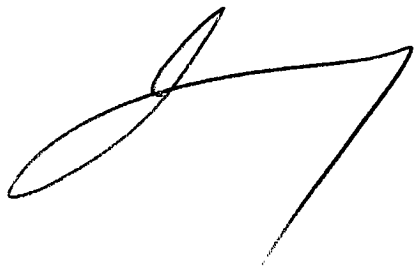
The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 2004

Dear Billy:

I have your letter of October 1, seeking suggestions as to how the Commission's guidelines might be improved. At the moment, I have no suggestions to make. I am sure that you are monitoring the courts of appeals' interpretations of the guidelines and are planning "corrective action" in those areas where we appellate types have gone astray.

Concerning the matter of probation revocation--a subject you are working on, I enclose, for whatever it may be worth, an opinion I recently wrote, in United States v. Smith, 907 F.2d 133 (11th Cir. 1990), as to the sentencing options available to the court after revoking a term of probation.

Sincerely,



Enclosure

UNITED STATES of America,
Plaintiff-Appellee,

v.

Philbert Ray SMITH,
Defendant-Appellant.

No. 89-8226
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

July 31, 1990.

The United States District Court for the Southern District of Georgia, No. CR488-76, Robert L. Vining, Jr., J., sentenced defendant, who pled guilty to possession of counterfeit United States currency, to 18 months of imprisonment followed by term of supervised release not to exceed three years, following probation revocation. Defendant appealed. The Court of Appeals, Tjoflat, Chief Judge, held that the District Court could not impose probation revocation sentence that exceeded the sentence originally available under the guidelines at the time of initial sentencing.

Sentence vacated and case remanded.

1. Criminal Law ⇐982.9(7)

Relevant facts before court at time of initial sentencing, rather than conduct that constituted probation violation, determine whether and to what extent district court may depart from guidelines after probation revocation; if relevant facts before district court at time of initial sentencing would have justified departure, district court may revisit those facts and, based upon them, may choose to depart when imposing new sentence. 18 U.S.C.A. § 3565.

2. Criminal Law ⇐982.9(1, 7)

Where probation revocation is not mandatory, district court may consider postsentencing conduct when deciding whether to revoke probation or to continue it, either on the same or different terms; furthermore, after revoking probation, district court has discretion to impose new sentence within the applicable range prescribed by law at time of initial sentencing, and court ought to be able to consider the conduct giving rise to the revocation when deciding what sentence to select within the guidelines range or even whether to depart from the guidelines, provided the conduct justifying departure was brought to the court's attention at initial sentencing hearing. 18 U.S.C.A. §§ 3563(c), 3565.

3. Criminal Law ⇐982.9(7)

Where term of supervised release is discretionary, court ought to be able to consider probation violation in deciding whether to impose such a term, and whether supervised release is discretionary or mandatory, court should be able to consider violation in determining the conditions, and, within the range prescribed by law, the duration of the term. 18 U.S.C.A. § 3565; U.S.S.G. §§ 5D1.1(a, b), 5D1.2, 18 U.S.C.A. App.

4. Criminal Law ⇐982.9(7)

District court could not impose sentence upon revocation of probation that exceeded sentence originally available under the guidelines at the time of initial sentencing. 18 U.S.C.A. § 3565; U.S.S.G. § 5D1.1(b), 18 U.S.C.A.App.

W. Douglas Adams, Brunswick, Ga. (Court-appointed), for defendant-appellant.

Kathryn M. Aldridge, Asst. U.S. Atty., Savannah, Ga., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Georgia.

Before TJOFLAT, Chief Judge, CLARK, Circuit Judge, and HENDERSON, Senior Circuit Judge.

TJOFLAT, Chief Judge:

Philbert Ray Smith appeals from an order of the district court revoking his probation and sentencing him to a term of incarceration. We vacate Smith's sentence and remand the case to the district court for resentencing.

I.

On August 15, 1988, Smith pled guilty to an information charging him with possession of counterfeit United States currency in violation of 18 U.S.C. § 472 (1988), for which the maximum statutory term of imprisonment is fifteen years. Because the offense occurred after November 1, 1987, Smith's sentence was governed by The Sentencing Reform Act of 1984, Pub.L. No. 98–473, 98 Stat. 1987 (codified, as amended, in scattered sections of 18 and 28 U.S.C.), and the sentencing guidelines promulgated thereunder, *see* United States Sentencing Commission, Guidelines Manual (West Nov. 1989) (hereinafter Sentencing Guidelines). Under the guidelines, the base offense level for offenses involving counterfeit currency is 9. *See id.* § 2B5.1(a). In his presentence investigation report, to which neither party objected, the probation officer adjusted the offense level upward by two levels based on defendant's role as an organizer of the two-person scheme to pass counterfeit bills, *see id.* § 3B1.1(c), and downward by two levels based on his acceptance of responsibility, *see id.* § 3E1.1(a), for a total offense level of 9. The probation officer placed Smith in Criminal History Category I. The applicable sentencing range, therefore, was from four to ten months of imprisonment, *see id.* ch. 5, pt. A sentencing tbl. & commentary. Because the minimum term of imprisonment specified by the sentencing table was between one and six months, Smith was eligible for probation provided he served a term of community confinement. *See id.* §§ 5B1.1, 5C2.1(c)(2), 5C2.1(e)(2). On November 21, 1988, the district court implicitly adopted the probation officer's guideline application and imposed a sentence of three years' probation,[1] with four months to be spent at a community treatment center, on the condition that, *inter alia*, Smith remain drug-free.

Smith entered the Chatham County Community Treatment Center in December 1988. Two drug tests administered while Smith was at the Center revealed the presence of drugs in his urine. Smith was expelled from the Center after the second test, and his probation officer petitioned the court for revocation of Smith's probation. The probation officer appended to the petition a report on Smith's conduct while on probation and recommended a new sentence of eighteen months' imprisonment followed by a two-year term of supervised release. The recommended sentence was calculated by applying the sentencing guidelines as follows:

Total offense level for the offense of conviction:		9
Base offense level for the conduct that violated probation: [2]	+	4
Adjustments:	+/−	0
TOTAL:		13
Criminal History Category:		I
Applicable Guideline Range:		12–18 months
Sentence Recommendation:		18 months

On March 6, 1989, the district court held a hearing and revoked Smith's probation. The court correctly noted that the guidelines do not specify how a court is to proceed after revoking a guideline sentence of probation, *see id.* ch. 7, then stated: "[T]here being no guidelines [on resentencing after probation revocation], the Court then reverts to the statutory maximum for the underlying offense, in this case possession of counterfeit bills. The maximum punishment prescribed by statute for that is fifteen years." The court then implicitly adopted the probation officer's recommendation and imposed a prison term of eigh-

1. Under the Comprehensive Crime Control Act of 1984, probation is a type of sentence in and of itself. *See* 18 U.S.C. § 3561 (1988); S.Rep. No. 225, 98th Cong., 2d Sess. 88, *reprinted in* 1984 U.S.Code Cong. & Admin.News 3182, 3271. Under prior law, the court would either (1) suspend the *imposition* of sentence and put the defendant on probation, or (2) impose a prison sentence, suspend its *execution*, and put the defendant on probation. *See* 18 U.S.C. § 3651 (1982) (*repealed* 1986).

2. *See* Sentencing Guidelines § 2D2.1(a)(3) (base offense level of 4 for possession of controlled substances not covered specifically by other subsections).

teen months followed by a period of supervised release not to exceed three years.

II.

In this case of first impression for the circuit courts of appeals, Smith argues that the district court erred (1) in holding that the guidelines do not apply to probation revocation proceedings and (2) in imposing a prison sentence (eighteen months) that exceeds the one originally available under the guidelines at the time of initial sentencing (four to ten months). We agree.

The statute governing probation revocation provides in relevant part:

> (a) Continuation or Revocation.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in [18 U.S.C.] section 3553(a) to the extent that they are applicable—
>
> (1) continue him on probation, with or without extending the term [or] modifying or enlarging the conditions; or
>
> (2) revoke the sentence of probation and *impose any other sentence that was available under subchapter A [18 U.S.C. §§ 3551–3559] at the time of the initial sentencing.*

18 U.S.C. § 3565 (1988) (emphasis added).[3]

At the time of Smith's initial sentencing, the district court was required to apply the guidelines. Thus, the guidelines, as well as the statutory maximum for the offense of conviction, determined what sentences were "available" at that time. Before the district court could impose a proper sentence under the guidelines, it had to make findings of fact concerning Smith's total offense level and criminal history category, which it did by adopting the findings in the probation officer's original report without objection from either party. Naturally, the facts established at the time of initial sentencing could include only conduct that had already occurred. Because the conduct that constituted a probation violation had not yet occurred, no upward adjustment in Smith's total offense level could have been based on that conduct, and the longer sentence of imprisonment resulting from such an adjustment was therefore not "available." Thus, pursuant to section 3565, the guidelines control the imposition of a new sentence after probation revocation in the sense that the original determinations of total offense level and criminal history category, based upon relevant facts established at the time of sentencing, delimit the sentences that were then available. The probation officer's use of the guidelines—adding the base offense level for the post-sentencing conduct that violated probation to the total offense level for the offense of conviction—was clearly incorrect in light of section 3565.

[1] The relevant facts before the court at the time of initial sentencing also determine whether and to what extent the district court may depart from the guidelines after probation revocation. If at that time the court had before it information that would have justified a departure, the court may revisit those facts and, based upon them, may choose to depart when imposing the new sentence. In such a case, the sentence departing from the guidelines was *available* at the time of initial sentencing, although the court did not at that time choose to depart or even to identify the information that supported a possible departure. The proper extent of the departure (subject to the statutorily prescribed sentencing range) depends, of course, upon the relevant sentencing facts originally before the court rather than on the conduct that constituted the probation violation.

[2, 3] This is not to say that post-sentencing conduct is irrelevant to probation

3. Section 3565, as amended in 1988, requires revocation when a defendant on probation is found to be in possession of a controlled substance. *See* 18 U.S.C. § 3565(a). The terms of the amendment apply only to persons whose probations began after December 31, 1988, however, and therefore do not apply to this case. *See* Pub.L. 100–690, title VII, § 7303(d), 102 Stat. 4181, 4464.

revocation proceedings. Where revocation is not mandatory,[4] the district court may certainly consider such conduct when deciding whether to revoke probation or to continue it, either on the same or different terms, *see id.* §§ 3563(c), 3565(a)(1). Furthermore, after revoking probation, the district court has discretion to impose a new sentence *within* the applicable range prescribed by law, *i.e.*, statute and guidelines, at the time of initial sentencing—in this case, within a range of four to ten months. Common sense suggests that the court ought to be able to consider the conduct giving rise to revocation (*i.e.*, post-sentencing conduct) in deciding what sentence to select within the guideline range or even whether to depart from the guidelines, provided the conduct justifying departure (*i.e.*, pre-sentencing conduct upon which departure could have originally been based) was brought to the court's attention at the initial sentencing hearing. Similarly, where a term of supervised release is discretionary, *see* Sentencing Guidelines § 5D1.1(b), the court ought to be able to consider the probation violation in deciding whether to impose such a term. And whether supervised release is discretionary or mandatory, *see id.* § 5D1.1(a), the court should be able to consider the violation in determining the conditions, and, within the range prescribed by law, the duration of the term, *see id.* § 5D1.2.

[4] In the case at hand, the district court's imposition of a three-year term of supervised release fell within the applicable sentencing range for a Class C felony. *See id.* § 5D1.2(b)(2) (offense is Class C felony if statutory term is from ten to twenty-five years). Supervised release is mandatory, however, only if a prison sentence of more than one year is imposed, *see id.* § 5D1.1(a); in such cases as the one at hand, where the applicable prison sentence is less than one year, the court has discretion with respect to supervised release, *see id.* § 5D1.1(b). In view of the court's erroneous imposition of a sentence exceeding one year, we cannot know whether the court would have imposed a term of supervised release had it exercised its discretion in the matter. Therefore, on remand, the district court should decide not only where to sentence Smith within the four- to ten-month range but also whether to impose a term of supervised release, and, if the court so decides, its duration. For these purposes, the court may consider Smith's conduct on probation.

III.

For the foregoing reasons, we vacate Smith's sentence and remand the case to the district court for resentencing consistent with this opinion.

VACATED and REMANDED.

4. *See, e.g., supra* note 3; Sentencing Guidelines § 7A1.2(a).



Leilani BEVERLY, Petitioner,

v.

UNITED STATES POSTAL SERVICE, Respondent.

No. 90-3002.

United States Court of Appeals, Federal Circuit.

July 3, 1990.

Supervisory postal worker brought action challenging her discharge following determination that she was absent without leave for one day and that she fraudulently claimed sick leave for that day. The Merit Systems Protection Board affirmed decision upholding discharge, and worker petitioned for review. The Court of Appeals, Jack R. Miller, Senior Circuit Judge, held that: (1) substantial evidence supported determination that worker was absent without leave, despite her denial that she was at football game where she was alleged to have been seen, and (2) removal was war-

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAMBERS OF
GILBERT S. MERRITT
CHIEF JUDGE
SUITE 303 CUSTOMS HOUSE
701 BROADWAY
NASHVILLE, TENNESSEE 37203

October 17, 1990

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

Re: Your Letter of Inquiry of 9/21/90

Dear Billy:

In the last three years we have reviewed many cases under the new Sentencing Guidelines that suggest the need for some revision. I was therefore encouraged by your letter of September 21, 1990, in which you asked for my top three guideline sections or policies that I believe need reconsideration. The Commission needs to clarify the standard of review that appellate courts should apply to departure cases, should revise the relevant conduct provisions of section 1B1.3, and should encourage judges to interpret and apply the Guidelines in light of constitutional provisions regarding procedure.

First, it has never been clear what standard of review an appellate court should apply in downward departure cases. Because appellate courts in this country have never had any sentencing cases, we have no common law principles of sentencing to which we can refer for guidance. Some judges think that the decision to depart from the Guidelines is a decision of law and should be reviewed *de novo* like other issues of law. Other judges, including myself, believe that a much more deferential standard should apply. For an example, see my opinion in *United States v. Brewer*, 899 F.2d 503, 511 (6th Cir. 1990). Regardless of which standard of review should apply, standards of review need to be stated.

Second, I believe that the Commission should limit the relevant conduct provisions of the Guidelines severely. They leave the trial judge no discretion. The Guidelines require a sentencing court to increase the base offense level for offenses not included in the indictment but admitted by the defendant or introduced by the government and proved by hearsay. Cases often arise in which imprisonment is doubled or tripled. The application of these provisions raises serious due process problems as defendants are sent to jail for crimes that they were never indicted for or convicted of. This undermines principles of notice and fairness. I have elaborated on these reasons in a dissenting opinion I wrote in *United States v. Miller*, 910 F.2d 1321, 1329 (6th Cir. 1990). If these provisions are not amended, the real indictment in each case will continue to be made up at the probation officer's desk -- a policy hard to square with principles of notices and due process.

Finally, I think that the Commission should recognize that some constitutional problems will arise under the Guidelines and should therefore encourage sentencing courts to weed them out. Recently, for example, Judge Arnold of the Eighth Circuit wrote a compelling and persuasive opinion addressing a problem under the Confrontation Clause. *United States v. Fortier*, 911 F.2d 100 (8th Cir. 1990). His case was by no means unique. Judges have focused so narrowly on the sometimes difficult, technical application of these rules that they have forgotten the constitutional framework in which the rules must be applied.

Sincerely,

Gilbert S. Merritt
Chief Judge

slp

United States District Court
Southern District of Ohio
801 U.S. Post Office & Courthouse
Cincinnati, Ohio 45202

Chambers of
Carl B. Rubin
District Judge

October 12, 1990

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

Dear Judge Wilkins:

Thank you for your letter of SEptember 27th and an opportunity to comment upon the Sentencing Guidelines. It is my opinion that they are working extremely well. There have been very few instances where the guideline sentence differs significantly from a sentence that I would have imposed in the absence of the Guidelines.

I do want to comment on a matter of some significance. There is a growing acceptance by the various circuit courts of the use of "relevant conduct" to be used as an enhancement of sentence. The cases seem to hold that relevant conduct need be proved only by preponderance of evidence. I am troubled by this notion that a person can be restrained of his liberty by a preponderance of the evidence. If a sentence is enhanced in this fashion, the prison walls will be no lower, nor will confinement be any less rigorous for the time that is spent where proof was required of a preponderance than the time that will be spent where proof beyond a reasonable doubt was required.

Very sincerely yours,

Carl B. Rubin
United States District Judge

United States District Court
District of Nevada

Chambers of
Edward C. Reed, Jr.
Chief Judge

300 Booth Street, Suite 5147
Reno, Nevada 89509

October 24, 1990

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

Attention: Communications Director

Dear Sir:

The idea of amending the guidelines and the subsidiary policy statements, etc., on an annual basis is not a good idea. Repeated amendments make the guidelines difficult to administer. Cases interpreting the guidelines may be quickly mooted by modifications; crimes committed in different years may be subject to different guidelines; and crimes which overlap several years become difficult to peg into the system.

Even though the guidelines may indicate that those in effect at the time of sentencing should be applied, it does not appear that the jurisprudence will permit that unless the most recently adopted guideline is more lenient than the previous guideline.

I urge the Commission to proceed carefully and to amend the guidelines only when and where needed.

Sincerely yours,

Edward C. Reed

Edward C. Reed, Jr.
Chief Judge

UNITED STATES COURT OF APPEALS
For the Third Circuit

Chambers of
MORTON I. GREENBERG
Circuit Judge

United States Courthouse
402 East State Street
Trenton, New Jersey 08608

September 25, 1990

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

Dear Judge Wilkins:

I am in receipt of your letter of September 12, 1990, regarding the sentencing guidelines. In your letter you ask that I give the benefits of my thoughts on the top three guideline section or policy statements needing review, amendment or clarification.

As it happens I have had occasion to write a number of guideline opinions which have been published. But I cannot recall seeing any section that I thought should be changed. When I was sworn in as a circuit judge in June 1987 and became aware of the guidelines in a more particularized way than I had been previously, I thought that their implementation would cause great difficulties. I predicated this in part on my experience as a judge on the Appellate Division of the Superior Court of New Jersey. On that court I regularly heard sentencing appeals as New Jersey allows appeals as of right in any case from sentences and at least when I was on that bench there were very many appeals.

But insofar as I can see the guidelines have worked very well and have not led to the mass of appeals I expected. I thought there would be numerous arguments over the basic range calculations but this seems not to have happened. I attribute this in large part to the fact that the guidelines are quite clear, particularly for a pioneering effort, and the presentence reports have been excellent. Thus, I have no recommendations to make. But you are to be congratulated on the fine job on them. Perhaps other judges will be of more help to you.

Sincerely yours,

Morton I. Greenberg,
United States Circuit Judge

UNITED STATES DISTRICT COURT

WESTERN, NORTHERN AND EASTERN DISTRICTS OF OKLAHOMA

CHAMBERS OF
DAVID L. RUSSELL
JUDGE

OKLAHOMA CITY 73102

October 16, 1990

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

Attention: Communications Director

To Whom It May Concern:

Judge Wilkins has written inquiring about any suggestions that judges may have about the guidelines.

The biggest problem I have had, as well as the Tenth Circuit, has been what to use as a guideline when you choose to depart upwards. This is particularly acute when you get past a criminal history category six. I suggest that after category six it should be left to the discretion of the judge within the statutory maximum.

Thank you for your inquiry.

Sincerely,

David L. Russell

DAVID L. RUSSELL
United States District Judge

DLR:ab

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
P.O. BOX 2-AD
RICHMOND, VIRGINIA 23205
(804) 643-7171

CHAMBERS OF
HON. ROBERT R. MERHIGE, JR.
SENIOR UNITED STATES DISTRICT JUDGE

October 19, 1990

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

Dear Billy:

I apologize for my delay in responding to your letter of September 21 soliciting my thoughts on the Guidelines sections or policy statements that I believe need review, amendment or clarification.

I preface my suggestions by pointing out that many, if not most, of the firearms violations in this district are prosecuted under 18 U.S.C. § 922(a)(6) -- in short, dealing with the making of false and factitious statements to a dealer and the acquisition of firearms. We frequently have seen defendants who have either attempted to or successfully purchased firearms locally to be sold out of state (usually New York City). There is no doubt in my mind that many of these firearms that come into the hands of such people end up in the major urban areas of the country. Sections 2K.1 and 2K.2 are the specific guidelines for this type of misbehavior. My understanding is that if a defendant purchases as many as 49 firearms in violation of 18 U.S.C. § 922(a)(6), his offense level would be an 11. Depending on his criminal history category, his guideline range could be as low as 8-14 months. If a defendant purchases 50 or more firearms, his offense level is increased only by 1. If he or she accepts responsibility for his or her offense behavior, the likelihood is that there would be a reduction of 2 points, resulting in a range of 4-10 months. Needless to say, a great deal would depend on the criminal history category of the defendant. My own experience is that most of the defendants that I have seen in this regard either tend to be first-time offenders, or have minor prior records. I suspect they are simply sent down here by others with false identification.

If a defendant purchases as many as 49 firearms in violation of 18 U.S.C. § 922(a)(6), his base offense level would be 6, which, because of the number of firearms, would be increased by 5, for a total offense level of 11. Depending on his criminal history category, his guideline range could be as low as 8-14 months.

Frankly, I think sending this number of guns to an urban area is an offense which warrants a very substantial term of imprisonment. Indeed, if a defendant purchases 50 or more firearms, his offense level would be increased only by 1. Couple that with the fact that if a defendant accepts responsibility for his offense behavior, that same 8-14 range would be 4-10 months, by virtue of reducing the offense level by 2 points.

My suggestion then is that we do not need to do any more to increase the base offense level in §§ 2K2.1 and 2K2.2. In addition, I would suggest a change in § 2K2.2(b)(1) to reflect a substantial increase concerning the number of firearms. More succinctly, I think anyone who purchases 50 or more guns are preparing to start their own war and warrants a very severe term of incarceration.

The Supreme Court's decision in Hughey v. United States, as I understand it, precludes the ordering of restitution for any offense of which the defendant has not been convicted. You may be assured that plea bargains in the future will result in the dismissal of counts which ordinarily would carry a burden of a high financial restitution. This case leads me to some concern reference Guideline § 1B1.3 dealing with relevant conduct. I suppose, in light of the fact that I have no solution to my concern, and perhaps it would have been better to have mentioned it, but the relevant conduct guidelines, which establishes the parameters for what has to be considered, is a source of much time-consuming argument between the prosecutor and defense counsel. Regardless of the correctness of the arguments, you may be assured that a great deal of time will be spent listening to arguments to the effect that in light of Huey, potential punishment should be limited premised on relevant conduct in the counts of conviction only.

Finally, I am running into difficulties with § 4A1.2 dealing with the computation of criminal history. The newest tactic in this area, when the defendant has been convicted by a state court as well as a federal court, is to delay the state sentence as long as possible in order to have the federal sentence first to avoid it being counted in the computation of criminal history. This could all be avoided if § 4A1.1 dealt not with sentencing, but with convictions, in which event § 4A1.2(a)(b)(c) could all deal solely with convictions as distinguished from sentences.

I am afraid none of this will be of much help, Billy, and it may be that much of my concerns could be alleviated by sentencing above the guideline range which, frankly, I have never done, nor indeed have I sentenced below the guideline range.

I know my comments are going to destroy my reputation for being a bleeding heart (undeserved, in my opinion), but I do think we should seriously consider that further study needs to be

conducted to the end that we consider guidelines more in line with the statutory maximums.

With warm personal regards, I am

Respectfully,

Robert R. Merhige, Jr.
United States District Judge

PCKL. 72/91

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

POST OFFICE BOX 2143

WILMINGTON, NORTH CAROLINA 28402

JAMES C. FOX
CHIEF JUDGE

TELEPHONE: (919) 343-4738

October 17, 1990

Mr. Paul Martin, Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Martin:

In response to Judge Wilkins' letter of September 12, 1990, soliciting comments on the top three guideline sections or policy statements needing review, amendment or verification, I offer the following comments.

1. Guideline § 4A1.2, Note 6, should be amended to preclude a defendant's collateral attack on the constitutional validity of convictions in state and federal courts. The defendant has had his day in court in regard thereto. Pragmatically, the existent commentary encourages debate of little or no value. Legally, it is of questionable foundation. See Judge Wilkinson's dissent, U.S.A. v. Jones, 907 F.2d 456 (4th Cir. 1990).

2. A long period of time between the date the offense was concluded and the date of conviction, coupled with the court's determination that during such period the defendant has exhibited self-rehabilitation, should be a recognized basis for either a reduction of offense level or a downward departure.

3. The commentary applicable to downward departures for substantial assistance to authorities (§ 5K1.1) should contain a norm, or, alternatively, a suggested maximum. The judge's discretion should remain unfettered in order to properly respond to each individual situation. Nevertheless, some guidance would be appropriate.

4. § 5K2.13, downward departure by reason of diminished capacity, is too vague (except in isolated cases) to be of rational application. For example, diminished mental capacity may arise by reason of a combination of congenital, emotional (stressful situations) and physical (pain or legal depressant) reasons. It is a judgment call the reasons for which often cannot be adequately articulated.

I hope the foregoing comments are of some value.

Sincerely yours,

James C. Fox

James C. Fox

JCF:jy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

CHAMBERS OF
HAROLD D. VIETOR
CHIEF JUDGE
UNITED STATES COURTHOUSE
EAST FIRST AND WALNUT
DES MOINES, IOWA 50309

October 22, 1990

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

Attention: Communications Director

I share the views expressed by Chief Judge G. Thomas Eisele in his October 9, 1990, letter to Judge Wilkins.

I have another point to make, and in this respect I suspect that mine is a voice in the wilderness. I think the two point reduction for acceptance of responsibility is fundamentally unfair. Although I do not have the figures at hand, I am sure that the vast majority of defendants who plead guilty receive a two point reduction and the vast majority of those who go to trial do not receive the two point reduction. The practical effect is that most defendants who exercise their constitutional right to go to trial are punished for doing so.

I fully agree with the comments concerning mandatory minimum sentences made by Judge Wilkins in his June 29, 1990, letter to Congressmen Brooks and Fish.

Sincerely,

Harold D. Vietor

PCRT -74/91

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
811 GRAND AVENUE
KANSAS CITY, MISSOURI 64106

Chambers of
SCOTT O. WRIGHT
District Judge

FTS 867-5012
(816) 426-5012

October 18, 1990

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

Dear Judge Wilkins:

In conjunction with the input from our Chief Probation Officer, Lewis D. Frazier, I would like to make the following suggestions for improvements in the Sentencing Guidelines:

(1) Urge the Sentencing Commission to continue to support a repeal of all mandatory minimum sentencing statutes. The concept of mandatory minimums is contrary to an overall guideline scheme and often works at opposite purposes with it. The mandatory minimums also create disparity as a result of charging decisions and plea bargain decisions by the prosecutors. The Guidelines themselves are sufficiently "tough" without the necessity of the mandatory minimum and mandatory consecutive sentences;

(2) There should be more flexibility in the Guidelines themselves that would permit more or greater latitude by the sentencing judge who is in the best position to apply the Guidelines and determine an appropriate sentence;

(3) Increase the number of offense levels, or "zones," wherein outright probation is an option. At the current time, outright probation is permissible only when the guideline range is zero to six. I would suggest that outright probation be considered an option in anything where the top of the guideline range was 12 or below;

(4) Permit the Court to have an option of changing the minimum requirement for imprisonment in the new "split" sentence from one-half the minimum term to at least one month in those options described at 5C1.1(c)(3), and (d)(2);

(5) In reference to the acceptance of responsibility adjustment, permit the Court to employ a sliding scale of two to five levels of reduction, according to certain suggested standards by the Sentencing Commission, such as an automatic two-level adjustment for just entering a plea of guilty or nolo to a greater reduction for an early, voluntary termination of one's criminal conduct, restitution having been made by the time of sentencing, etc.; and

(6) Departures for substantial assistance to authorities, 5K1.1. At the present time, the Guidelines make very brief mention of what factors should go into the determination for this section to be employed. In reality, there are varying degrees of "cooperation," and since it takes a motion by the government for the Court to depart on this basis, the Commission could promulgate certain standards concerning how much of a departure one should be given, e.g., one-fifth, one-fourth, one-half, two-thirds, etc. At the present time, this is a "gray area" with very little guidance to the Court.

I want you to know that I appreciate the work you and your committee do on this Sentencing Commission. I know that it is a large task. Since I am convinced we are going to have the Sentencing Guidelines for a long time, I think we should make them as fair and practical as possible, and I believe that your committee is trying to do that. I, for one, appreciate it.

Yours very truly,

Scott O. Wright
United States District Judge

SOW:pw

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
113 ST. JOSEPH STREET
MOBILE, ALABAMA 36602

RICHARD W. VOLLMER, JR.
DISTRICT JUDGE

(205) 694-4545

October 12, 1990

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

Attn: Communications Director

Gentlemen:

I have insufficient experience since coming on the bench to provide the Commission with any significant input concerning guideline sentencing.

I would agree with the Commission's position urging Congress not to enact additional mandatory minimum sentences.

It appears to the writer that some other sentencing options need to be made available or our federal prisons will be unable to house the increasing number of prisoners being detained under the guideline sentencing provisions.

Very truly yours,

Richard W. Vollmer, Jr.

RWVjr/bjs

PCRI-76/91

United States District Court
District of Kansas
401 North Market
Wichita, Kansas 67202

Chambers of
Sam A. Crow, Judge

October 11, 1990

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

Attention: Communications Director

Dear Communications Director:

September 24th I received a letter from William W. Wilkins, Jr., Chairman of the United States Sentencing Commission, asking for our comments as to the "top three guideline sections or policy statements you believe need review, amendment or clarification..."

Enclosed is a copy of a memorandum which has been provided to me by Arlo D. Lindsey, Supervising Probation Officer, here in Kansas.

I hope this will be of some benefit to you.

Yours very truly,

Sam A. Crow
U.S. District Judge

SAC:bjr

Enclosure

cc: Arlo D. Lindsey

UNITED STATES GOVERNMENT

memorandum

DATE: October 9, 1990

REPLY TO ATTN OF: Arlo D. Lindsey, Supervising U.S. Probation Officer

SUBJECT: **SENTENCING GUIDELINE**

RECEIVED
OCT 9 1990
U. S. District Judge
Sam A. Crow

TO: The Honorable Sam A. Crow
U.S. District Court Judge

Reference is made to your inquiry regarding William Wilkens September 7, 1990 letter concerning the sentencing guidelines. I offer the following thoughts/concerns:

With regard to Acceptance of Responsibility 3E1.1. As you know, many courts are allowing the two level reduction for acceptance of responsibility simply by virtue of the defendant's plea of guilty. The guideline clearly states that the defendant must demonstrate a recognition and affirmative acceptance of personal responsibility for his criminal conduct to receive the two level reduction. We often interview defendants who do not clearly meet the criteria set out in the commentary which would include a) voluntary termination or withdrawal from criminal conduct or association; b) voluntary payment of restitution prior to adjudication of guilty; c) voluntary and truthful admission to authorities of involvement in the offense and related conduct; d) voluntary surrender to authorities promptly after commission of the offense; e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense; f) voluntary resignation from the office or position held during the commission of the offense; and g) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility. To the contrary, we often find that the defendant does not clearly accept responsibility stating that he was forced into criminal conduct, blaming others for his involvement, being entrapped by agents, etc., etc. It is suggested that this guideline might be divided into two areas whereby a one level reduction could be applied for a guilty plea and an additional level, or levels might be applied for those defendants who do take one or more of the affirmative steps listed in the commentary or for other affirmative actions such as voluntary participation in a drug treatment program, etc. As it currently stands those persons who make an affirmative acceptance and take those steps noted above to demonstrate their acceptance receive the same two level reduction for acceptance as does the one who enters a plea of guilty but does nothing more than that and even, during the presentence investigation, tends to shift blame to others and really not demonstrate a sincere contrition or acceptance of responsibility. In other words, an active participant in those affirmative steps might receive a greater deduction than a person who simply enters a plea of guilty.

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

☆ U. S. GOVERNMENT PRINTING OFFICE : 1982 O - 361-526 (7366)

Another concern I have is with the Criminal History Category with regard to juvenile adjudications. As you know, points are added for each prior sentence of imprisonment and for each prior sentence, including juvenile sentences. Nationally there is wide diversity in the availability of juvenile records. In many other states juvenile adjudications and records are destroyed or are not disclosed. From a national perspective then there is a punishment disparity between those courts who can obtain juvenile records and those who cannot obtain them, by virtue of the application of criminal history points for juvenile adjudications. Kansas, for example, does have a good juvenile system for the most part and records are generally readily obtainable. Many other states, however, either destroy their records or by state law refuse to divulge them. Therefore there is the possibility that those defendants who commit juvenile offenses in states where records are not released would receive a less harsh sentence than a defendant might who committed an offense where the records are made available. This of course would allow some disparity to continue. Unfortunately, I have no solution to offer.

Lastly, I would express my concern regarding the U.S. Attorney's Offices' role in a sentencing process. In some cases the courts are accepting every aspect of the plea agreement, in effect, allowing the U.S. Attorney and the defense attorney to set the sentence. I recognize the necessity of plea bargaining but there have been occasions when the plea bargain contains elements that are directly opposed to the guidelines. For example when the U.S. Attorney agrees not to consider additional counts of drug distribution in setting the offense level, agreeing that weapons found in the defendant's home were clearly not a part of the offense, etc. Again, I bring these concerns to your attention but cannot offer a solution.

ADL/cs

UNITED STATES DISTRICT COURT
District of Alaska
222 West 7th Avenue - No. 54
Anchorage, Alaska 99513-7545

H. Russel Holland
Chief Judge

October 16, 1990

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

Re: Review of Sentencing Commission
Guidelines & Policy Statements

Dear Judge Wilkins:

I am in receipt of your letter of September 21, 1990, soliciting the views of other judges with respect to guideline sections and policy statements which may need review, amendment, or clarification. In fact, the aspects of guideline sentencing which I view as being most in need of revision or amendment are in areas over which the Commission has no control: statutory, mandatory, minimum sentences, and the mandatory (as opposed to discretionary) use of the guidelines. In both of these areas, it is my opinion that Congress has unreasonably injected itself into the art of judging, and in particular the matter of determining just sentences. The trend toward mandatory minimum sentences is certainly understandable, but in my view it is an overreaction to a serious problem.

More to the point of your subject letter, and despite my view that guidelines should be discretionary rather than mandatory, I am finding the application of guidelines quite workable in almost all cases which have come before me. There is one area which does come to mind in which I have repeatedly faced a conflict between my personal evaluation of how a case should be treated and the dictates of the guidelines. This has to do with Part H of Section 5--specific offender characteristics. Part H of Section 5 in substance provides that age, education, and vocational skills, mental and emotional conditions, physical conditions, employment record, and family ties, etc., "are not ordinarily relevant in determining whether a sentence should be outside the guidelines." Several of the specific guidelines, of

course, have variations of this theme. I frequently find myself feeling strongly that these kinds of considerations should be a factor in whether or not to depart from guidelines. It is my belief that historically these considerations were a factor in sentencing. I believe they were appropriately so used, and I believe the retreat from this practice was a philosophical mistake on the part of the Commission.

If I may divert your attention to a mundane, administrative matter, I would hope that any future, official publication of the Guidelines Manual would take the looseleaf form of the original manual rather than the paperback (bound) form of the present manual. I find the looseleaf version far easier to use. Also, an index in the official publication would be helpful for locating items to which one does not frequently refer.

Good luck on your endeavors.

Sincerely yours,

H. Russel Holland

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

H. E. Widener, Jr.
Circuit Judge

October 8, 1990

Judge Wilkins

Re: United States Sentencing Commission

Dear Billy:

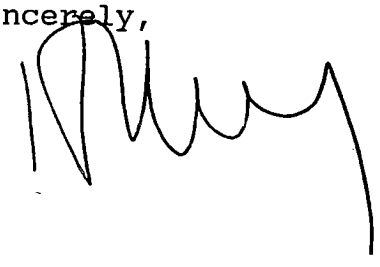
I have your letter of October 1st with respect to the Sentencing Commission's work.

I happen to be one of the minority who thinks that the guidelines have worked out better than I had anticipated and that the Sentencing Commission, all in all, has done a pretty good job.

My principal objection at the time the system was inaugurated was that it did not give enough, if any, leeway to account for local conditions, and I have been looking at the decisions to ascertain if that could ever be undone. I see no solution to the problem, however, which comes to mind at this time, so I will wait.

I note the Sentencing Commission opposed Congressional enactment of minimum sentences. From the outside looking in, this might appear to some to be an objection to discretionary jurisdiction which Congress has a right to exercise. What I have said about Congressional enactment of minimum sentences, however, should not detract from the fact that I think you are doing a good job.

Sincerely,



UNITED STATES DISTRICT COURT

Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois
60604

Chambers of
George W. Lindberg
District Judge

(312) 435-5355
FTS 387-5355

October 4, 1990

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

Dear Judge Wilkins:

Thank you for the opportunity to comment outlined in your letter of September 21, 1990. Although I participate in our weekly Sentencing Council reviews of presentence reports for sentencing scheduled for the week, I don't feel I have had enough exposure to make meaningful comments; I have sentenced less than 50 defendants since my induction in November 1989.

Nonetheless, I support the general guideline objectives. If anything, our Sentencing Council discussions reflect a wide disparity of views among judges even within the ranges. It is obvious rational restraints are desirable if a reasonable degree of fairness is to be achieved.

Congratulations on your accomplishments and good luck in your future efforts toward a laudable goal.

Sincerely,

George W. Lindberg

GWL/dma

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
219 FEDERAL BUILDING AND U.S. COURTHOUSE
DETROIT, MICHIGAN 48226

CHAMBERS OF
AVERN COHN
DISTRICT JUDGE

Tuesday

Dear Judge Wilkins:

Your letter to Congressmen Brooks + Fish is the best argument I've read on mandatory minimum sentences & the evils associated with them. I hope that the lawyers listen. I also hope your Commission in its future work continues to take an enlightened & open particular view of the need for some discretion in sentencing.

Best regards.

Avern Cohn

United States District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Chambers of
John F. Grady
[redacted] Judge

Telephone
312-435-5600
FTS 387-5600

September 28, 1990

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

Dear Billy:

I have been out of the sentencing business ever since the guidelines took effect, due to the fact that in this district the chief judge does not handle criminal cases. I am, therefore, not able to offer any informed suggestions in response to your letter of September 12. I ceased being chief judge on July 1, and will begin working with the guidelines in the next few months. The next time you call for comments I hope to have enough experience to offer something useful.

I am impressed by the statement in your letter that the rate of guilty pleas has not diminished under the guidelines. The anecdotal evidence I get on this is remarkably inconsistent. Defense attorneys have told me, with considerable relish, that there is no longer any incentive to plead and that they take everything to trial. Some of my colleagues have told me that that is their impression of what is happening. Other judges of this district have told me that they take just as many pleas now as they did before the guidelines. I am interested to see what my experience will be.

With best regards.

Sincerely,

John F. Grady
Judge

sas

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 626-8500
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William W. Wilkins, Jr. Chairman
Julie E. Carnes
Helen G. Corrothers
Michael S. Gelacak
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A. David Mazzone
Ilene H. Nagel
Benjamin F. Baer (ex officio)
Paul L Maloney (ex officio)

September 7, 1990

Honorable Peter Beer
United States District Court
500 CAMP ST RM C-322
New Orleans, LA 70130-3316

Dear ~~Judge Beer~~ Peter :

This November will mark three years since the new system of guideline sentencing took effect. During this time, compliance has held steady, with the latest nationwide figures showing judges imposing guideline sentences in 82.0 percent of the cases, departing downward upon government motions for substantial assistance to authorities in 5.8 percent, departing downward for other reasons in another 8.7 percent, and departing upward in 3.5 percent. Significantly, the rate at which defendants plead guilty has remained essentially unchanged under the guidelines when compared with pre-guideline sentencing practices.

Nonetheless, while the Commission has achieved its initial goal of drafting and implementing workable guidelines, we need your assistance as we continue a methodical review to improve this new sentencing system. Our past efforts to improve the guidelines have significantly benefitted from judges who apply and interpret the guidelines on a regular basis. In this spirit, the Commission again solicits your advice.

The Commission requests that you give us the benefit of your thoughts on the top three guideline sections or policy statements you believe need review, amendment, or clarification (e.g., increase or reduce an offense level, add a specific offense characteristic, clarify language). Importantly, we urge that this be followed by the specific language you would offer for the amendment to help the Commission focus on those priority areas you have identified.

Please send your comments to the United States Sentencing Commission, 1331 Pennsylvania Avenue, N.W., Suite 1400, Washington, D.C. 20004, Attention: Communications Director. If you have questions, please contact Paul Martin, Communications Director, or John Steer, General Counsel, at (202) 626-8500.

Dear Billy —
I just want to say that you've done a wonderful job — often under tough circumstances and I'm proud of your staff and of you!
As ever,
Pete

The Commission plans to take a measured approach when amending the guidelines. Working groups have already been formed to focus on specific guideline application issues, such as departures, acceptance of responsibility, and criminal history. A notice soliciting comment and suggestions was published in the July 24, 1990, Federal Register and outreach is underway to the private bar and other interested groups. Additionally, the Commission continues to work closely with federal defenders, the Department of Justice, the federal probation system, and representatives of the Commission's Practitioners Advisory Group of defense attorneys.

You may also be interested to know that the Commission recently unanimously voted to urge Congress not to enact additional mandatory minimum sentences, arguing that this legislative approach is unnecessary and inconsistent with a guideline sentencing system. Appended for your information is a copy of the Commission's letter sent to the Senate and House Judiciary Committees.

Finally, within the next few months the Commission will forward to you policy statements pertaining to revocation of probation and supervised release. The Commission elected to issue non-binding policy statements at this time in order to have the benefit of your experience before issuing guidelines.

Thank you for helping to improve the sentencing guidelines. As always, please contact the Commission if we can be of assistance to you.

With highest personal regards, I am

Sincerely,

Billy Wilkins

William W. Wilkins, Jr.
Chairman

Enclosure

PCRL 11/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 5 1990

OFFICE OF ENFORCEMENT

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

Dear Judge Wilkins:

The United States Sentencing Commission has requested comments and recommendations from the Environmental Protection Agency (EPA) concerning the drafting of proposed amendments to enhance the effectiveness of Part Q of the Sentencing Guidelines, which governs environmental offenses. In response, the Office of Enforcement established a Sentencing Guidelines Workgroup consisting of counsel from this Office and five Regional Criminal Enforcement Counsels, who have most directly participated in the application of Part Q to environmental crimes prosecuted within their Regions. The Workgroup has met to consider previous and current recommendations and to assemble proposed amendments.

In accomplishing this task, the Workgroup also consulted with the Environment and Natural Resources Division of the Department of Justice. Accordingly, the EPA is submitting the enclosed recommendations to the Commission for its consideration. I am certain that the close working relationship that has evolved between the EPA and the Commission will facilitate producing a set of amendments that can be strongly endorsed by both the Commission and EPA.

EPA's proposed amendments address several issues:

(1) The two separate guidelines for mishandling of hazardous and non-hazardous pollutants would be rendered unnecessary by making the mishandling of a hazardous pollutant a specific offense characteristic under one guideline. (Part 2Q1.2(b)(4)) This would not alter the penalty based on the sentencing table since a hazardous pollutant would still cause an increase of two offense levels.

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Pesticides should not be included within this specific offense characteristic, since the FIFRA definition of a pesticide can include a non-toxic substance (i.e., water) provided it is a killing agent for any pest, 7 U.S.C. § 136(u). If a specific chemical in a pesticide is hazardous, it would be a CERCLA hazardous substance or CWA toxic pollutant, and a pesticide, if disposed, may be a RCRA hazardous waste.

(2) It is the Agency's judgment that the integrity violations, which imperil the Government's compliance monitoring functions and can result in serious endangerment to public health and the environment, are sufficiently different in their nature from actual mishandling violations as to warrant a separate guideline, rather than being an "add-on" as a "simple record keeping" specific offense characteristic to Parts 2Q1.2 and 2Q1.3.

Under a separate guideline for an integrity violation, if serious consequences flow from an integrity violation, then a more severe penalty will result, because of the specific offense characteristics in proposed new Part 2Q1.3. For instance, a failure to report health and safety data as required by TSCA, 15 U.S.C. § 2607, can result, when preventative measures are thereby avoided, in substantial harm to persons. A failure to report a release of a hazardous substance as required by CERCLA, 42 U.S.C. § 9603(a), can result in severe and widespread environmental harm by preventing an appropriate and prompt response to the release.

(3) It was concluded that Part Q presently does not adequately address the degrees of environmental economic harm that can result from an offense. Corresponding increases in offense levels are proposed throughout. (Part 2Q1.1, 2, and 3) The knowing endangerment guideline (Part 2Q1.1) also needs several specific offense characteristics which address any resulting damages/harm that can be associated with the commission of such an offense, because another substantive environmental violation may not necessarily accompany a knowing endangerment conviction.

(4) Likewise, the Guidelines now only provide for one, six-level increase for ongoing, repetitive offenses. Stepped offense-level increases are proposed, depending on the duration of the offense. (Part 2Q1.1, 2, and 3)

(5) Violations of a condition of a permit are encompassed in the substantive offense itself, and it is somewhat redundant for this to be a separate specific offense characteristic. The failure to obtain a permit or license, though, definitely should be a specific offense characteristic since this penalizes more severely those who choose to operate entirely outside the regulatory system. (Part 2Q1.2(b)(6))

(6) Criminal violations of TSCA and FIFRA, unfortunately, remain misdemeanor violations. The only way to account for this anomaly is to provide a specific departure in offense levels for such violations. (Part 2Q1.2, Application Note 7). Once these statutes are amended to felony levels to be consistent with other environmental criminal provisions, the Guideline can be amended accordingly.

(7) Our proposed amended mishandling-of-pollutant guideline has separate specific offense characteristics for actually causing death/serious bodily injury, and for causing a substantial likelihood of such harm. (Part 2Q.1.2(b)(1) and (2)) These would apply to those situations where such consequences are not knowingly foreseen, but nonetheless are a consequence of the crime.

Thank you for the opportunity to comment on the Sentencing Commission's proposed amendments. We look forward to continuing our close and fruitful relationship with the Commission. Counsel Bruce Bellin (475-9662) of the Office of Criminal Enforcement is available to work with the Commission in further developing proposed amendments for consideration by the Commission and Congress.

Sincerely,

James M. Strock
Assistant Administrator

Enclosure

cc: Richard B. Stewart
Assistant Attorney General, DOJ

Please do not hesitate to let me know at any time if I may be of assistance

Recommended Amendments: Part Q - Environmental Offenses

§2Q1.1. Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances or Other Pollutants.

(a) Base Offense Level: 24.

(b) Specific Offense Characteristics:

(1) If the offense caused damages or involved harm to the environment (including actual or reasonably estimated restoration or clean-up costs) in the amount of:

(A) $50,000 - $250,000, increase by 2 levels;

(B) $250,001 - $1 million, increase by 3 levels;

(C) $1,000,001 - $5 million, increase by 4 levels; or

(D) Over $5 million, increase by 6 levels.

(2) If the offense involved the disposal, discharge, release, or emission of an environmental pollutant that was repeated, ongoing, or continuous for:

(A) 2 - 5 days or repetitions, increase by 1 level;

(B) 6 - 15 days or repetitions, increase by 2 levels;

(C) 16 - 30 days or repetitions, increase by 3 levels; or

(D) More than 30 days or repetitions, increase by 4 levels.

(3) If death results, increase to level 33.

§2Q1.2. Mishandling of Environmental Pollutants

(a) Base Offense Level: 6

(b) Specific Offense Characteristics:

(1) If the offense caused serious bodily injury or death, increase by 10 levels.

(2) If the offense caused a substantial likelihood of death or serious bodily injury, caused an evacuation, or caused a disruption of public services, increase by 6 levels.

(3) If the offense caused damages or involved harm to the environment (including actual or reasonably estimated restoration or clean up costs) in the amount of:

(A) $50,000 - $250,000, increase by 2 levels;

(B) $250,001 - $1 million, increase by 3 levels;

(C) $1,000,001 - $5 million, increase by 4 levels; or

(D) Over $5 million, increase by 6 levels.

(4) If the offense involved the mishandling of a hazardous or toxic substance, increase by 2 levels.

(5) If the offense involved the disposal, discharge, release, or emission of an environmental pollutant that was repeated, ongoing, or continuous for:

(A) 2 - 5 days or repetitions, increase by 1 level;

(B) 6 - 15 days or repetitions, increase by 2 levels;

(C) 16 - 30 days or repetitions, increase by 3 levels; or

(D) More than 30 days or repetitions, increase by 4 levels.

(6) If the offense involved a failure to obtain a permit, license, or consent, or a violation of an international agreement or a failure to have a required manifest, increase by 2 levels.

(7) If the offense resulted in a discharge, emission, or release of an environmental pollutant, increase by 4 levels.

(8) If the offense was committed in violation of an order:

(A) If the order was issued by an administrative agency, increase by 2 levels; and

(B) If the order was issued by a court, increase by 3 levels.

Application Notes Amendments

1. This section applies to offenses which may involve substances designated toxic or hazardous at the time of the offense by statute or regulation. A listing of hazardous and toxic substances in the guidelines would be impractical. Several federal statutes (or regulations promulgated thereunder) list toxic substances, hazardous wastes, and hazardous substances. These lists, such as those of toxic pollutants for which effluent standards are published under the Federal Water Pollution Control Act (e.g., 33 U.S.C. § 1317), as well as the designation of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (e.g., 42 U.S.C. § 9601(14), are revised from time to time. If a substance involved in a violation appears on any of those lists, it shall be considered hazardous or toxic for purposes of applying this guideline.

2. "Disruption of public services" is one basis for an offense level increase under sub-section (b)(2). Examples of such disruptions are sewer system contaminations, which cause publicly-owned sewage treatment works to fail to adequately treat in-coming pollutants, and water pollutant discharges which force the closing of drinking water intakes.

3. Sub-section (b)(6) adds 2 levels for failure to obtain a required permit or license. This includes any equivalent to a permit or license which may be required under a state or local pollution abatement program, for example, for a tie-in to a municipal or regional sewage treatment system. It also applies to the transportation of hazardous wastes without a manifest, to the failure to secure a receiving country's consent for the export of hazardous waste, and to such export in violation of any international agreement.

Sub-section (b)(6) also applies to situations in which an activity can only be carried out legally with a permit or its equivalent, but in which no such permit would be issued for the type of activity involved in the violation. For example, discharges of pollutants into waters of the United States can only be carried out legally in accordance with a permit. See 33 U.S.C. § 131(a), 1319(e) and 1342. However, a permit would not be issued for a person to discharge a tanker load of spent industrial solvents into a river. Similarly, a permit would not be issued for a person to dispose of a load of drums of hazardous wastes by dumping them along a roadside. In any such case, though, the addition of 2 levels under sub-section (b)(6) would apply.

Additionally, sub-section (b)(6) applies to a situation in which a person knowingly transports hazardous wastes to a facility which does not have a permit, in violation of 42 U.S.C. § 6928 (d)(1). Although the transporter may not be responsible for securing a permit for a disposal site, still he is responsible for assuring that a site to which he delivers hazardous wastes is a properly permitted one.

4. Sub-section (b)(3) requires a monetary assessment of community damages and the natural resources harm to the land, fish, birds, plants, wildlife, air, water, ground water, and drinking water. Factors to be considered in making this determination include:

a) the costs necessary for the cleanup or removal of the pollutant or contaminant from the environment, the disposal of the removed material and the taking of such other actions as may be necessary to prevent, minimize, to mitigate damage to the public health or welfare or to the environment, which may otherwise result from the violation;

b) the costs of the interruption or loss of economic livelihood caused by the environmental violation;

c) the costs of evacuation or permanent or temporary relocation of residences and businesses and community facilities caused by the environmental violation;

d) the value of the wildlife, plants, and other natural resources injured or killed by the environmental violation; and

e) the costs of restoration of the natural resources.

5. Sub-section (b)(5) takes into account repetitious, on-going, or continuous environmental violations. The stepped increases depend either upon the number of days of repetition or continuity or upon the number of repetitions themselves, if each repetition could be independently charged under the applicable statute. For an example of a situation in which individual repetitions are taken into account, on a single day a person hauls eight loads of hazardous wastes into nearby woods and dumps them. Each of those loads represents a separate violation under 42 U.S.C. § 6928(d)(2)(A), even though all of them occurred on the same day. Therefore, sub-section (b)(5)(B) would apply and an increase of 2 levels would be added.

6. The increments in sub-section (b)(5) for only up to 30 days. However, environmental laws are particularly susceptible to extended repetitive or continuous violations (e.g., a year's illegal storage of hazardous wastes or months of unpermitted water pollutant discharges, each day of which would be a felony). Therefore, for daily or repetitive violations extending beyond 30 cumulative days an upward departure of up to 4 levels may be warranted.

7. Criminal violations of several environmental statutes, principally the Toxic Substances Control Act, 15 U.S.C. § 2615(b) and the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 1361(b), remain statutory misdemeanors. A downward departure of up to 3 levels may be warranted for these types of convictions.

2Q1.3 Failure to Report, Recordkeeping, Falsification, and Tampering Offenses

(a) Base Offense Level: 6

(b) Specific Offense Characteristics:

(1) If the offense reflected an effort to conceal a substantive environmental offense, release, discharge, or emission of an environmental pollutant, increase by 4 levels.

(2) If the offense caused serious bodily injury or death increase by 10 levels.

(3) If the offense caused a substantial likelihood of death or serious bodily injury, caused an evacuation, or caused a disruption of public services increase by 6 levels.

(4) If the offense caused damages or involved harm to the environment (including actual or reasonably estimated restoration or clean up costs) in the amount of:

(A) $50,000 - $250,000, increase by 2 levels;

(B) $250,001 - $1 million, increase by 3 levels;

(C) $1,000,001 - $5 million, increase by 4 levels; or

(D) Over $5 million, increase by 6 levels.

(5) If the offense involved a hazardous or toxic substance, increase by 2 levels.

(6) If the offense involved more than;

(A) 2 - 5 days or repetitions, increase by one level;

(B) 6 - 15 days or repetitions, increase by 2 levels;

(C) 16 - 30 days or repetitions, increase by 3 levels; or

(D) More than 30 days or repetitions, increase by 4 levels.

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, D.C. 20226

NOV 16 1990

CC-38,342 FE:SRR

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW., Suite 1400
Washington, DC 20004

Dear Judge Wilkins:

This is in response to the request of your staff that we review the sentencing guidelines and make recommendations with respect to possible changes in the guidelines for certain firearm and explosive offenses. The changes recommended in this letter are based on our experience with the guidelines.

Initially, we would express our appreciation to the Commission for the careful consideration it gave to our earlier comments on the guidelines and the improvements in the guidelines which became effective on November 1, 1990. As a result, the proposed new sentencing guidelines on arson and "Armed Career Criminals" will be significantly improved. We also want to thank Commissioner Carnes and the members of your staff for meeting with us on October 12, 1990, to discuss these additional recommendations.

Felons in Possession of Firearms

Under 18 U.S.C. § 922(g), it is generally unlawful for a felon to receive or possess a firearm. In November 1988, Congress increased the maximum penalty for this offense from 5 years to 10 years imprisonment. The current sentencing guideline applicable to this offense in section 2K2.1 provides a base offense level of 12 and requires a decrease to level 6 if the defendant obtained or possessed the firearm solely for lawful sporting purposes or for collection. Effective November 1, 1990, this reduction does not apply to National Firearms Act (NFA) weapons, i.e., machineguns, silencers, destructive devices, or short-barrelled rifles and/or shotguns. In our view, the offense level for felons

who possess firearms and those who have prior convictions for crimes of violence or for controlled substance offenses is too low.

Initially, we would point out that the 1986 amendments to the Gun Control Act of 1968 (18 U.S.C. Chapter 44) significantly decreased the number of felons prohibited by section 922(g) from possessing firearms. Effective November 15, 1986, under 18 U.S.C. § 921(a)(20), a felon who has received an expunction, pardon, set aside, or restoration of civil rights, and is not prohibited by the law of the jurisdiction in which convicted from possessing firearms is no longer prohibited under Federal law from possessing firearms. In addition, under 18 U.S.C. § 925(c), persons prohibited from possessing firearms because of a disabling conviction may apply to ATF for relief from their firearms disabilities. Thus, a section 922(g) offense has become more serious because only individuals not having any of these indicia of rehabilitation are prohibited from possessing firearms.

Because of the insufficient sentences provided for by the guidelines, ATF has experienced difficulty in having individuals prosecuted who possess firearms and who have committed a prior crime of violence or a controlled substance offense. Some United States attorneys are reluctant to expend time and resources to prosecute these cases. Thus, the guidelines should provide an increase in the base offense level to 18. If the defendant has one prior conviction for controlled substance offenses or crimes of violence, the offense level should be increased to 20. If the defendant has two prior convictions for controlled substance offenses or crimes of violence, the offense level should be increased to 22. If the defendant <u>used</u> a firearm or explosive in a prior felony, the offense level should be increased by two levels. If the defendant <u>used</u> a firearm or explosives in two prior felonies, the offense level should be increased by four levels. Finally, there should be a 2-level enhancement if the weapon possessed is an unregistered NFA weapon.

These classes of individuals pose a serious threat to society, yet they do not qualify for sentencing as "career offenders" or as "armed career criminals." Therefore, a significant deterrent to such possession should be

implemented. Enclosure one contains a discussion of cases where defendants with prior violent felonies or controlled substance offenses received minimal sentences.

Furthermore, the decrease in offense level, if the defendant obtained or possessed the firearm solely for lawful sporting purposes or collection, should be eliminated. The fact that the defendant originally acquired the firearm for sporting or collection purposes is immaterial. Rather, the circumstances surrounding the defendant's possession and use of the firearm should be more significant for purposes of sentencing. This would eliminate frivolous arguments such as that raised by the defendant in United States v. Smeathers, 884 F.2d 363 (8th Cir. 1989), who, having fired a rifle throughout his home after a quarrel with his wife, and having been convicted of being a felon in possession of the rifle, argued that his sentence should be reduced because the firearm was obtained for sporting purposes. If the Commission believes that there should be a sentence reduction available in those cases involving "technical" violations of section 922(g), such instances should be limited to persons having firearms for sporting purposes who have no more than one prior felony conviction which was neither a violent felony nor a substance abuse offense.

Furthermore, except for NFA weapons, we do not believe that the "type" of firearm possessed, e.g., handgun, shotgun, or rifle, should be a factor in the guidelines. For your further information, enclosure two includes a breakdown of firearms taken into ATF custody since 1983. While the enclosure might indicate that more handguns are involved in crime than any other type of firearm, we would conclude from our experience that criminals will use any type of firearm that is available. In our view, any felon with a firearm is potentially dangerous. Therefore, the "type" of firearm possessed by a felon should not be a major concern in sentencing.

Engaging in a Firearms Business Without a License

Under 18 U.S.C. § 922(a)(1), it is unlawful to willfully engage in the business of dealing in firearms without a license. Under this section, ATF must prove that the defendant devoted time, attention, and labor to dealing in firearms with the principal objective of livelihood

and profit through the repetitive purchase and resale of firearms. However, a person who makes occasional sales, exchanges or purchases of firearms for the enhancement of a personal collection, or for a hobby, or who sells all or part of his or her personal collection of firearms, would not be engaging in a firearms business. See 18 U.S.C. § 921(a)(20)(C).

The current sentencing guideline applicable to this offense in section 2K2.2 provides a base offense level of 6. If the offense involved distribution of firearms, or possession with intent to distribute, the guideline provides for an increase in the offense level depending on the number of firearms distributed or involved in the violation. In our view, the base level of 6 is too low. Any willful violation of section 922(a)(1) is serious, notwithstanding the number of firearms involved in the violation. As noted above, dealing in firearms without a license is not a "technical violation" since the legitimate gun collector or hobbyist is not subject to this provision. With respect to the enhanced penalties based on the number of firearms illegally distributed, we are unable to make a recommendation for change in the guideline. In our view, the number of firearms involved in the offense would not necessarily indicate the seriousness of the crime. Indeed, a small number of firearms sold to terrorists or members of organized crime may have a greater consequence from a law enforcement standpoint than a larger number of firearms illegally sold to otherwise law-abiding citizens. However, we would recommend an increase in the base level for the offense from 6 to 12. In addition, we would recommend that "Commentary 2" accompanying this guideline allow for an upward departure if the number of weapons involved exceeds 25 rather than 50. The distribution of 25 or more firearms clearly indicates a trafficker in firearms warranting an increase in the sentencing level.

Receipt of Explosives by Felons

Under 18 U.S.C. § 842(i)(1), it is generally unlawful for any person who has been convicted of a felony to receive explosives. Under section 2K1.3 of the guidelines, the base offense level for unlawfully receiving explosives is 6 and if the defendant is prohibited under section 842(i) from receiving explosives, the offense level is increased 10

levels to 16. We recommend an increase in the offense level to 18 for individuals who receive explosives and who have been convicted of a crime of violence or a controlled substance offense. If the defendant has two prior convictions for controlled substance offenses or crimes of violence, the offense level should be increased to 20. If the defendant used a firearm or explosive in the prior felony, the offense level should be increased by two levels. If the defendant used a firearm or explosive in two prior offenses the offense level should be increased by four levels. Similar to firearms violators, these individuals pose a serious threat but do not qualify for sentencing as "career offenders" or as "armed career criminals."

Unlawfully Trafficking in Explosives

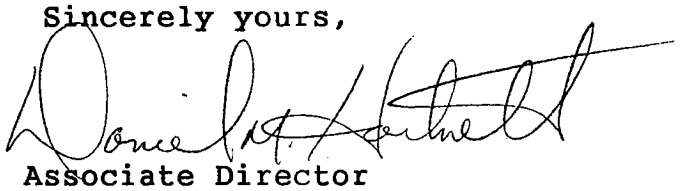
Under 18 U.S.C. § 842(a)(1), it is unlawful to engage in the business of manufacturing, importing or dealing in explosives without a license. The current sentencing guideline for this offense in section 2K1.3 provides a base level of 6. While increases in offense levels are provided in certain circumstances, e.g., dealing in stolen explosives or sales to felons, the base level of 6 is too low for the serious offense of illegally engaging in the business of an explosives manufacturer, importer, or dealer. In one case, for example, an individual pled guilty to dealing in explosives without a license (M-80's and M-200's) and was sentenced to probation for 3 years and fined $1,420.

The clandestine manufacture of explosives, including illegal fireworks, poses a serious threat to public safety, particularly to children. Increasing the base level to 12 would comport with the seriousness of the offense. In addition, consideration might be given to an enhancement of the level based upon the quantity of explosives involved. For example, the sentence could be increased by two levels for every 50 pounds of explosives involved in the violation. Thus, an illegal fireworks manufacturer in possession of 200 pounds of explosives could be subject to sentencing at a base level of 12 and an additional enhancement of 8 levels based on the amount of explosives.

Honorable William W. Wilkins, Jr.

We appreciate this opportunity to comment on the sentencing guidelines. If additional information is desired, please let us know.

Sincerely yours,



Associate Director
(Law Enforcement)

Enclosures

On April 13, 1990, Anthony Watkins, a three-time convicted felon and member of the Bloods Street Gang, was found in possession of two handguns and a small quantity of marijuana. Watkins was subsequently indicted and pled guilty to one count of 18 U.S.C. 922(g)(1), the title 21 charges for the marijuana were dismissed. Watkins was sentenced in Tucson, Arizona, to 12 months of incarceration. The sentencing guidelines for Watkins were in the vicinity of 18 to 24 months.

In April 1989, Delbert Lee Thorne, who had two prior burglary convictions, was found in possession of three long guns. Subsequently, Thorne pled guilty to one count of 18 U.S.C. section 922(g)(1) in the Western Judicial District of Virginia. Originally, Thorne was sentenced to 6 months of incarceration and 3 years of probation. The U.S. attorney's office appealed the sentence and Thorne was resentenced to 21 months of incarceration and 2 years of supervised probation.

Recently, Raoul Tanguma, a twice-convicted felon on narcotics charges, pled guilty to one count of 18 U.S.C. section 922(g)(1). Tanguma was found in possession of two firearms while out on parole. Tanguma was sentenced to 14 months of incarceration. The presiding district court judge stated that he wished he could have given Tanguma additional jail time.

In 1987, Eluid Guerra was indicted by a Federal grand jury for violation of 18 U.S.C. section 922(g)(1). A short time later, Guerra became a fugitive. In August 1989, Guerra was rearrested in Texas. Guerra has two prior Federal convictions for narcotics violations. Guerra pled guilty and received 12 months of incarceration.

On February 17, 1989, Roberto Valles Narvaiz, a four-time convicted felon, pled guilty to one count of 18 U.S.C. section 922(g)(1) and was sentenced to 12 months of incarceration and 3 years of supervised probation. Narvaiz' convictions included three narcotics convictions and a theft conviction.

FIREARMS ENFORCEMENT PROGRAM

FY	DEF.	FELONY	NARC.	T/GUNS	HG	LG	OTHER
83	2,533	1,534	896	9,616	3,544	3,217	2,855
84	2,293	1,316	1,185	9,436	4,701	3,161	1,574
85	3,137	1,696	1,192	11,242	3,857	3,913	3,472
86	3,699	2,117	1,524	11,891	4,637	3,540	3,714
87	3,917	2,061	1,958	8,583	3,735	3,203	1,645
88	4,648	2,282	2,639	12,863	7,026	2,775	3,062
89	6,669	3,044	4,066	15,019	8,351	3,957	2,711
90	7,955	3,702	4,431	12,469	5,811	4,510	2,151
	34,851	17,752	17,891	91,119	41,662	28,276	21,184

FELONY--DEFENDANTS THAT HAVE PRIOR FELONY CONVICTIONS

NARC--DEFENDANTS WITH PRIOR NARCOTICS BACKGROUND

T/GUNS--TOTAL FIREARMS TAKEN IN BY ATF.

H/G--TOTAL HANDGUNS TAKEN IN BY ATF.

L/G--TOTAL LONG GUNS (RIFLES AND SHOTGUNS) TAKEN IN BY ATF.

45% OF ALL FIREARMS TAKEN IN BY THE BUREAU ARE HANDGUNS.

51% OF ALL DEFENDANTS HAVE PRIOR FELONY CONVICTIONS.

51% OF ALL DEFENDANTS HAVE SOME NARCOTICS TRAFFICKING BACKGROUND.

BETWEEN FY83 AND FY87 37% OF ALL DEFENDANTS HAD PRIOR NARCOTICS INVOLVEMENT; HOWEVER, BETWEEN FY88 AND FY90 63% OF ALL DEFENDANTS WERE INVOLVED IN NARCOTICS.

OTHER CATEGORY--(SAWED-OFF SHOTGUNS, MACHINEGUNS, MACHINEGUN CONVERSIONS, SILENCERS, AND OTHER NFA WEAPONS).

OFFICE IN ST. THOMAS
AT CHARLOTTE AMALIE

P. O. BOX 720
TEL. 774-0640

THE CLERK OF THE DISTRICT COURT
VIRGIN ISLANDS OF THE UNITED STATES 00801

October 16, 1990

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

Dear Judge Wilkins:

Mr. Orinn Arnold, Clerk of the Court, has directed me to reply to your letter of September 7, 1990 concerning the new system of guideline sentencing.

Judge Christian has retired since October 31, 1988 and Judge O'Brien, who became the Chief Judge, presiding in the Division of St. Croix died on December 22, 1989. The District Court of the Virgin Islands is without a judge for both divisions of St. Thomas-St. John and St. Croix; therefore, we regret that we are at this time unable to assist in the review to improve the aforementioned system.

Respectfully yours,

Dorothy A. Lockhart

Dorothy A. Lockhart
Secretary

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
U. S. COURT HOUSE & CUSTOM HOUSE
ST. LOUIS, MISSOURI 63101

CHAMBERS OF
WILLIAM L. HUNGATE
DISTRICT JUDGE

October 1, 1990

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

Dear Mr. Chairman:

Thanks for your letter inviting comments on the Sentencing Guidelines.

I regret that I cannot be of more assistance. I do think Judge Irving in California expressed the feelings of many of us.

I am like the man who traded for a new car which turned out to be a complete lemon. I am unable to tell you how to build the car I want, but I do know I don't want this one and I sure would prefer to have my old one back.

After I am eligible for senior status, I hope to have the time to write and lecture on the substantial injustices I regrettably have helped to administer under the Sentencing Guidelines.

Respectfully and sincerely,

William L. Hungate

WLH:db

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN M. DUHE' JR.
CIRCUIT JUDGE
BOX 17
SUITE 200
556 JEFFERSON STREET
LAFAYETTE, LA 70501

October 3, 1990

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

Dear Chairman Wilkins,

I would not want you to think that I have ignored your letter of September 12 asking for my ideas on the top three guideline sections or policy statements that I feel might need some work. It has indeed not been ignored. However, Chief Judge Clark, to whom you have also written, has asked all the members of our Court to furnish our suggestions and comments to him so that they might then be forwarded to you and I will respond in that manner.

Sincerely,

John M. Duhé. Jr.

JMD,Jr.:di

United States District Court
Southern District of Indiana
Indianapolis, Indiana 46204

Chambers of
Judge James E. Noland

October 5, 1990

Hon. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Judge Wilkins:

In response to your letter of September 27, 1990 which requests comments pertaining to the top three guidelines sections or policy statements, I would not offer any comment at this time since I no longer carry a criminal calendar and am not imposing any criminal sentences.

I do wish to offer my commendation to the Commission on the effective implementation of the guidelines sentencing system. The general comments that I have heard from my colleagues in regard to guidelines sentencing is one of positive approval.

With all best wishes, I am

Sincerely yours,

James E. Noland

James E. Noland
Sr. U.S. District Judge

United States District Court
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201

JACK B. WEINSTEIN
JUDGE

October 8, 1990

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

Dear Mr. Wilkins:

Thank you for your letter of October 1, 1990. I very much appreciate your work on the Guidelines Sentencing. I have nothing to suggest at this time.

With all best wishes,

Sincerely yours,

Jack B. Weinstein
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
POST OFFICE DRAWER 27585
RALEIGH, NORTH CAROLINA 27611

FRANKLIN T. DUPREE, JR.
[redacted] JUDGE

TELEPHONE: (919) [redacted]-4200

856-

October 9, 1990

Honorable William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, District of Columbia 20004

RE: Sentencing Guidelines

Dear Judge Wilkins:

Your letter dated September 12 requesting input on the guideline sections or policy statements believed to be in need of review, amendment or clarification reached me near the end of the month while I was engaged in a lengthy jury trial, and this is the first opportunity I have had to respond.

I am sorry that I am not able to be of any assistance, but since the guidelines became effective in November 1987 I have not been assigned any criminal cases arising since that date, and the consequence is that I have had no experience whatever with the guidelines.

I do take this occasion to congratulate and thank you and the Sentencing Commission for the monumental job you have accomplished in establishing the guidelines which, notwithstanding some controversy they have generated, appear to be working quite well at this time. I regret that I have no backlog of experience which would enable me to make an informed response to your inquiry.

With kindest personal regards,

Sincerely,

F. T. DUPREE, JR.

FTDjr/na

United States Court of Appeals
Ninth Circuit
The Pioneer Courthouse
Portland, Oregon 97204

Chambers of
John F. Kilkenny
Senior Circuit Judge

September 28, 1990

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

RE: Sentencing Commission

Dear Mr. Wilkins:

Thanks for your letter and invitation of September 21st to participate.

I am now approaching ninety years of age and I would prefer to leave the suggestions as to sentencing to those at the district court level and the active judges on the courts of appeal.

Sincerely,

John F. Kilkenny

JFK:ni

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

WOODROW SEALS
SENIOR U.S. DISTRICT JUDGE
P.O. BOX 61547
HOUSTON, TEXAS 77208

October 9, 1990

William W. Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, DC 20004

Dear Chairman Wilkins:

Judge Seals is seriously ill and will be undergoing heart surgery in the next few weeks, so I am taking the liberty of replying to your letter of September 27 regarding comments on the sentencing guidelines. When Judge took senior status in December 1982, he ceased hearing criminal cases. Although he did hear three criminal cases in 1983 and 1984 at the request of our Chief Judge, he has heard none since the guidelines went into effect. His trial docket consists solely of civil cases in which a jury has been requested.

Sincerely yours,

Doris E. Clark

Doris E. Clark
Secretary

United States Court of Appeals

Ninth Circuit

Joseph T. Sneed
United States Circuit Judge
Post Office Box 547
San Francisco, California 94101-0547

October 16, 1990

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

Dear Judge Wilkins:

I begin by disclaiming being an "experienced" judge when it comes to sentencing guidelines, having participated only in a modest number of appeals from sentences imposed by district judges. For this reason you may find my comments worthless.

I hasten to point out that I'm not particularly disturbed by the technical nature of the guidelines because, having once been a tax lawyer, I know that the guidelines are years away from the degree of complexity the tax law presently reflects. Nonetheless, their start in this direction is impressive.

What does disturb me, however, is the possibility that the "discretion," meticulously taken from the Article III district judges, now belongs to prosecutors, probation officers, and, in a more visible form, to appellate Article III judges. Some say that is precisely what has happened. Thoughtlessly I have even said so myself at times. Is it true? Is "discretion" like a river which when blocked from its normal channel makes another?

I admire the thoroughness of your work, and best wishes for the future.

Sincerely,

Joseph T. Sneed

United States District Court
District of Arizona
55 E. Broadway
Tucson, Arizona 85701-1790

William D. Browning
Chief Judge

October 16, 1990

Honorable W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004

Dear Judge Wilkins:

Responding to your request regarding certain guideline sentencing sections, I think it more appropriate that I express my opinions on the guidelines which I believe are shared by the majority of judges in Arizona (if not all).

Before doing that let me tell you that I have nothing but admiration and great respect for the difficult thankless and efficient job with respect to the implementation of congressional mandate. My quarrel is with the Congress, and should not be taken as focused on you or the Sentencing Commission.

Human nature being what it is, and the variation in behavioral and environmental patterns of humans, there is no rigid preconceived system which can replace the sound discretion of judges trained, as I hope we are, to recognize and accommodate those differences in the sentencing process. The attempt you have made is admirable but it falls short.

What Congress has done is given the prosecution a tool by which they can move cases more quickly through our Courts. The fear of sentencing within guideline ranges, or minimum mandatory sentencing, as you well know causes many guilty pleas which would otherwise not result. They constitute, in effect, a penalty for exercising the constitutional right to a trial.

Too many cases that I see result in downward departures from the guidelines because it is convenient to the government and not because it best serves the system which we are all trying to effectuate. The government can find cooperation in one individual and deny it in another whereas the judge is powerless to make a finding of cooperation and thus depart from a mandatory sentence. The government, to dispose of a case, can agree to a downward departure which I believe violates the spirit of the Sentencing Commission Rules.

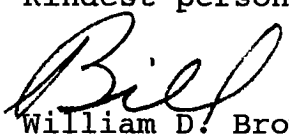
In short what the sentencing guidelines scheme, and minimum mandatory scheme, does is to substitute prosecutorial discretion for judicial discretion. Whether it reads that way on the cold printed sheet or not it is undeniably true that in operation that is what is happening.

We are dealing, at least in my part of the country, with individuals whose cultural background is vastly different from ours and which the sentencing guidelines do not adequately address. The social and economic conditions in the Republic of Mexico produce a "criminal" who is a vastly different person, with markedly different motivation, than the American engaging in the same activity. The same is true of the Native Americans on our Indian Reservations throughout Arizona and indeed the entire western United States.

I would think that the collection of information by your commission would allow you to approach the Congress with request for changes in the system to comport with what I believe most judges feel are its inadequacies, and I would hope that you as chairman of the commission would do so.

I reiterate my admiration for the hard work you have done and offer my assistance in any way possible to further a just sentencing policy.

Kindest personal regards,



William D. Browning
Chief Judge

WDB:gmm

C PAUL

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
PROBATION OFFICE

JACK R. SAYLOR
CHIEF PROBATION OFFICER
212 U.S. Courthouse
400 S. Phillips
Sioux Falls, SD 57102
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Aberdeen, SD 57402-0922
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439 Post Office Bldg.
Pierre, SD 57501
605/224-1210

257 Fed. Bldg. & U.S. Courthouse
Rapid City, SD 57701
605/342-4240

Reply To: SIOUX FALLS

November 16, 1990

Honorable William W. Wilkins
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Ave., NW, Suite 1400
Washington, DC 20004

RE: Recommended Guideline Changes

Dear Judge Wilkins:

I am sending you the attached recommendations at the request of Chief Judge Donald J. Porter. The changes represent the views of all of our probation officers who routinely use the guidelines. As you requested, we have offered specific wording changes for selected guideline sections. Following each recommended change, we have provided a brief statement of support.

As a general statement, you will note we are recommending that the Commission consider adding three additional specific circumstances under which departure would be appropriate. We understand that departure in each of these circumstances could have been handled under the general grounds for departure, §5K2.0, Grounds for Departure, but we believe there is justification for highlighting these. The primary justification being that they are much more apt to be given consideration by the probation officer, parties, and the Court if they are listed in Chapter 5, Part K, along with the other suggested departures. In addition to being more readily considered, the fact that they are listed tends to imply that these departure considerations are somehow more acceptable than a departure under the general departure provisions.

The recommended guideline changes are as follows:

RECOMMENDATIONS FOR GUIDELINE CHANGES

5K2.16 - Youthful Offender

If, at the time of the offense, the defendant had not attained the age of 23 years, a lower sentence may be warranted to reflect the extent to which peer influence and/or the defendant's immature judgment or diminished emotional control contributed to the commission of the offense, provided the defendant's history or characteristics do not indicate a need for incarceration to protect the public.

Statement of Support: The existence of an identifiable group of youthful offenders did not disappear with the repeal of the Youth Corrections Act. Nationally, the numbers of cases that fall into this category may be negligible; however, any District Court that has jurisdiction on Indian land will see a number of youthful type offenders.

The youthful offender group is frequently more juvenile-like than adult-like. Their behavior is more often motivated by a desire to imitate and/or gain peer acceptance than by a desire to achieve some criminal goal. Also, peer pressure in reservation communities (and no doubt everywhere) is very real and very powerful. It does influence criminal behavior; it will not disappear because we deny its existence. Moreover, although not defense, their juvenile-like judgment is frequently further impaired by the use of alcohol or drugs.

Admittedly based only on the combined observations of seasoned probationer officers in our district, imprisonment significantly increases the likelihood that an unsophisticated youthful offender will become a sophisticated youthful offender. Moreover, the elevated status in the community as "having done hard time in a federal joint," frequently impedes the reintegration process upon release.

While we cannot prove it, experience tells us that the likelihood of influencing positive behavioral change is significantly greater with youthful offenders. The timing is ripe for giving special consideration to the youthful offender because the commitment to community corrections in terms of correctional treatment resources and manpower available to the probation service has increased dramatically in recent years. Also, the federal probation system nationally is in the process of refocusing its commitment to protection of the community through a variety of intensive supervision practices. With the increased treatment and manpower resources, the Federal Probation System is poised to do a better job dealing with the multi-faceted problems present in the youthful offender type case.

2A2.2(b)(5)

If the assault did not result in permanent or life-threatening or extreme psychological injury, if defendant's actions were spontaneous and occurred while under a highly charged emotional state, and if at the time of the assault the defendant had not attained the age of 23 years, reduce to Level 12.

> Statement of Support: Although the goal intended by the above-wording could be achieved through departure, it seems there is justification to add this specific offense characteristic under the aggravated assault guideline. Envisioned here is a case where one or more youthful offenders commit a spontaneous assault motivated by something that occurred in the past and then fueled by peer influence and contagion. The goal is to reduce the offense level down to a point where a short period of confinement would be possible along with a community corrections center placement and treatment, if indicated. A parallel goal would be to avoid the negative influences of imprisonment as explained above. Obviously, this assumes the Criminal History Category is I. If it were II or higher, imprisonment would still be required which would be appropriate.
>
> We have offered only one example where a specific offense characteristic could be added to provide special consideration for youthful offenders. There may be other guidelines where similar consideration would be appropriate, i.e., §2B2.2, Burglary of Other Structures.

4A1.1(f)

Add two points if the defendant has ever received a prior sentence of imprisonment for an offense similar to the instant offense.

> Statement of Support: In our judgment, prior similar offense behavior has not been given adequate weight. We acknowledge that it is listed under §4A1.3(e), Adequacy of Criminal History Category, as possible grounds for departure, but we believe it is important enough to be elevated to guideline status. Admittedly lacking supporting scientific data, it nonetheless seems safe to assume that the prior commission of like criminal behavior would be an excellent predictor of future behavior. Also, and of equal importance, is our belief that similar prior criminal behavior is not being treated uniformly across the country. This recommendation is made with the knowledge that it might appear to be double counting; however, careful analysis should reveal that we would be sanctioning different behavior.

5K2.18 - Multiple Crimes of Violence

If the defendant injured more than one victim during the commission of one or more offenses, or injured the same victim more than once during the commission of separate offenses, and the Court does not believe that the offense level enhancement resulting from application of the multiple count rules (Chapter Three, Part B) adequately sanctions the totality of a defendant's behavior, the Court may increase the sentence above the authorized guideline level.

> Statement of Support: The above-recommendation is made with the knowledge that Commentary to §3D1.4, Background, informs the Court that "additional punishment for additional crimes... can be handled by departure from the guidelines." Nonetheless, it seems that this is such an important issue that it should be given additional attention. The likelihood that the typical reader would find this reference to departure, which is tucked away in Commentary, is remote. This departure consideration would occur most frequently in crimes of violence where several victims are involved or where the same person is victimized repeatedly. The primary goal here is equality in the administration of justice--it does not appear to be fair to the offender who victimizes one person to be treated very similarly to the offender who victimizes two.

5K2.17 - Indirect or Secondary Victims

If an individual(s) other than the victim suffers substantial physical, psychological or economic injury as a result of the commission of the offense, the Court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend upon the severity of the injury and the extent to which the injury was intended or knowingly risked.

Normally, physical injury would be sufficiently severe to warrant application of this adjustment only if "serious bodily injury" or "permanent or life-threatening bodily injury" occurred. (For definitions of "bodily injury" and "permanent or life-threatening bodily injury," see Commentary to §1B1.1, Application Instructions.)

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional or behavioral functioning of a victim, or when the impairment is likely to be of an extended or continuous duration and/or when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The Court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

Normally, economic injury would be sufficiently severe to warrant application of this adjustment only when there is severe financial hardship resulting in a significant depletion of economic resources or a significant lifestyle alteration.

> Statement of Support: Again as a matter of fundamental fairness, a defendant who creates suffering for a single victim should not be treated the same as an offender whose actions create suffering not only for the primary victim but also for secondary victims. The key here is in the statement which indicates that, "The extent of the increase ordinarily should depend upon the severity of the injury and the extent to which the injury was **intended** or **knowingly risk** (emphasis added)." Offenders who have little or no regard for the suffering of the primary victim nor the ramifications of their behavior beyond the primary victim, should be sanctioned accordingly.

Please call if the Court has any comments or questions concerning the above recommendations.

Respectfully submitted,

Jack R. Saylor

Jack R. Saylor
Chief Probation Officer

JRS/lmo

U.S. Department of Justice

United States Attorney
District of Montana

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

Post Office Box 1478
Billings, Montana 59103

406/657-6101
FTS/585-6101

August 22, 1990

Ms. Phyllis J. Newton
Staff Director
U. S. Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D.C. 20004

Re: **Sentencing Guidelines**

Dear Ms. Newton:

In regards to your memorandum of August 9, 1990, this office has no specific comments or suggestions at this time.

Sincerely,

DORIS M. POPPLER
United States Attorney

FOR KLAUS P. RICHTER
Assistant U.S. Attorney

KPR:dlb

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Room 320
255 WEST MAIN STREET
CHARLOTTESVILLE, VIRGINIA 22901

JAMES H. MICHAEL, JR.
JUDGE

804-295-3148

November 21, 1990

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

Dear Billy:

Thank you for your letter of September 21, 1990.

Considering the Congressional direction to establish the Sentencing Guidelines, it seems to me that the Guidelines have been working reasonably well. This is not to say that I approve of them in all respects, but I have been able to follow them with reasonably little controversy.

As an adverse comment, it does seem to me that the sentencing process now takes, simply put, too much time. Most of the sentencing instances before me are relatively simple matters, involving relatively simple offenses. They range from the illegal hunting of bear to conspiracy to distribute cocaine. Obviously, in the latter category, there are occasionally very difficult issues to resolve, but such issues scarcely present themselves in the game violation cases. Nonetheless, the time involved in both categories is about the same. This is not totally accurate, since some of the more serious cases can involve much more time than the run-of-the-mill cases, but, generally speaking, it seems to me that we spend too much time in what I might refer to as the medium and minor offense categories in going through the litany for the sentencing process.

Recognizing that due process concerns mandate some of the matters which the Commission sets out, I still am of opinion that for certain cases the time could be considerably shortened. This is particularly important to the trial bench, since time is an increasingly rare commodity for us.

In many ways, the litany to be followed in the sentencing process is similar to the litany to be followed in accepting a guilty plea: both seem to me to soak up too much time. Again, I recognize the constraints of the due process clause, but believe those constraints could be met with considerably less precise requirements than are presently the case in both situations.

A second point of some concern to me relates to the application of the Guidelines to the first offender. I realize that it is difficult to draw lines in this area, but believe that the courts could be afforded some more discretion for a downward departure, where a defendant is before the court for the first time, where his offense is not of grave severity, and where his attitude and acceptance of responsibility give reasons to think that a more lenient disposition would be appropriate. Particularly is this so, in my mind, with the very young defendants. What will happen to those young persons when they get into the hardened prison population is a prospect that I have in my mind when I am doing the sentencing, and it is a prospect which worries me a great deal. Whether this can be done is perhaps a question of the philosophy of the Sentencing Commission, and I do not have specific language which I could offer you to work this change. It is probable that it can only be done by some sort of general statement, rather than one that relates to specific offenses.

As to this comment, I am probably straying off my reservation of the Western District of Virginia, but I have been concerned by some of the matters set out in the opinion of Judge Green, of the United States District Court for the District of Columbia, concerning the interrelationship between the United States Attorney and the court under the Guidelines. First, let me hurry to say that we have not to my knowledge had any of this problem in the Western District. The United States Attorney's Office here seems to me to have done a very fine job in discharging its obligations under the Guidelines, and I have no complaint whatever with this situation in the Western District. If, however, it is a problem of the severity indicated by Judge Green in other districts, it certainly is something which ought to have careful attention. The United States Attorney must have full discretion in determining what charges to bring, what charges to omit or to downgrade, etc. However, if that discretion can be coupled with the Guidelines so as to hamper the court's role in determining the degree and severity of the offense, then some sort of corrective mechanism needs to be put in place.

In some measure, the comments concerning the situation addressed by Judge Green raise also the question of the very heavy responsibility and burden which the Guidelines, in effect, place on the probation officers. The probation people in the Western District of Virginia produce some presentence reports which I consider to be superb, but they do so with some apparent concern on their part that they are called on to make legal judgments, etc., which they feel they are perhaps not fully qualified to make. Contrary to my comment about the United States Attorney's Office in this district, I do sense this aura of concern on the part of the probation officers in this district. They do not permit it, so far as I can see, to affect the thoroughness or the rationale of the presentence reports, but I do believe that they are to some degree worried about being called on to make some of the judgments which they feel they must make under the Sentencing Guidelines. I cannot come up with a solution for this point, but hope that, if the point has any validity at all, the Commission may give some attention to it. Wiser heads than mine may well be able to find some relief for this problem -- always assuming that it is a problem.

Those are the only comments which I have about the Sentencing Guidelines themselves and their application.

I do want to express my strong support for the Commission's message to Congress not to enact additional mandatory minimum sentences. Recently, I had before me a 19 year old, with no previous record of any sort, who had been found with cocaine in his possession while carrying a weapon, and, albeit without his knowledge, making sales of that cocaine within the proscribed limit of a school. The statutory requirements in that situation are for five years on each charge, to be served consecutively, with no prospect for parole. Those are mandated sentences, and I confess that I felt strongly that the total sentence imposed was too much, but did not feel any comfort in trying to deviate from the Congressional mandates in the case. Certainly, the argument can be made that the defendant made his bed, and he must now lie in it. However, this seems to me totally to ignore at least the possibility that this young man could be a reasonable citizen after a reasonable punishment for the offenses. All of this, however, is a matter within the purview of Congress, rather than the Sentencing Commission, but I do think that the position of the Commission on the subject is exactly right. The Guidelines themselves seem to me to provide an adequate approach, and mandatory minimum sentences seem inconsistent with a Guidelines system.

Hopefully, these comments will be of some value, but they are sent on for what they may be worth.

With sincerest personal regards, I am,

Cordially,

James H. Michael, Jr.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

DONALD J. PORTER
CHIEF JUDGE
413 U.S. COURTHOUSE
PIERRE, SOUTH DAKOTA 57501

November 16, 1990

William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue NW
Suite 1400
Washington, D.C. 20004

RE: Recommended Guideline Changes

Dear ~~Mr.~~ Judge Wilkins:

I enclose herewith recommended amendments to the Guidelines.

Sincerely yours,

DONALD J. PORTER, CHIEF JUDGE
U.S. DISTRICT COURT

Enclosure

JACK R. SAYLOR
CHIEF PROBATION OFFICER
212 U.S. Courthouse
400 S. Phillips
Sioux Falls, SD 57102
605/336-0721
FTS: 782-4437

REPLY TO: SIOUX FALLS

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
PROBATION OFFICE

P.O. Box 922
Aberdeen, SD 57402-0922
605/225-0250, Ext. 591
FTS: 782-7591

439 Post Office Bldg.
Pierre, SD 57501
605/224-1210

257 Fed. Bldg. & U.S. Courthouse
Rapid City, SD 57701
605/342-4240

November 2, 1990

Honorable Donald J. Porter
Chief U.S. District Judge
413 U.S. Post Office & Courthouse
Pierre, SD 57501

RE: Recommended Guideline Changes

Dear Judge Porter:

Responding to your request, below you will find several suggested guideline changes. The changes represent the views of all of our probation officers who routinely use the guidelines. As Judge Wilkins requested, we have offered specific wording changes for selected guideline sections. Following each recommended change, we have provided a brief statement of support.

As a general statement, you will note we are recommending that the Commission consider adding three additional specific circumstances under which departure would be appropriate. We understand that departure in each of these circumstances could have been handled under the general grounds for departure, §5K2.0, Grounds for Departure, but we believe there is justification for highlighting these. The primary justification being that they are much more apt to be given consideration by the probation officer, parties, and the Court if they are listed in Chapter 5, Part K, along with the other suggested departures. In addition to being more readily considered, the fact that they are listed tends to imply that these departure considerations are somehow more acceptable than a departure under the general departure provisions.

The recommended guideline changes are as follows:

RECOMMENDATIONS FOR GUIDELINE CHANGES

5K2.16 - Youthful Offender

If, at the time of the offense, the defendant had not attained the age of 23 years, a lower sentence may be warranted to reflect the extent to which peer influence and/or the defendant's immature judgment or diminished emotional control contributed to the commission of the offense, provided the defendant's history or characteristics do not indicate a need for incarceration to protect the public.

Statement of Support: The existence of an identifiable group of youthful offenders did not disappear with the repeal of the Youth Corrections Act. Nationally, the numbers of cases that fall into this category may be negligible; however, any District Court that has jurisdiction on Indian land will see a number of youthful type offenders.

The youthful offender group is frequently more juvenile-like than adult-like. Their behavior is more often motivated by a desire to imitate and/or gain peer acceptance than by a desire to achieve some criminal goal. Also, peer pressure in reservation communities (and no doubt everywhere) is very real and very powerful. It does influence criminal behavior; it will not disappear because we deny its existence. Moreover, although not defense, their juvenile-like judgment is frequently further impaired by the use of alcohol or drugs.

Admittedly based only on the combined observations of seasoned probationer officers in our district, imprisonment significantly increases the likelihood that an unsophisticated youthful offender will become a sophisticated youthful offender. Moreover, the elevated status in the community as "having done hard time in a federal joint," frequently impedes the reintegration process upon release.

While we cannot prove it, experience tells us that the likelihood of influencing positive behavioral change is significantly greater with youthful offenders. The timing is ripe for giving special consideration to the youthful offender because the commitment to community corrections in terms of correctional treatment resources and manpower available to the probation service has increased dramatically in recent years. Also, the federal probation system nationally is in the process of refocusing its commitment to protection of the community through a variety of intensive supervision practices. With the increased treatment and manpower resources, the Federal Probation System is poised to do a better job dealing with the multi-faceted problems present in the youthful offender type case.

2A2.2(b)(5)

If the assault did not result in permanent or life-threatening or extreme psychological injury, if defendant's actions were spontaneous and occurred while under a highly charged emotional state, and if at the time of the assault the defendant had not attained the age of 23 years, reduce to Level 12.

> Statement of Support: Although the goal intended by the above-wording could be achieved through departure, it seems there is justification to add this specific offense characteristic under the aggravated assault guideline. Envisioned here is a case where one or more youthful offenders commit a spontaneous assault motivated by something that occurred in the past and then fueled by peer influence and contagion. The goal is to reduce the offense level down to a point where a short period of confinement would be possible along with a community corrections center placement and treatment, if indicated. A parallel goal would be to avoid the negative influences of imprisonment as explained above. Obviously, this assumes the Criminal History Category is I. If it were II or higher, imprisonment would still be required which would be appropriate.
>
> We have offered only one example where a specific offense characteristic could be added to provide special consideration for youthful offenders. There may be other guidelines where similar consideration would be appropriate, i.e., §2B2.2, Burglary of Other Structures.

4A1.1(f)

Add two points if the defendant has ever received a prior sentence of imprisonment for an offense similar to the instant offense.

> Statement of Support: In our judgment, prior similar offense behavior has not been given adequate weight. We acknowledge that it is listed under §4A1.3(e), Adequacy of Criminal History Category, as possible grounds for departure, but we believe it is important enough to be elevated to guideline status. Admittedly lacking supporting scientific data, it nonetheless seems safe to assume that the prior commission of like criminal behavior would be an excellent predictor of future behavior. Also, and of equal importance, is our belief that similar prior criminal behavior is not being treated uniformly across the country. This recommendation is made with the knowledge that it might appear to be double counting; however, careful analysis should reveal that we would be sanctioning different behavior.

5K2.18 - Multiple Crimes of Violence

If the defendant injured more than one victim during the commission of one or more offenses, or injured the same victim more than once during the commission of separate offenses, and the Court does not believe that the offense level enhancement resulting from application of the multiple count rules (Chapter Three, Part B) adequately sanctions the totality of a defendant's behavior, the Court may increase the sentence above the authorized guideline level.

> Statement of Support: The above-recommendation is made with the knowledge that Commentary to §3D1.4, Background, informs the Court that "additional punishment for additional crimes... can be handled by departure from the guidelines." Nonetheless, it seems that this is such an important issue that it should be given additional attention. The likelihood that the typical reader would find this reference to departure, which is tucked away in Commentary, is remote. This departure consideration would occur most frequently in crimes of violence where several victims are involved or where the same person is victimized repeatedly. The primary goal here is equality in the administration of justice--it does not appear to be fair to the offender who victimizes one person to be treated very similarly to the offender who victimizes two.

5K2.17 - Indirect or Secondary Victims

If an individual(s) other than the victim suffers substantial physical, psychological or economic injury as a result of the commission of the offense, the Court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend upon the severity of the injury and the extent to which the injury was intended or knowingly risked.

Normally, physical injury would be sufficiently severe to warrant application of this adjustment only if "serious bodily injury" or "permanent or life-threatening bodily injury" occurred. (For definitions of "bodily injury" and "permanent or life-threatening bodily injury," see Commentary to §1B1.1, Application Instructions.)

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional or behavioral functioning of a victim, or when the impairment is likely to be of an extended or continuous duration and/or when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The Court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

Normally, economic injury would be sufficiently severe to warrant application of this adjustment only when there is severe financial hardship resulting in a significant depletion of economic resources or a significant lifestyle alteration.

> Statement of Support: Again as a matter of fundamental fairness, a defendant who creates suffering for a single victim should not be treated the same as an offender whose actions create suffering not only for the primary victim but also for secondary victims. The key here is in the statement which indicates that, "The extent of the increase ordinarily should depend upon the severity of the injury and the extent to which the injury was **intended** or **knowingly risk** (emphasis added)." Offenders who have little or no regard for the suffering of the primary victim nor the ramifications of their behavior beyond the primary victim, should be sanctioned accordingly.

Please call if the Court has any comments or questions concerning the above recommendations.

Respectfully submitted,

Jack R. Saylor
Chief Probation Officer

JRS/lmo

United States Court of Appeals
125 South Grand Avenue — Suite 303
Pasadena, California 91105

Dorothy W. Nelson, Judge

November 16, 1990

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

Dear Judge Wilkins,

In response to your letter of September 27, 1990 regarding U.S. Sentencing Commission Guidelines, may I first express appreciation for all your excellent work.

Since I do not now have the time to respond to your request in depth, I would like to state one major criticism. The mandatory minimum sentences have resulted in more injustice than any other kinds of sentences. Therefore, while I fully support your letter to Congressman Brooks, I would go one step beyond. I would suggest that Congress consider eliminating all mandatory minimum sentences.

With warmest appreciation for your work.

Sincerely,

Dorothy W. Nelson

Dorothy W. Nelson

DWN:jat

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
JOSEPH H. RODRIGUEZ
JUDGE

401 MARKET STREET
P.O. BOX 886
CAMDEN, NEW JERSEY 08101
PHONE: 609-757-5002

November 26, 1990

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

Attention: Communications Director

I have considered the request contained in your letter of September 27, 1990 and find that my primary concern is ably expressed in Judge Rosenn's concurring opinion in United States of America v. Yu Kikumura, No. 89-5129, filed November 2, 1990, which I have enclosed.

Very truly yours,

Joseph H. Rodriguez
U.S.D.J.

JHR:sm

Filed November 2, 1990

UNITED STATE COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-5129

UNITED STATES OF AMERICA

v.

KIKUMURA, YU,

Appellant

On Appeal From the United States District Court
for the District of New Jersey
(D.C. Crim. No. 88-166)

Argued: September 7, 1989

Before: BECKER, COWEN and ROSENN,
Circuit Judges

(Filed November 2, 1990)

RONALD L. KUBY (Argued)
WILLIAM M. KUNSTLER (Argued)
13 Gay Street
New York, NY 10014

Attorneys for Appellant

SAMUEL A. ALITO, JR. (Argued)
United States Attorney
JOHN P. LACEY
Assistant U.S. Attorney
Federal Building
970 Broad Street
Newark, NJ 07102

Attorneys for Appellee

ROSENN, *Circuit Judge*, concurring.

I concur in the court's holding that a sentencing judge may not make extreme departures from the sentencing guidelines without abiding by standards of procedural fairness more stringent than those which usually apply in sentencing hearings.[1] I also concur in the court's analysis under the guidelines and in the sentence imposed upon Kikumura. I write separately, however, to express my concern that the Government's manipulation of Kikumura's charge and sentencing illustrates the problem reported by many courts that the sentencing guidelines have replaced judicial discretion over sentencing with prosecutorial discretion. In so doing, it may have violated Kikumura's right to due process.

The labyrinthian course which the sentencing guidelines require courts to navigate in reaching their decisions might obscure one salient feature of Kikumura's prosecution and sentencing: Kikumura was not convicted of attempted murder and yet that is the crime upon which the court relied most heavily in sentencing him. The original indictment handed down by the grand jury charged Kikumura in count two with transporting explosives with the "intent that it will be used to kill, injure, and intimidate one or more individuals." Before trial, the Government deliberately deleted that phrase from the indictment, allowing Kikumura to stipulate to the facts and be convicted of the remaining charges, the most serious of which involved Kikumura's

1. The Sentencing Commission's commentary expressly authorizes the sentencing court to "determine the appropriate procedure in light of the nature of the dispute." Commentary to Guidelines § 6A1.3, eff. Oct. 1987.

knowledge or intent that the bombs would be used to damage *property*.[2] *See United States v. Kikumura*, 706 F. Supp. 331, 334 (D.N.J. 1989). Thus, the court did not convict Kikumura of the intent to kill, injure, and intimidate one or more individuals, an offense of which Kikumura consistently protested he was innocent. The Government then proceeded at sentencing under guideline § 2K1.6(a)(2) which permitted consideration of Kikumura's alleged intent to kill people with his bombs.

This strategy, of course, made the Government's burden of proving such felonious intent much lighter. For example, prior to the sentencing hearing, the Government was not compelled to furnish Kikumura with the evidence against him to assure an informed and able cross-examination, and at the hearing, the Government was not burdened by the Federal Rules of Evidence and the responsibility to prove each fact beyond a reasonable doubt.

The sentencing guidelines no doubt encouraged this strategy. The guidelines permit the sentencing court to consider relevant conduct not charged in the indictment, including evidence of the defendant's intent in committing the offense. *See* Guidelines § 1B1.3(a)(4), eff. Oct. 1987.[3] Indeed,

2. At Kikumura's *pro forma* trial, the Government stated its intention to prove at sentencing that Kikumura intended to commit *murder*. Thus, the trial court was fully aware that this most serious charge was being "reserved" by the Government for the sentencing hearing. *United States v. Kikumura*, 706 F.Supp. 331, 334, n. 2 (D.N.J. 1989).

3. The Commission has since deleted the specific reference to the defendant's intent from this section of the Guidelines and replaced it with "any other information specifically in the

this comports with the former practice of sentencing judges who traditionally have considered collateral information affecting the level of a defendant's culpability. However, because of the extreme departure involved here for the separate offense of attempted murder, it seems evident that the Government and the sentencing judge did not consider Kikumura's attempt to kill as collateral but *primary*. In such a case, Kikumura should have been charged and tried for that offense. Failure to do so should preclude the Government from relying upon the separate crime of attempted murder as the vehicle for the drastic enhancement of the defendant's sentence.

A number of courts and the recent Federal Courts Study Committee have noted that one unintended effect of the sentencing guidelines has been to replace traditional judicial discretion over sentencing with prosecutorial discretion. In its final report, the Study Committee noted that "we have been told that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system." Report of the Federal Courts Study Committee, April 1990 at 138.

In its earlier tentative recommendations, the Committee aptly observed, "Instead of achieving the congressional purpose of limiting and regulating sentencing discretion, the guidelines

applicable guideline." Guidelines § 1B1.3(a)(4), eff. Nov. 1, 1990. The Government, in this case, applied guideline 2K1.6(a)(2) which specifically permits consideration of the defendant's intent. The court sentenced the defendant on February 10, 1989.

have actually had the perverse effect of transferring discretion from the court to the prosecutor, who then exercises the discretion outside the system . . . ." Federal Courts Study Committee Tentative Recommendations for Public Comment, December 22, 1989 at 62, cited in *U.S. v. Holland*, 729 F. Supp. 125, 133-32 (D.D.C. 1990). *See also U.S. v. Roberts*, 726 F. Supp. 1359, 1363 (D.D.C. 1989) ("the de facto transfer of much of the responsibility for sentencing from impartial judges to prosecutors has had the effect of disturbing the due process balance essential to the fairness of criminal litigation"); *U.S. v. Boshell*, 728 F. Supp. 632, 637 (E.D. Wash. 1990) ("Congress has thus shifted discretion from persons who have demonstrated essential qualifications to the satisfaction of their peers, . . . to persons who may be barely out of law school with scant life experience and whose common sense may be an unproven asset").

Such prosecutorial control, although not unconstitutional *per se*, if left unchecked by the courts could be applied in a manner which encroaches upon the constitutional rights of defendants. Indeed, district courts have already found such constitutional violations. *See U.S. v. Roberts*, 726 F. Supp. 1359, 1368 (D.D.C. 1989). In *Roberts* the district judge found a due process violation where the prosecutor regularly transferred certain drug cases pending in D.C. Superior Court to federal court. The court noted,

> Simply by selecting out some defendants from among the many in Superior Court for prosecution in this Court, the U.S. Attorney is able to ensure that these particular defendants will be sentenced to imprisonment for a

> minimum of five or ten years, while others, not so selected but otherwise similarly situated, will, upon conviction, be sentenced under the discretionary sentencing provisions available in Superior Court to a small fraction of that time.

Roberts, 726 F. Supp. at 1372.

I am concerned that the Government's tactic in obtaining Kikumura's long sentence comes into conflict with the Constitution. What the Government appears to have done is to deliberately collateralize at the charge and trial stage the most critical element for this sentencing, Kikumura's specific intent in transporting the explosives. A hypothetical prosecution may illustrate the perceived misconduct. Suppose the police apprehend a man who is driving recklessly with the intention to meet others in a robbery conspiracy. State officials only charge and convict the man with violating traffic ordinances, but at the man's sentencing hearing argue that the underlying motive for the man's speeding was participation in a robbery at another end of town. The sentencing judge finds the state's evidence convincing and sentences the defendant as if he had been convicted of conspiracy to commit a robbery. I believe that in a federal habeas corpus proceeding attacking the constitutionality of the conviction, we would conclude such conduct violated the man's right to have the most serious crime specifically charged and proven at a trial which included the full panoply of procedural protection. Here, the Government's analogous conduct in manipulating the charge and sentence of Kikumura is no less offensive simply because it

has occurred within the shadow of the sentencing guidelines.

Because Kikumura himself did not raise these objections on appeal and the Government had no opportunity to respond, I concur rather than dissent. For this reason, I believe that we are precluded from reversing on the ground that the Government's conduct here infringed upon Kikumura's right to due process. However, I believe that if the Government had proceeded properly and introduced the evidence of Kikumura's intent to kill at trial, the record at trial probably would have justified his conviction of that charge and sentencing as determined by this court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

United States Court Of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
United States Circuit Judge

19613 United States Courthouse
Independence Mall West
Philadelphia, Pa. 19106-1782

November 5, 1990

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, DC 20004

Dear Billy:

I write in response to your letter of September 7, 1990 in which you solicit comments with respect to possible Guidelines revision.

Preliminarily, I take this opportunity to express my appreciation to you and your fellow Commissioners for the cooperation given to me during my three year term as Chairman of the Judicial Conference Committee on Criminal Law and Probation Administration, a term which began just at about the time the Guidelines became effective. I believe that the cooperation between the Commission and the Committee was a significant factor in the successful implementation of the Guidelines. One special note in this regard -- the Committee was especially appreciative of your response to our concerns about the monitoring of departures. I believe that this good working relationship helped inform the Committee's unanimous vote to disapprove the recommendation of the Federal Court Study Committee that the Guidelines be made advisory. As all the Commissioners are doubtless aware, the Judicial Conference adopted our view and declined to endorse the Study Committee's recommendation.

I deem the aspirations of the Committee in the guidelines sentencing area to be best reflected at this point by the Committee's recommendations, approved by the Judicial Conference, for revisions in the Guidelines. I transmitted these to you on behalf of the Judicial Conference in September 1990. I earnestly hope that these recommendations will be the subject of serious consideration by the Commission. The Commissioners may wish to note that the Judicial

Conference has authorized the Committee to submit to the Commission further recommendations from time to time without the necessity of Conference approval. I assume that you will be hearing in this regard from my successor, Judge Vincent Broderick, in the months and years ahead.

I take the liberty of making some suggestions beyond those made by the Committee. On these I am speaking only for myself, for I no longer have authority to speak for the Committee or the Judicial Conference. While the principal thrust of my comments relates to the need for moderating the harshness of some sentences, this is not a plea simply to reduce the Guideline ranges, or provide more downward adjustments. Indeed, it is my belief that there are a number of areas in which the Guidelines are too low. While I have only anecdotal evidence from talking to probation officers, I can identify document fraud (I hear this concern from probation officers in the New York area), credit card fraud (I hear about this from a lot of sources), and explosives and firearms charges (ditto). On the latter, you might consider my opinion in United States v. Kikumura, No. 89-5129 (3d Cir. Nov. 2, 1990), which makes recommendations for upward revision. I would suggest that the Commission look into these three areas.

However, even the most "hardline" judges and Probation Officers to whom I have talked believe that the Commission must make it possible for judges to give lower sentences to truly low level offenders, particularly in drug operations and fraud schemes, those who really are "errand boys" and have no knowledge of the scope of the enterprise. More specifically, I make the following proposals for the Commission's consideration:

1. I would create a new "low low" criminal history category for first offenders, perhaps even a special category for people with no arrests.

2. I would also like to see some "super" downward adjustments, perhaps with a built-in range of discretion rather than a specific ratchet, for offenders with minimal roles, operative only at higher guidelines levels. At the lower levels the present up to four level adjustment would seem adequate; however, at the upper ranges, one or two levels don't make that much of a difference to a defendant in view of the long

sentence (in absolute terms).* Perhaps a differential proportionality principle could be built in, much as the Committee has suggested with respect to acceptance of responsibility.

3. An alternative approach might be simply to set an offense level ceiling for offenders with minimal roles under the rationale that precise amounts have little to do with determining the seriousness of "errand boy" offenses.

4. I also think that the Commission needs to give more express leeway for defendants with extreme health problems. A lot of judges are discomfited by their apparent inability to respond to such situations. Perhaps 5H1.4 could be put into the 5K2 departure section so as to give them clearer authority.

The judges really are upset about these problems. It is not easy to depart from the Guidelines (and a lot of judges think that the appellate jurisprudence thus far discourages departures). The judges thus find themselves constrained by the Guidelines to impose what they, based upon long experience, consider unduly harsh sentences upon people of very low relative culpability, who often have no prior criminal record or have only a minor record. I think that there is much room to build in flexibility in the kinds of cases that I have described without impairing the integrity or structure of the Guidelines.

I am not, of course, speaking of the mandatory minimums about which not even the Commission can do anything, although I hope that it will continue to work with the Committee to try to talk some sense into the Congress on this subject. I believe that Judge J. Lawrence Irving (S.D. Cal.) was sincere when he wrote the President that his frustration about having to impose what he though were unduly harsh sentences because of mandatory minimums (and the Guidelines) so discouraged him that he felt impelled to resign from the federal bench.

---

*. I acknowledge that the current system is statistically proportional. However, I adhere to the point made in the text.

I would hope that the Commission would take the opportunity in the next several months to speak to a large number of sentencing judges about this general subject. I think that the judges will be able to identify for you with particularity the areas of their concern. The Commissioners who attended the small groups at the Fort Worth Sentencing Institute have already heard from some of them. I know that you have, in the past, sent out questionnaires, but these forms tend to go unanswered because most judges don't like filling in forms. And they are not prone to answer letter such as the one I am responding to because they are too busy. I suggest that the Commission consider a monitoring/research project that entails direct communication with a sample of sentencing judges (interviewing is preferable to telephone contact, but either is preferable to a survey). I believe that a direct project to seek judicial input would be beneficial.

I think it fair to state, in terms of its relationship with the federal judiciary at large, that the Commission has been on the defensive for quite some time, though I believe that it was put there in large measure by the attitude of a number of federal judges. However, having now weathered the storm of federal judicial protest and won the judiciary's commitment to work with it as reflected by the Judicial Conference's recent resolution, I would hope that the Commission will reciprocate by responding positively and quickly to the serious and fervent federal judicial concerns about the lack of flexibility in the Guidelines. I have suggested some possible approaches. There are doubtless others.

I would hope too that the Commission would, in the future, revise its statistical format and press releases which characterize sentences within the Guidelines as being "in compliance." This characterization is sharply at odds with the very clear text of the Guidelines and policy statements, which encourage departures and render them a critical part of the ongoing development of sentencing law. This usage sends the wrong message to the public, and angers the judges who believe that they are faithful to their duty when they depart, and yet by the Commission's characterization, departure is publicly branded as non-compliance.

With best wishes and kindest personal regards, I am

Cordially,



Edward R. Becker

ERB:afr

cc: Members of Sentencing Commission
Members of Committee on Criminal Law & Probation Administration
Judge Schwarzer
Donald Chamlee
Mike Keenan
Maggie Jensen
Toby Slawsky
David Adair
William Eldridge
Barbara Meierhoefer
Paul Hofer
John Steer
Phyllis Newton

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National Association of Criminal Defense Lawyers

December 5, 1990

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

Dear Judge Wilkins:

I am writing on behalf of the 20,000 members of NACDL and its state and local affiliates regarding the Sentencing Commission's study of mandatory minimums, as directed under section 1703 of the newly enacted crime bill, P.L. 101-647.

We know that the Commission has its hands full carrying out this detailed study within the six-month time frame allotted, but there is one important related issue we wish to commend to the Commission's attention: the need for this same type of impact assessment on new mandatory minimum sentencing provisions before they are voted upon for enactment.

The reality is that, whatever conclusions the Commissions reaches in its report, and whatever recommendations it makes, it is likely that legislation proposing new mandatory minimums will continue to surface from time to time in Congress. Although we heartily endorse the concept of reviewing the impact of all existing mandatory minimums and suggesting alternative ways that Congress might express its desire to increase sentences without resorting to mandatory minimums, we believe it is necessary to deal with this reality, and to equip Congress to make informed decisions based on the merits of each new proposed mandatory minimum.

Many states now require that some sort of impact assessment be conducted on new sentencing legislation before it is enacted. (Enclosed for your information is a review of state experience in this area which we prepared for Senate Judiciary Committee staff last year, including proposed legislation.) One state--Tennessee--mandates a "pay as you go" approach, so that any sentencing-enhancement law enacted without accompanying funding for prison costs "shall be null and void." We found that the legislative reaction to such assessments has been overwhelmingly positive.

We note that the prosecutorial community also appears to support making such information available to legislators. Last Fall, the Criminal Justice Section of the American Bar Association--made up of prosecutors and judges as well as private practitioners--debated a resolution urging that Congress and the state legislatures should not enact any legislation affecting sentencing or parole policies without first considering a prison impact assessment and appropriating the necessary money to implement the legislation, or taking "other counterbalancing steps" to decrease prison populations. Prosecutors on the Criminal Justice Council spoke up in favor of the resolution: a representative of the Justice Department's Criminal Division said that Congress has been "unbelievably irresponsible" in not seeking and considering this type of information in the past. Prosecutors from Illinois and Maryland also expressed the support of the law enforcement community. Subsequently, the full ABA overwhelmingly approved the resolution.

We stress that although the need for prison impact assessments is nowhere more compelling than where mandatory minimums are proposed, it extends to all laws which would be likely to cause a net increase in prison populations. A requirement for prison impact assessments should extend to any legislation creating a new offense, expanding the scope of an existing offense, changing the rules of eligibility for probation, parole or supervised release, or otherwise increasing sentence length or the number of offenders subject to imprisonment. Naturally, this would cover amendments to the sentencing guidelines developed by the Commission, though they are legislated in a slightly different way.

Judge Wilkins, we and many in Congress were shocked at the prospect that the massive new mandatory minimums approved by the Senate in its version of this year's crime bill could have suddenly become law without a moment's consideration of their effect on prison populations or on proportionality with sentences for other federal offenses. These provisions, particularly those in the Gramm amendment approved on June 28, 1990, were virtually drafted on the Senate floor, were shouted through not on their own merits but as part of a passionate debate on gun control, and raised the specter of penalties as extreme and irrationally disparate as those caused by the 5-year mandatory minimum for crack enacted in 1988, which the Commission has rightly singled out for criticism. It is our view that any report on mandatory minimums which does not address the need for impact assessments before enacting any such mandatory minimum has fallen short of satisfying the Congress's legislative request to the Commission, in section 1703(b)(8) of the crime bill, for information which would "contribute to a thorough assessment of mandatory minimum sentencing provisions."

We encourage the Commission to discuss this idea with corrections officials and any other criminal justice planning professionals. We have no doubt that support for the concept of pre-enactment impact assessments will be unanimous among all responsible authorities involved in criminal justice policy.

Finally, though we fear the Commission may tire of hearing us harp on it, we hope that in reviewing the impact of mandatory minimums on "the Federal prison population" (section 1703(b)(3)), you will also consider the impact on individuals within that population. The insanity of mandatory minimums is not just a question of prison head counts, unwise budget allocations, or even illogical and inconsistent undermining of the guideline system. It is injustice with a human face, like Susana Sanchez-Robles, the single mother of five young daughters who I mentioned in my testimony before the Commission earlier this year, who is serving a mandatory ten-year sentence for a low-level "mule" offense. Many such cases are reviewed in the enclosed excellent article from the March issue of American Lawyer magazine, and more crop up every day, with judges increasingly lamenting their absolute powerlessness to avoid imposing an absurd and unjust sentence on a peripheral drug defendant--to tailor, for example, an alternative sentence for Ms. Sanchez-Robles which would punish and incapacitate her without, in effect, orphaning her children.

Such injustices are compounded, we note, by the requirement that mandatory minimums can be avoided only if the prosecutor certifies to the judge that the defendant has provided substantial cooperation in the prosecution of another person. In practice, our members attest, prosecutors will award such reductions only to the more culpable, high-level defendants who can roll over on somebody important. Low-level defendants, who can provide information only about their immediate supplier, never qualify, and thus end up serving proportionally more severe sentences than the true "kingpins."

The Commission's consideration of our views on these vitally important issues is, as always, greatly appreciated. If NACDL can be of any further assistance as you prepare your report under the crime bill, please do not hesitate to contact me.

With best regards,

Sincerely,

H. Scott Wallace

H. Scott Wallace
Legislative Director

PRISON IMPACT ASSESSMENTS

Corrections population forecasting is utilized in some form in many states, to assist policymakers in the allocation of resources in addressing significant criminal justice issues. As the National Conference of State Legislatures has recommended (State Legislatures and Corrections Policies: An Overview, May 1989):

> As legislatures consider new sentencing or corrections policies, it is important that they know the impact on the corrections system. For example, although a number of states enacted new mandatory sentencing provisions over the past decade, few planned for the increases in prison populations generated by these new laws. Corrections population forecasts and fiscal impact statements for corrections bills are two critical tools that legislatures should make use of as they develop criminal justice policy.

States which use corrections population forecasts to estimate the impact of pending legislation include Delaware, Florida, Louisiana, Tennessee, Minnesota, Oregon and Washington. Kansas, Colorado, South Carolina, Oklahoma, Pennsylvania and Indiana are reportedly in the process of developing forecasting capability. Legislatures in 10 states--Florida, Maryland, Michigan, Montana, Nebraska, Ohio, South Dakota, Vermont, Virginia and Washington (according to a 1987 report of the National Conference of State Legislatures)--have established legislative fiscal offices to prepare their own prison population forecasts.

Corrections population forecasts for pending criminal justice bills generally have at least two parts: an assessment of the legislation's impact on corrections populations, and a fiscal assessment of the cost of any such increases in corrections populations. Operations costs are usually projected at least five years into the future. The process is greatly expedited by reliance on a fiscal impact simulation model, containing various assumptions about how policy changes will affect incarceration patterns and related costs, and permitting easy computer manipulation of specific variables to reflect the operation of the new legislation.

In some states the process is compelled by statute. The Louisiana Law Enforcement Commission is statutorily required to "maintain prison population projections" and "prepare and present to the governor and legislature a policy impact statement on each major change to correctional law." (La. R.S. 15:1204.1). Some

states with sentencing commissions have assigned the task to them. In Minnesota, the Sentencing Guideline Commission is statutorily required to consider correctional resources in establishing and modifying its sentencing guidelines (Ch. 244.09, Minn. Statutes, 1989), but performs a similar function voluntarily on pending legislative measures; the legislative leadership and chairs of the House and Senate Judiciary Committees routinely route criminal justice legislation through the "fiscal impact note process" at the Commission, and if a bill is determined to have a fiscal impact, it is referred to the Appropriations Committees.

Often, the process is undertaken voluntarily by the legislature or the executive branch. In Delaware, the idea of prison forecast reports on proposed legislation was conceived by the Criminal Justice Executive Committee, a panel consisting of the Attorney General, Chief Justice of the state Supreme Court, Director of Corrections, a colonel of the state police, a public defender, head of Juvenile Rehabilitation, and chaired by a private criminal defense lawyer. The reports are carried out, at the request of the Committee, jointly by staff at the state's Statistical Analysis Center and the Criminal Justice Council, to provide a cooperative balance between research and policy perspectives. An annual report reflecting cumulative legislative changes over the past year is also prepared. The Delaware project has been duplicated in Washington. In Florida, the process is carried out by the Criminal Justice Estimating Conference, which includes representatives of both the executive and legislative branches.

Tennessee mandates a "pay-as-you-go" approach, requiring that any law causing a net increase in periods of imprisonment is "null and void" unless and until funding is appropriated to cover the "operating costs" of the law equal to the projected costs of the most expensive of the 10 ensuing fiscal years, as estimated by the state prison impact assessment office. (Tennessee Statutes, 9-6-118).

When a legislature is informed beforehand of a bill's impact on prison resources, it can move immediately to provide the necessary funding, rather than waiting until after implementation to assess the actual impact on prison overcrowding. In Minnesota in 1988, for example, when a prison impact assessment was performed on a bill to substantially increase sentences for violent and repeat offenders, the legislature made use of the assessment to support an appropriation for an entire new prison, allowing prison construction to begin in time to adapt to the increased prison population.

Assessments of a bill's impact commonly go beyond bare prison numbers. They may include assesments of its projected effect on crime, based on empirical studies of similar laws in

other jurisdictions; the effect on resources for other parts of the criminal justice system, including courts, prosecutors, indigent defense services, probation and pre-trial services; and adjudication patterns. The Delaware project, for example, in considering a reduction from 15 to 5 grams in the threshold quantity of heroin or cocaine which would trigger a mandatory minimum 3-year prison term, examined the bill's effect on criminal drug activity, to determine the ability of drug sellers to stay within the 5-gram limit without significantly affecting sales, and to determine the proportion of non-selling users who would be brought within the bill's increased penalties.

In Louisiana, a recent report on a proposed increase in the mandatory minimum sentence for armed robbery, from 5 to 15 years, included an empirically based assessment of the negligible added deterrent effect, expected reductions in plea agreements and corresponding increases in judicial resources for trials, and an analysis of counterproductive factors (including a difficulty obtaining convictions because of juror reluctance to convict if the mandatory minimum sentence seems disproportionately harsh). Louisiana also examines practical problems with a bill's implementation, based on interviews with prosecutors (on a recent proposal to make AIDS transmission prosecutable as second-degree murder, the report explored the significant evidentiary problems in tracking the victim's sexual history, showing causation, or establishing intent), as well as cost issues related to expected litigation challenges, including the costs of litigating a significant constitutional claim up to the U.S. Supreme Court.

The result is an analysis not just of cost, but of costs relative to benefits. Information is provided to legislators which will permit them to reach informed conclusions about whether the proposed legislation's cost is appropriate relative to its potential for reducing crime and increasing the safety and security of the citizenry.

The administrative burden of the prison impact assessment process appears minimal. A variety of computer forecasting models have already been developed for the states, by experts such as Kay Knapp, former Executive Director of the Minnesota Sentencing Commission and the United States Sentencing Commission, and currently Director of the Institute for Rational Public Policy. Staffing requirements vary according to the number and complexity of assessments performed, but are generally moderate: in Louisiana, two full-time staff produce some 300 assessments on pending bills in each 85-day legislative session. In Washington, regular Sentencing Commission research staff report on any bill in hearing--some 50 reports per legislative session. In Delaware, a professional staff of three, asked to analyze some 100 bills in a year, select fewer than 10 of the most significant measures for detailed reports.

PRISON IMPACT ASSESSMENTS

(a) Section 3731 of title 42, United States Code, is amended by adding at the end the following new subsection:

"(g) Preparation of prison impact assessments

"(1) The Director shall prepare prison impact assessments, in consultation with the Prison Impact Advisory Committee established under paragraph (2), in response to requests from Congress for information relating to the prospective impact of a pending measure or matter on prison populations and resources within the criminal justice system. A prison impact assessment shall include--

"(A) Projections of the measure's impact on prison (including community confinement facilities), probation and parole populations;

"(B) An estimate of the fiscal impact of such population changes on federal (and, if applicable, state) expenditures and revenues, including expenditures for construction and operation of correctional facilities for the current fiscal year and five succeeding fiscal years;

"(C) An analysis of any other significant factors affecting the cost of the measure, its impact on the operations of the components of the criminal justice system, and its potential for making law enforcement more effective and the administration of justice more efficient and fair; and

"(D) A statement of the methodologies and assumptions

utilized in preparing the assessment.

"(2)(A) The Director shall appoint, under section 3787(e) of this title, a Prison Impact Advisory Committee to assist in carrying out the authority provided under paragraph (1). The Committee shall consist of two designees of the Attorney General, two representatives of the federal judiciary, two practicing criminal defense lawyers (of whom one shall be a federal public defender), two experienced prison forecasting methodologists, a representative of the National Institute of Corrections, a representative of the United States Sentencing Commission, and a representative of the Bureau of Prisons.

"(B) The Committee shall prepare and transmit to the Congress, by February 1 of each year, a prison impact assessment reflecting the cumulative effect of all relevant changes in the law taking effect during the preceding 12 months.".

(b) Title 2, United States Code, is amended by inserting in chapter 6 the following new section:

"190n. Requirement of prison impact assessments; appropriations

"(a) Any measure or matter proposing to establish a new criminal offense, expand the scope of an existing offense, establish or increase a minimum mandatory term of imprisonment, or otherwise increase sentence length or the number of offenders subject to imprisonment shall not be considered in either House of Congress, nor take effect, until a prison impact assessment prepared under the authority set forth in section 3731(g) of title 42 has been transmitted to the Congress by the Director of

the Bureau of Justice Statistics and has been available to the Members for at least seven calendar days (excluding Saturdays, Sundays, and legal holidays).

"(b)(1) For any law enacted, or amendment to the federal sentencing guidelines taking effect, after January 1, 1989, which results in a net increase in periods of imprisonment for federal criminal offenses, there shall be appropriated the estimated net cost of such law or amendment.

"(2) The amount of appropriations made under paragraph (1) shall be equal to the amounts reflected in the prison impact assessment prepared by the Bureau of Justice Statistics under section 3731 of title 42. For purposes of this subsection, the estimated net cost shall be the first-year operating cost plus the construction cost of any new federal correctional facility capacity attributed in such assessment to the enactment of such law or amendment.

"(3) Any law enacted, or amendment to the federal sentencing guidelines approved under section 994(p) of title 28, without the funding required by this subsection shall be null and void unless and until such funding is appropriated in regular appropriations enactments.".

(c) Section 994(g) of title 28 is amended by adding "and in promulgating an amendment under subsection (p)" after "in promulgating guidelines pursuant to subsection (a)(1)", and by adding a comma and "in consultation with the Prison Impact Advisory Committee established under section 3731(g) of title

42," after "and shall make recommendations".

SUMMARY

The proposed legislation is in three parts:

1) An authorization for the Director of the Bureau of Justice Statistics to conduct prison impact assessments on pending criminal justice legislation, as well as a cumulative annual report at the end of each year, working together with a Prison Impact Advisory Committee composed of experts in prison forecasting and in all aspects of the criminal justice system. The minimum components of an assessment are a prison population forecast, a cost estimate, and a statement of the assumptions and methodologies relied upon. Analysis of any other significant factors affecting the cost or effectiveness of the measure would be within the discretion of the Committee and the Director.

The responsibility to perform impact assessments might alternatively be assigned to other bodies, such as the U.S. Sentencing Commission or the General Accounting Office. The important thing is that the objectivity, balance and credibility of the process be maximized, through devices such as the proposed Prison Impact Advisory Board, with its wide range of professional skills and perspectives represented.

2) A requirement that any bill (including sentencing guideline amendments transmitted by the U.S. Sentencing Commission to the Congress for approval) which would create or broaden a criminal offense, or increase sentence lengths or the number of offenders subject to imprisonment, not be considered in either House until a prison impact assessment has been prepared and made available to Members of Congress for seven calendar days. The legislation also includes the Tennessee statute's "pay-as-you-go" requirement, so that measures increasing prison populations or costs would not take effect until the necessary funding is appropriated.

3) A requirement that the U.S. Sentencing Commission consider prison impact assessment information in formulating guideline amendments.

Ten Years For Two Ounces

Congress is packing prisons with bit players in small-time drug deals.

BY STUART TAYLOR, JR.

"For the kingpins—the masterminds who are really running these operations, and they can be identified by the amounts of drugs with which they are involved—we require a jail term upon conviction. If it is their first conviction the minimum term of ten years."—*Robert Byrd, Democrat of West Virginia, then the Senate minority leader and a principal sponsor of the Anti-Drug Abuse Act of 1986, on September 30, 1986.*

MEET RICHARD Anderson and Susana Sanchez-Robles, drug kingpins.

Born poor into a Louisiana sharecropping family, Anderson left school in the eleventh grade to work. He fought his way into the longshoreman's union in Oakland in the sixties, when black-white brawls were part of the job. He did well. Now 48 years old, he is a skilled crane operator with a stellar work record after 24 years on the docks.

Anderson was driving his beat-up 1972 Toyota through East Oakland the evening of December 12, 1988, headed for a family birthday party at his sister Marilyn's house. From there he would go to the docks to work the graveyard shift.

Anderson spotted Michael Lucero at a phone booth. Lucero, the teenage boyfriend of a friend's daughter, flagged him down. Could he have a ride to Burger King and then home? Sure, for a couple of dollars of gas money.

At the Burger King parking lot, Lucero got out and said he'd be back in a few minutes. Moments later a big man—6 feet 5 inches big—opened the passenger-side door and got in. It was night and a dangerous part of town. Anderson was scared. The big man picked up a yellow paper bag Lucero had left between the two front seats. "Is this the stuff?" he asked. "I don't know," said Anderson. "What stuff?" The big man took the paper bag and left.

Now Anderson knew this was a drug deal. He was trying to start his car and leave when men with guns and badges swarmed around him.

That's the way Anderson recalled it at his trial in March 1989 in federal district court in San Francisco. The big man—a federal undercover agent—told a different story about their

20-second encounter:

He had arranged the buy with Lucero earlier that day. Lucero had said a friend would drive him to their Burger King rendezvous in an old beat-up car. Up drove an old beat-up Toyota. Lucero got out and into the agent's waiting car. He said the agent would find a bag of crack cocaine in the front of the Toyota.

The agent had trouble with the Toyota's door. The driver opened it from the inside, as though expecting him. The agent picked up the yellow bag and emptied the crack—a "hard, tan, rocky substance"—into his hand. "Looks good," he said. The driver nodded. The agent asked if he could take it back to his own car. Sure, the driver said.

Back in his own car, the agent settled the price with Lucero: $2,300 for 102 grams (3.7 ounces) of crack. Then he gave a signal. Other agents hidden nearby closed in and arrested Lucero and Anderson.

TEN YEARS, NO PAROLE

The jury believed the agent, and Anderson was convicted on three federal narcotics trafficking charges. The trial judge, William Schwarzer, said at the sentencing that "I might have found differently," but that "the evidence, although marginal, was sufficient" to support the jury's verdict.

The sentence followed automatically: Ten years, without parole.

Ten years. In an extraordinary display of emotion, Judge Schwarzer choked back tears when he had to say those words last September 15. He called the sentence a "grave miscarriage of justice." But he said he had no choice: In the Anti–Drug Abuse Act of 1986 Congress imposed an array of long, mandatory minimum prison sentences for drug crimes, including ten years for anyone involved in distribution of more than 50 grams of crack. Ten years for less than two ounces.

Ten years. "I couldn't believe it," recalls Anderson. Before 1986 many judges would have put him on probation. A tough judge might have given him two years, perhaps four.

Ten years. No matter that, even under the prosecution's theory, he was just a marginal figure in a small-time crack sale, a man with no prior drug convictions, at most a drug user making a few dollars to support his personal consumption.

Ten years: twice the average federal prison time served for robbery. More than ten times the average time served for bribery, fraud, or embezzlement.

Ten years: Taxpayers will pay more than $200,000 to warehouse this former taxpayer.

Unless Anderson wins his appeal, the earliest he will get out of the federal correctional institution at Pleasanton, California—with the maximum 14 months off for good behavior—is late 1997.

By then he will be 56 years old. "My daughter who's ten will be eighteen," he muses. "The one twelve will be twenty. Sheew. . . .

"That's the only thing hurts me," Anderson says, "thinking about them last two. . . . There's so much corrupt out there on the streets. It's just impossible for a lady to raise two girls and keep 'em straight. It's rough out there. . . .

"They're growing up fast, too," he adds. "So fast, sheew. You can't bring that time back. That's lost time, and one might grow up and say, 'Well, you wasn't there when I needed you.' "

Judge Schwarzer, a scholarly, highly respected Ford appointee, is not known as a light sentencer or a man given to displays of emotion. But he suggested at the sentencing that nobody with any sense of justice would put Anderson away for ten years. Halting for long intervals to control his emotions, he bitterly denounced the 1986 law as an "unjust statute" that "makes judges clerks or, not even that, computers, automatically imposing sentences without regard to what is just and right.

"In the long run," said Schwarzer during the sentencing, "if that's the task we impose on judges, the kind of judges we will get on the bench are those who have no sense of justice or conscience and who will serve as clerks to carry out the rule of the Congress. It behooves us to think that it may profit us very little to win the war on drugs if in the process we lose our soul."

Schwarzer is one of dozens of federal judges—including many Reagan-appointed conservatives and some former prosecutors—who bitterly denounce the mandatory minimum sentences that Congress has ratcheted upward in a drug-warring frenzy each election year since 1984. "The vast majority of federal judges are extremely concerned over the impact of mandatory minimum sentences," Schwarzer says.

These laws have more than doubled the average time served for federal drug crimes and produced a staggering increase in long-term incarceration of drug offenders. Most are undoubtedly real criminals. But many are marginal players with no prior criminal records—lookouts, drivers, "mules."

Some are naive kids who made one slip, perhaps to save face with friends. Some are guilty at most of helping out in something they suspected, but did not know, was a drug deal. A small percentage, the law of averages suggests, are innocent. Anderson just might be one of those. "I was unaware," he says. "I didn't know what the kid had left in my car. . . . He's the one that sold the stuff to them, not me." Probably he knew more than he admits. Probably. But how much more?

Most of these long-term drug prisoners, like Anderson, are black or Hispanic and were born poor. Many, like him, have had rough lives. Anderson had a violent father who left the family when Anderson was 7 years old and with whom he had frequent fights. During one of them, in 1965, he stabbed his father, who had a heart attack and died. Anderson says his father had been trying to kill him with a gun. He was allowed to plead to manslaughter "without malice . . . in heat of passion" and served only a year in jail.

Anderson was also arrested in 1985 for jaywalking and charged with possession of a small amount of crack. The charge was later dismissed, as was another possession charge after a similar street arrest in 1987. His urine tested positive for cocaine in January 1989, when he was in a halfway house awaiting trial on the Burger King bust.

Joseph Russoniello, the U.S. attorney in San Francisco, says Anderson was apparently "a cocaine user who in all probability [was] lending himself out to the trade to support his habit."

The lawyers handling Anderson's appeal, Charles Breyer and Liisa Van Duyts of San Francisco's Coblentz, Cahen, McCabe & Breyer, vigorously reject this bold inference from a couple of minor, unproven possession charges and urine tests.

"If he was involved in this matter at all he was just giving the ride," says Breyer. "What's so offensive about this law is that it makes it impossible to impose just sentences, sentences that fit the crime and the person. This man has been an outstanding citizen for over twenty years."

The grounds for the appeal are that Anderson was incorrectly told by two magistrates, two prosecutors, and his federal public defender before going to trial that the mandatory

minimum he faced if convicted was five years when in fact it was ten (they had misread or failed to read the 1986 law); that the evidence was insufficient to support the conviction; and that there was no evidence that Anderson knew the type and quantity of drugs Lucero was selling.

It could have been worse for Anderson. If he'd had one prior drug felony conviction—state or federal—even for simple possession of one marijuana cigarette, his mandatory minimum sentence would have been 20 years. If he had had two prior drug convictions, it would have been life imprisonment without parole.

Virtually all state law drug offenses are also federal crimes. Traditionally federal prosecutors have taken only the biggest cases, involving interstate and international drug networks and major dealers. Now, with Congress imposing mandatory minimum sentences far heavier than those in most tradictions in the stories told by her daughters. "She was using these children as decoys to distract the inspectors," Wheat says.

The jury apparently agreed. Sanchez-Robles was convicted in September on four federal charges of cocaine and marijuana trafficking.

But there is no reason to think she was more than a minor cog—a mule—in somebody else's drug enterprise. She had never been arrested before. She and her girls lived in dingy simplicity. Poor Mexican-American women who don't use drugs and know little of them are typically paid only a few hundred dollars for such lowly work, according to Hall. They are given little information about what or how much they are hauling and are often discarded after one or two trips.

Prosecutor Wheat says Sanchez-Robles's pattern of frequent border crossings suggests that she was "part of an organized operation" and that she may have made thousands of dollars bringing in drugs from Mexico.

Neither Hall nor Wheat really knows whether Sanchez-Robles took dope across the border more than once, or what she was paid, if anything. In the eyes of the law it makes no difference. To convict Sanchez-Robles of trafficking marijuana and cocaine on June 30, 1989, the jury did not have to find that she knew the type of drugs in the van—or the quantity.

The jury did not even have to find that she knew for certain there were any drugs in the van at all; Judge Judith Keep of the U.S. district court in San Diego explained, in a fairly standard instruction, that it would suffice for the government to prove the defendant had "deliberately closed her eyes" to obvious signs that illegal drug were stashed somewhere in the van.

The conviction on all counts could thus have rested on no more than a jury finding that Sanchez-Robles must have smelled the marijuana. It mattered not whether she had loaded the drugs, had seen them, or had been paid.

And once convicted, her mandatory minimum sentence under the 1986 law followed automatically: ten years, without parole. The marijuana alone would have brought a five-year sentence. But the mandatory minimum for having more than five kilograms of cocaine is ten years. In the eyes of the law, proof that Sanchez-Robles knew she was hauling cocaine, not just marijuana, was not necessary for her to be sentenced on the basis of the cocaine.

Application of the federal Sentencing Commission's guidelines—which have been skewed upward by using the mandatory minimum statutes as a baseline—actually increased the sentence, to ten years and one month.

Sanchez-Robles says Judge Keep smiled at her, perhaps in an effort to soften the blow, after pronouncing her sentence last December 4. "I'll remember that smile forever," she says.

NO DISCRETION

Anderson and Sanchez-Robles are among hundreds of peripheral players in other people's drug deals who are serving long prison terms under the 1986 law and another mandatory minimum sentencing law that Congress passed in 1988, dramatically ratcheting up the penalties for drug offenses.

These laws remove all judicial discretion by requiring mandatory minimum sentences of five years, ten years, 20 years, or life in prison, without parole, for a wide range of drug offenses. The penalties for first offenders are determined solely by the amounts of drugs involved, regardless of whether the defendant is the head of the drug enterprise, a one-time lookout, or a driver.

Five years is the minimum for assisting in distribution of five grams of crack (the statutory term is "cocaine base"), 500 grams of cocaine powder, 100 grams of heroin, 100 kilograms of marijuana, or one gram of LSD.

Ten years is the minimum for 50 grams of crack, five kilograms of cocaine powder, one kilogram of heroin, 1,000 kilograms of marijuana, or ten grams of LSD.

The penalties for crack are astronomical: Simple possession of five adulterated grams, weighing less than a quarter and worth a few hundred dollars, carries the same five-year sentence as selling 4,999 grams of pure cocaine, worth as much as $175,000 wholesale.

And the drug quantities for which a defendant can draw five or ten years are small enough to sweep in low-level street dealers and their lookouts, drivers, and runners, and even, in the case of crack, some mere drug users uninvolved in selling. These are people who used to be dealt with by state courts and punished by probation or a prison stint of six months to two years.

One perverse aspect of these laws is that the mandatory minimums are triggered by the weight of the drugs without regard to whether they are pure or adulterated. A half kilogram of highly diluted cocaine in the hands of a small-time dealer will bring a five-year mandatory minimum, while a smaller quantity of pure, much more valuable stuff in the hands of a major trafficker will not.

An additional five years is added to the sentence of anyone who "uses or carries a firearm" in a drug trafficking crime. This has been interpreted to include having an unloaded pistol under your bed along with five grams of crack. The quantity-based mandatory minimums are doubled if the defendant has one prior felony drug offense. And the ten-year mandatory minimums are extended to life in prison without parole for defendants who have two prior drug offenses.

There are also mandatory minimums for distributing drugs to persons under 21 and pregnant women, employing minors in drug sales, and distributing within 1,000 feet of a school or college campus or within 100 feet of a playground or video arcade.

If the feds find five grams of crack in your bedroom, you get five years. If you had previously been convicted of even a minor drug felony, you get ten. If they also find an unloaded and licensed pistol that you keep in your closet for protection against burglars—perfectly legal but for the presence of drugs—make it 15.

Don't expect the judge to give you a break just because your role was minimal or you aren't really a drug dealer. The judge has no power to give you a break. The mandatory minimums strip judges of their traditional discretion to fit the punishment to the crime and transfer it to prosecutors, who determine the sentence when they choose from the long menu of charges they could bring.

Congress isn't finished jacking up these penalties yet. After all, it's another election year, and a Gallup poll last year found 92 percent of the public favor tougher penalties for drug dealers. Democrats and Republicans,

liberals and conservatives alike are vying for commissions in the drug war by combing through the statute books in search of new ways to increase mandatory minimum sentences.

Last October Senator Phil Gramm, a Republican from Texas, found a nifty one, and the Senate adopted it without recorded dissent: the third increase in three years in the mandatory minimum sentence for distributing drugs to persons under 21, this time to ten years. Gramm cited the need to put away "people who are selling drugs to children." But his amendment would give ten years without parole to an 18-year-old college freshman—a senator's daughter, let's say—who gives her 20-year-old boyfriend 5.1 grams of marijuana, which would make ten cigarettes and cost as little as $10, or one snort of cocaine.

How's that? Here's how: In the eyes of the law, anyone 18 or over deserves special punishment as a corrupter of youth if she distributes even a tiny amount of certain illegal drugs to anyone under 21. (Congress, perhaps with senators' children in mind, exempts "offenses involving five grams or less of marijuana" from this mandatory minimum.) And distributing includes giving.

One might think that in such a case a sensible federal prosecutor would find a way to avoid charging a defendant—a senator's daughter, at least—under a statute carrying a ten-year mandatory minimum.

But don't count on it. Under a Justice Department policy issued last March by Attorney General Richard Thornburgh, prosecutors are obliged to charge "the most serious readily provable offense or offenses consistent with the defendant's conduct." There's no exception for cases in which throwing the book at a defendant would lead to an unjust or absurd mandatory minimum prison term.

COOPERATE OR ELSE

There is one way—and only one way—for a defendant to get around these mandatory minimum sentences: by coming up with enough information incriminating other people to bargain for a prosecution motion to give the defendant credit for "substantial cooperation." If you will help your federal prosecutor make a case against your business partner, your neighbor, your friend, or your brother, maybe you can cut a deal.

Providing an incentive to snitch—an incentive strong enough to overcome feelings of loyalty and fears of being killed—is thus the only value deemed important enough to release a drug defendant from the inexorable arithmetic of mandatory minimum sentencing. Congress has codified the value system George Orwell captured in *1984*: "Under the spreading chestnut tree, I sold you and you sold me."

But bit players like Anderson and Sanchez-Robles typically don't know enough to get credit for substantial cooperation. Both tried, and both were spurned. Most prosecutors will not make such a motion simply because the defendant tells all he knows. The information has to be of substantial value in making other cases. And Congress has barred judges from giving defendants credit for cooperation unless the prosecution moves for such credit.

The people who have the kind of information needed to cut "substantial cooperation" deals with prosecutors are typically midlevel or high-level traffickers who have been in the business for some time. That is why lowly mules often draw longer prison terms than the career criminals who are using them.

That is also why bit players in drug deals often have little incentive to plead guilty. In many cases they will be in prison just as long if they plead as if they gamble on a trial and lose. Many judges expect a major increase in the number of drug defendants going to trial. That in turn will aggravate court backlogs and delays; the mandatory minimums could actually increase crime, by defeating the swiftness of punishment that many experts consider a more effective deterrent than long prison terms.

The real kingpins should get long prison sentences. But most don't get caught. Many of those who do get caught are people like these:

● A Dominican man with a wife, children, a job at home, and no criminal record was visiting his brother in Queens when the brother, a crack dealer, got busted. The guest was convicted of assisting in his brother's operation during his brief stay. His sentence was 15 years, without parole, reduced to ten when the appellate court held he was not liable for the gun possessed by a co-defendant. "This sentence was just off the wall, crazy," says the judge who had to impose it. "He has a wife and kids at home. He's in the United States two days. He looked at me and started to cry like a baby. It was a moment I will not soon forget."

● Juan, a 20-year-old New Yorker with no criminal record and a job at a transmission shop, was asked by an uncle in Texas one evening to go to Baltimore the next day, meet someone, and pick up a package for $100 or so. The uncle did not say what would be in the package. Juan obliged. At the Baltimore train station, the uncle's contact, an informant, handed him a bag, opened it, told him it contained cocaine, and left. Juan was sitting on a bench thinking about what to do next when federal agents arrested him moments later. With eight kilograms in the bag, the automatic sentence was ten years. "He's a good kid, a nice kid," says his lawyer. "He is confronted with an uncle who asks for some favors. The next day he finds himself sitting in jail for what could be half his life. It is a tragedy."

● Robin Nurse, a 27-year-old single mother of a 7-year-old girl, was an office manager for her mother, a Long Island, New York, psychoanalyst. Then she became one of hundreds of mules caught bringing drugs from New York by train through Washington's Union Station. She had no prior convictions. The valuable part of her cargo, four kilograms of cocaine, would have brought a five-year sentence. But she also had 91 grams of crack, which she denied knowing about. The mandatory minimum for that was ten years. Nurse declined to set someone else up in an effort to get a sentence reduction for fear of harm to herself or her family.

● Another mule busted at Union Station, a 21-year-old woman described by the judge in her case as a "naive" first offender, got five years for hauling 1.4 kilograms of cocaine. She pled guilty, saying she had been told her cargo was marijuana and had been paid $300 plus train fare.

● Jose Alberto Mendez, a high school student, pled guilty to taking $500 to deliver a bag full of 287 grams of heroin to a restaurant rendezvous last May. Federal district judge Robert Sweet of Manhattan termed him "an impressionable young man with no prior criminal record" who had "fallen under the influence of older, hardcore criminals." The judge called the five-year mandatory minimum he had to impose "excessive and counterproductive."

● A 19-year-old high school graduate with no prior record was caught with two ounces of crack and a .22 caliber pistol in his car. His mandatory minimum was 15 years—ten for the crack plus five for the gun.

● An 18-year-old Mexican alien with no prior record who had been working odd jobs in the United States for a few months was recruited as a lookout for a heroin sale for $500. He was caught. The proprietor was not. That's what lookouts are for. This one got ten years.

● A 35-year-old Washington man

with a long history of petty crimes was arrested in his bedroom with 21 grams of crack and two pistols, released on bond, and later caught with 28 grams of crack and some other drugs in his car. The judge had to give him 35 years, without parole. "He's just a small-time dealer," the judge says, shaking his head. "Now he'll be in prison until he's at least sixty-five. It's the longest sentence I have ever imposed."

- A 40-year-old Syrian immigrant with two small children who ran a juice bar with his wife in New York got involved in selling a few ounces of heroin, because, he said, he needed the money to avoid losing the juice bar and his apartment. He got five years.
- A Washington, D.C., secretary got a mandatory five-year sentence; her son sold crack in her house—with her knowledge, the jury found—and some crack was found hidden in the attic and in a locked box in the family room.

DEMONS AND ABSTRACTIONS

It seems doubtful that most members of Congress or most voters would favor such sentences for any of these defendants after seeing them up close and hearing the facts and circumstances that judges and juries hear. A few years ago many would have gotten probation.

But nobody talks about defendants like these when the mandatory minimum laws sweep like tornados across the House and Senate floors, scattering sense and reason in their path. The legislators talk about demons and abstractions—drug lords, kingpins, scourges, plagues, merchants of death, enemies in the drug war. Little thought is given to the application of these laws to real people in real cases.

Among the judges and probation officers (not to mention defense lawyers) who do deal with real defendants, the emerging consensus seems to be that Congress has created a monstrosity, a grotesque engine of injustice that does little to deter crime.

The consternation that has swept through much of the federal judiciary at being required to impose draconian sentences on peripheral players in drug deals is striking. It is not limited to liberals with a soft spot for criminal defendants. Some of the most forceful complaints come from conservative Reagan appointees, including more than ten who have spoken out publicly or were interviewed for this article, four of them former prosecutors.

"It kills you to sentence these mules. It's awful," says a Reagan-appointed former prosecutor who favors very harsh prison sentences for real drug dealers. "All these guys know is that someone named Charlie in the Bronx told them to to take it to somebody named Joe in Washington."

"I am putting I don't know how many young Mexicans in jail for mandatory minimums of five or ten years who have absolutely no record and who were making peanuts," says federal district judge James Redden of Portland, Oregon. Noting that he had to sentence two 50-year-old men to about 30 years in prison, he adds, "I guess we can ask the government to put them on life support systems so that they can serve their full sentences."

A Reagan-appointed trial judge in Washington, D.C., who requested anonymity says he does not know of a single judge in his district—which has more than 20 judges—who thinks the mandatory minimum laws make sense. "Every judge in this courthouse has had at least one case in which he was just horrified by the sentence he had to impose," this judge says.

In many cases judges say they are forced to incarcerate minor offenders who present no danger to the community for terms wildly disproportionate to their culpability, locking up peripheral drug defendants for longer terms than many killers, robbers, and rapists. These laws are trashing the careful gradation of penalties in proportion to degree of culpability that Congress professed to be seeking in the Sentencing Reform Act of 1984, which created the Sentencing Commission. And, these judges add, by eliminating all judicial discretion to fit the punishment to the crime, the laws shift to prosecutors the traditional judicial power to determine sentences.

"They've taken the problem of sentencing disparities, put it in the prosecutor's office, and worse, draped it with the mantle of prosecutorial discretion," complains a federal judge who used to be a federal prosecutor. "When two nutball federal judges issued very disparate sentences for similar defendants in the past, at least it was out in the open."

"I'M SORT OF A MOUTHPIECE"

Most judges who express such sentiments decline to speak for attribution. One notes that criticizing any aspect of the drug war could hurt a judge's chances for elevation to an appellate court.

"It takes the judging out of being a judge," Pamela Rymer, a Reagan appointee on the U.S. district court in Los Angeles, who is considered a tough sentencer, told the *San Francisco Chronicle*. "There's no point in your being out there on the bench. I'm sort of a mouthpiece."

Some federal judges have gone beyond complaining about mandatory minimums and have publicly rebelled against them. Judge Robert Schnacke of San Francisco, a Nixon-appointed conservative, took the highly unusual step of telling the jurors at the end of a drug trial in November that the defendant would have to serve life in prison without parole if they convicted him of possessing more than 50 grams of crack. (He had two prior felony drug convictions, one for possessing a tenth of a gram of cocaine, the other for having two ounces for sale.)

Judge Schnacke explained that since sentencing was no longer the province of the judiciary, the jurors "should know what they're doing." After three days' deliberations, the jury acquitted the defendant on the crack charge, while convicting him on a firearm charge.

Most judges who assail mandatory minimums also denounce, as far too rigid, the federal Sentencing Commission's comprehensive sentencing guidelines. The guidelines determine the sentences for crimes not covered by mandatory minimums and the maximum penalties for all crimes. They are based on a "matrix" system in which the sentencing range (for example, 63 to 78 months) is set by adding "points" for the seriousness of the offense and the defendant's criminal history. "You compute the little numbers and scores, come up with an adjusted offense level, add in the criminal history, and bingo! Where the lines intersect is your sentence," complains a federal judge in New York.

The complaints about the guidelines resemble those about the mandatory minimums: They give judges too little latitude to take into account mitigating circumstances and the defendant's background; they shift the power to determine sentences from neutral judges to prosecutors; and the sentences for drug offenses are far too harsh across the board. (The Sentencing Commission is dominated by hard-line Reagan appointees and is very much in tune with the lust for long prison terms in Congress and the Bush administration.)

But whatever the problems with the guidelines, the mandatory minimum statutes are both more harsh and more rigid. In the absence of a mandatory minimum, the guidelines at least allow the judge to cut the sentence if the defendant played a minor role or accepts responsibility. They also give judges some latitude to go above or below the guideline range in

extraordinary cases.

The mandatory minimums not only eliminate these avenues for judicial discretion, they have driven the guidelines toward greater harshness for all drug offenses. This is because the Sentencing Commission has had to prescribe much longer guideline sentences to incorporate the mandatory minimums and provide proportional guideline sentences for similar crimes not covered by them.

The federal judiciary seems slowly to be preparing to lobby Congress to get rid of the mandatory minimums. Given the apparent futility of trying to get Congress to worry about the simple injustice of overly harsh sentences for minor drug defendants, the main line of attack seems to be that the mandatory minimums are messing up the system of guideline sentencing designed by the 1984 Sentencing Reform Act and will clog up the courts with drug trials.

A committee of the Judicial Conference of the United States headed by Judge Edward Becker of the U.S. Court of Appeals for the Third Circuit resolved last year that mandatory minimum laws "are inconsistent with the scheme of guideline sentencing" under the 1984 Sentencing Reform Act and often lead to unduly harsh sentences in individual cases "that Congress could not have intended." The judges of the Third, Eighth, Ninth, and Tenth Circuits and the 15-member Federal Courts Study Committee, appointed by Chief Justice William Rehnquist, have also suggested with varying degrees of circumspection that the mandatory minimum statutes should be repealed.

"THIS MAN IS ONE OF THE ENEMIES"

Some judges say they have no problems with the mandatory minimums and see them as fitting weapons in the drug war.

In sentencing 22-year-old Richard Winrow to life without parole last December, federal district judge David Williams of Los Angeles said, "Congress has gone out to battle the drug war, and this man is one of the enemies." Winrow was convicted of having 5.5 ounces of crack for distribution in his room in his mother's house; he had three prior cocaine convictions. In state court his maximum sentence would have been four years. But under Congress's Anti-Drug Abuse Amendments of 1988, this small-time drug dealer will be punished more severely than most murderers. Noting that he and the defendant were both black and from the same neighborhood, the 79-year-old judge said drug dealers like Winrow were "making it one of the neighborhoods you can't live in, can't walk down the streets on; my people are the victims."

Prosecutors said afterward that they planned to put up posters in South-Central Los Angeles with Winrow's photograph, his crime, and his sentence, to deter other would-be drug dealers.

"Maybe if we want to have a deterrent effect we have to have tough sentences for some minor defendants," says a federal district judge from Tennessee. "It's just as important to deter the little people as the big guys because they can't be in business without the little people."

Many prosecutors like mandatory minimums, which give them the power to determine the sentence as well as enormous leverage to get defendants to turn informant. Some prosecutors say that under the old sentencing system many judges used their broad discretion to let professional drug criminals off with parole or token prison terms.

Russoniello, the U.S. attorney in San Francisco, says judges had been emasculating the drug laws by giving unduly light sentences. The mandatory minimums, he says, are a welcome congressional "reaction to the judiciary's failure to adequately sentence those involved in drug trafficking." He says "the peril of drug trafficking is so great, the danger and damage in what it does to society is so immediate, that those who are criminally culpable albeit peripheral ought to be prosecuted" and sent away for long prison terms.

Russoniello says the tough new laws will have a strong deterrent effect once people realize "that there will be a dire consequence if they get caught." Implicitly rejecting centuries of practice fitting the punishment to the defendant's degree of participation in the crime, he dismisses the "tired argument that persons who have different roles to play in a drug conspiracy are somehow entitled to different treatment at sentence merely because of the level of their involvement."

But most judges say that long prison sentences can provide only modest increments of deterrence at enormous social cost, barely denting the drug problem.

The Rockefeller drug laws in New York in 1973 imposed a regime of mandatory prison terms for minor offenders much like the new federal laws, with little effect on the drug problem. New York reduced the marijuana penalties in 1979, but its penalties for heroin and cocaine remain among the most harsh in the nation, according to Robert Gangi, executive director of the Correctional Association of New York. "The drug problem is worse than ever," he says. Even the liberal use of the death penalty against relatively minor drug offenders in Malaysia and Singapore has not solved the drug problem there.

The people running drug rings rarely get caught. And they have little trouble finding new mules, lookouts, drivers, and the like, no matter how many are locked up.

"It doesn't deter," says Portland, Oregon's Judge Redden. "Certainly not with non-English speaking Mexicans who act as mules. . . . Perhaps it will deter a few young blacks when they see their friends facing a mandatory five or ten years at age eighteen or nineteen. I doubt it."

"Every year there's a new generation of eighteen-year-old kids who haven't gotten the message," says a Reagan-appointed federal judge in New York.

And how meaningful is the retributive purpose of criminal law in dealing with young members of an urban underclass where involvement in the drug culture is increasingly the norm, not the exception, where it is the exceptional teenager who resists the temptations and threats that his peers put before him?

"People born and raised in the inner city, they drop out of school. Even if they complete school they're essentially illiterate; they have no future, their peer influence, everything is negative," says a federal judge. "They have nothing going for them. This life-style that drugs and crime represent is the only thing they reach out for. It's the only thing that's there."

Many, perhaps most, of those sentenced to long terms of incarceration under the new laws are career drug dealers who arguably deserve five or ten years behind bars. Some may even deserve 20. But the Sentencing Commission's guidelines are a strong enough restraint on any soft-hearted judges to ensure that the really bad guys will get long sentences; for these most culpable defendants, the mandatory minimums are largely redundant. Meanwhile, the broad net Congress cast in the mandatory minimums is scooping up schools of minnows.

"My sense is that twenty percent of those who are going to jail now would have received probation under the old law, and they are primarily nineteen-, twenty-, and twenty-one-year-old first offenders," says a veteran probation officer in a large Eastern city. "In my experience their sentences are ranging from eighty-five to one hundred twenty months with no parole. That's a long time. It's just too harsh."

"Most of those sentenced under the mandatory minimums are people in up to their eyeteeth or repeat offenders," says Loren Buddress, chief federal probation officer in San Francisco. "But in a small percentage of the cases there are human beings who come before the court who may be tangentially involved in a large dope case or were not terribly bright or were coerced into it and get stuck with very tough sentences, and it's not just. It troubles me that the judges have absolutely no discretion at all to take mitigating factors into account. All the discretion now lies with the U.S. attorney's office."

Although the full impact of the 1986 and 1988 mandatory minimum statutes and the sentencing guidelines has not yet been felt, available statistics already reveal astonishing increases in the number of people being prosecuted and imprisoned, and the amount of time they are serving, for less and less serious drug offenses.

Between 1980 and 1987 the number of federal drug prosecutions rose by 153 percent, the number of convictions by 161 percent, and the number of prison sentences by 177 percent, from 3,675 in 1980 to 10,196 in 1987, according to the Bureau of Justice Statistics. These numbers, which have continued to soar since 1987, compare with a mere 4 percent increase from 1980 to 1987 in the number of violent offenders sentenced to federal prison, from 1,770 to 1,837.

The Sentencing Commission calculates that the average time served for all drug offenses will rise by 126 percent, from 23.1 months before the 1986 Anti-Drug Abuse Act to a projected 52.2 months, after all the new sentencing laws and guidelines are fully implemented.

The number of federal drug offenders serving five years or more without parole nearly doubled from September 1986 to September 1988, according to the General Accounting Office, even though, the GAO found, "moderate drug offenses have replaced serious offenses as the largest proportion of drug offenses for which individuals are sentenced." The average time served is pulled below five years by the many defendants convicted of having or selling quantities too small to trigger the mandatory minimum laws.

Mainly because of the new drug sentencing laws, the prison population is growing exponentially, and the proportion of black, Hispanic, and nonviolent first offenders is steadily increasing.

After rising gradually from 17,000 inmates in 1950 to 24,000 in 1980, the federal prison population has more than doubled in the past ten years to 54,500. It is likely to double again by 1997, reaching 109,100, and continue rising to 147,000 by 2002, according to Sentencing Commission projections.

About 80 percent of the increase in recent years is attributable to incarceration of drug offenders. The Bureau of Prisons forecasts that the proportion of drug offenders among all federal prisoners will rise from the current 48 percent to 70 percent by 1995; in 1981 it was 26 percent.

"MY GOD, WHAT ARE WE DOING?"

Most drug offenders who get caught are black or Hispanic. These groups comprised 65 percent of those sentenced in drug trafficking cases under the new Sentencing Guidelines and mandatory minimum laws in the 16 months that ended a year ago. Blacks and Hispanics comprised 53 percent of federal prisoners in May 1989, and the percentage is rising.

Aliens comprise one quarter of the federal prison population. Many are couriers locked up for five or ten years at taxpayers' expense for bringing drugs into the United States once. "When you have a simple mule, a Nigerian woman who's not going to make a thousand dollars in her lifetime, and she smuggles by swallowing drugs in a balloon, and she doesn't even speak English, and we're putting these people away for three, four, and five years," says a federal judge in New York, "my God, what are we doing?"

Most of the drug offenders have never before been incarcerated, and 94 percent of these first-timers have no history of violence, according to the GAO.

The projected increase in the federal prison population will outstrip the government's plans to spend $1.8 billion to double prison capacity by 1995. The system was over its design capacity by 1 percent in 1981; today it is 68 percent over capacity. Even if design capacity is doubled to the planned 64,400 by 1995, the system will still be 53 percent over capacity, based on the Sentencing Commission's "high growth scenario" projection of 98,400 prisoners in 1995.

Where to put all these people? Senator Gramm and House Republican whip Newt Gingrich of Georgia have called for putting them in tents on prison grounds and military bases. They also want legislation to prevent federal courts from curbing prison crowding. And they want to force prisoners to work to pay their keep.

Given the pervasiveness of the drug culture in many inner-city areas, the Gramm-Gingrich approach could begin to approximate simply rounding up young urban blacks and putting them into involuntary servitude on chain gangs.

"We certainly support the spirit of it," White House spokeswoman Alixe Glen said when asked in January about the Gramm-Gingrich package by *The Washington Times*.

Meanwhile, J. Michael Quinlan, head of the federal Bureau of Prisons, made a revealing comment in a roundtable discussion excerpted in the July-August 1988 *Federal Sentencing Reporter*, a monthly publication of case reports and commentary on sentencing under the guidelines and mandatory minimums: "We're also acquiring college campuses and religious seminaries and converting them into minimum-security facilities."

So that's what we have come to. This is madness. The drug war will not be won, and a just society will not be achieved, by giving ever-longer prison terms to less and less serious, usually nonviolent, black and Hispanic first-time drug offenders.

Yet so far, the congressional urge to throw mandatory minimum sentences at the drug problem seems as politically unassailable as it is legally senseless and morally bankrupt. And many prosecutors and some judges dismiss questions about whether the sentences are unduly harsh with the observation that it is not for them to question what Congress, in its wisdom, has ordained.

Wisdom is not the word that comes to mind in reviewing the congressional process that produced the mandatory minimums required by the 1986 and 1988 drug laws, the 1989 Senate amendments, and other proposals moving through Congress this year.

When Congress was passing the 1986 and 1988 drug laws in election-year fevers of public panic and media hype, "people were trying to figure out every conceivable basis for increasing prison time," says Eric Sterling, who spent eight years as assistant counsel to the House crime subcommittee. He left in January 1989 to found the Criminal Justice Policy Foundation, which opposes overreliance on criminal sanctions to deal with the drug problem.

HELTER SKELTER IN HALLS OF CONGRESS

"The process has deviated from any kind of rational, organized approach," Sterling adds. "The committees with jurisdiction have largely been supplanted by floor action and Senate versus House throwing bills back and forth at each other. By final passage nobody knows what is in these bills. You have maybe an hour or two to review four hundred pages of legislation and your mind glazes over and you say, 'Wait a minute, am I looking at the fifth version or the tenth version?' It was the worst kind of legislating, it was legislating the way the stock market looks on a busy day, and so whether there's any kind of fit between subtitle G and subtitle K is purely accidental."

Sterling cites, as one example, Senator Gramm's 1988 amendment raising the maximum sentence for having narcotics in prison from five to twenty years. "That made the possession of narcotics in prison twice as serious a crime as the possession of a gun or a bomb or a rocket," he says. "I said to Gramm's staff person, 'This is absurd.' But he said Gramm insisted. This was going to be Gramm's part of the package, so it had to be in there."

The 1986 law started as an effort to identify the quantities of various types of drugs that drug kingpins and major dealers characteristically would have. As amendments got thrown on and the bill bounced back and forth between House and Senate, "the quantities kept going down, down, down," recalls Sterling, and the prison terms kept going up, up, up. He adds that "there was this whole offense-stacking process. We had multipliers of mandatory sentences for all kinds of circumstances."

"Congress passes these statutes imagining the worst cases," a Senate aide explains. "Like the law about selling within a thousand feet of a schoolyard, Congress is picturing a thirty-five-year-old drug kingpin on the corner selling crack to school kids. But the schoolyard statute ends up getting this eighteen-year-old kid selling to his seventeen-year-old friend."

Some members of Congress privately admit that mandatory minimum sentencing statutes are counterproductive. A few—Democratic Senator Edward Kennedy of Massachusetts most conspicuously—have suggested grave doubts as to the wisdom of these laws in floor debate. But they let most of the amendments pushing mandatory minimum sentences ever upward sweep through by voice votes, without recorded dissent.

Last October 5, for example, when Senator Gramm put in his amendment to raise the mandatory minimum for distributing drugs to persons under 21 to ten years in prison, Senate Judiciary committee chairman Joseph Biden, a Democrat from Delaware, put in the record resolutions evincing the concerns of federal judges about mandatory minimums. He said, "I have a practical concern about the ability of the system to tolerate all these mandatory minimum sentences."

But Biden took pains to stress that he was second to none in "wanting to get tough with those who sell to minors" and to say that "I am prepared to accept the amendment." Without further ado the Gramm amendment sailed through on a voice vote. It awaits House action.

"The politics of this issue are just terrible," says a Senate aide. "Nobody on the Hill will allow himself to be out-drugged. It's crazy, where they're voting to shoot down planes. We're going to be creating geriatric wards in prison. On the whole sentencing question the rhetoric is out of the ballpark, and nobody is saying anything reasonable on the other side. What are we doing to ourselves as a country? What kind of system are we creating? The senators up on the Hill don't take time to think about these questions."

The senators are too busy rushing from hearing to floor vote to fundraising event. Many members apparently have little conception of what they are voting for. One senator, considered among the more thoughtful on legal issues, "didn't want to hear about" problems the mandatory minimums would cause, an aide says. This senator said in discussions of the issues that the life sentences were really only 15-year sentences because prisoners would get out early on parole.

"I had the darnedest time convincing him that parole had been abolished," the aide recalls, not to mention that the senator had voted to abolish it. The 1984 law, which created the Sentencing Commission to write the guidelines, also abolished parole for all crimes committed after the guidelines had taken effect.

"Many of these guys didn't even know that was in there," this aide says; they did not understand that "life in prison means life now," both under the guidelines and under mandatory minimum statutes. Ten years means ten years now, except that those serving less than life terms can earn up to 54 good-time credit days a year, after their first year.

When the Senate was whipping through one mandatory minimum sentencing amendment, a Democratic senator who did understand it turned to an aide and said, "This is the most ridiculous thing." But he added, the aide recalls, that it would be political suicide to cast a vote against tougher penalties in drug cases.

"We're all being held hostage to fear of another Willie Horton campaign," the aide observes.

Robert Nelson, the assistant public defender in San Francisco who represented Richard Anderson at his trial, feels bad about what Congress has done to his client, and to others like him.

"I can't emphasize enough how strongly I feel about this," Nelson says. "Every time I have a mandatory minimum case I say to myself, this is wrong. It's just wrong. This man is not that bad. He's not a murderer; he's not a rapist. He made a mistake.

"It's just so sad that Congress and society have decided to punish blindly," Nelson adds. "It creates a system where the defendant is completely irrelevant. His prior history is irrelevant. His degree of culpability is irrelevant. His potential for rehabilitation is irrelevant. His ability to contribute to society is irrelevant. It makes me feel that our criminal justice system is bankrupt, that it's not about justice." □

PCCI-10/8/91

UNITED STATES DISTRICT COURT
POST OFFICE AND COURTHOUSE BUILDING
BOSTON, MASSACHUSETTS 02109

CHAMBERS OF
WALTER JAY SKINNER
DISTRICT JUDGE

November 9, 1990

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

Attention: Communications Director

Dear Mesdames and Gentlemen:

In response to your request dated October 1, 1990, I have the following suggestions to make with respect to the sentencing guidelines:

1. There should be no increment in the offense level for the use of firearms where there is a statute imposing a mandatory add-on for the use of firearms in connection with the same specific offense.

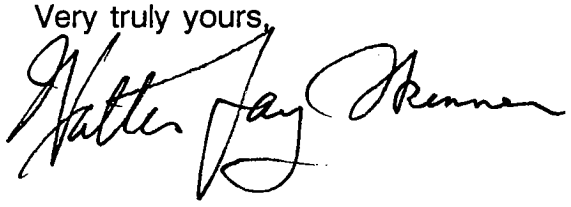
2. The offense level for people found to be in possession of child pornography should be adjusted to permit probation in those cases where the defendant has not been himself involved in the exploitation of children. For most of these people, who are otherwise harmless and productive citizens, the conviction is sufficiently traumatic to prevent recurrence. The jail sentence is unnecessary and harmful and consumes scarce prison facilities to no good purpose.

3. Presently, sentencing in drug cases turns on the weight of material which the defendant is found to have been distributing. Instead of counting the weight of the drug, plus the dilutants, sentencing should depend upon the weight of the drug itself. For instance, a defendant carrying 501 grams of a compound containing 10% cocaine is more severely punished than a defendant carrying 100 grams of a compound which is 85% cocaine. The latter-described defendant is more apt to be a significant distributor, while the former is likely to be a "mule."

4. The definition of violent crime, prior conviction of which requires a defendant to be sentenced as a career criminal, is much too broad. There are many crimes which are included such as burglary in which, although there is a potential for violence, no violence usually occurs. In many of the cases that I have seen, an essentially non-violent defendant has been unfairly tagged as a career criminal.

If the above suggestions have merit in your view, I would be glad to try my hand at a redrafting effort.

Very truly yours,



FCRI-109/91

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND
BALTIMORE, MARYLAND 21201

ALEXANDER HARVEY II
CHIEF JUDGE

December 12, 1990

Honorable William W. Wilkins, Jr.
Chairman
Federal Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Request for Comments on Guidelines

Dear Billy:

I am responding herewith to your letter of September 12, 1990, soliciting comments of the judiciary on the "top three guideline sections of policy statements [we] believe need review. . . ." The judges of this Court have asked me to send this letter to you as our joint response to your solicitation. My delay in responding has been caused by my undertaking to secure the views on this matter of each of the active and senior judges of the Court.

Although we are all of the opinion that the Guidelines are, on the whole, overly complex and difficult to apply, we recognize that it is not possible to solve this inherent problem by proposing specific amendatory language, as your letter requests. Thus, we have focused on the most troublesome aspect of the Guidelines for us in our daily business of imposing sentences and the one which has been the subject not only of comment by the Weiss Committee, but also by individual judges (such as Judge Irving, recently resigned) and by scholars. See, e.g., M. Miller & D. Freed, "Offender Characteristics and Victim Vulnerability: The Differences Between Policy Statements and Guidelines," 3 Fed. Sent. Rep. 3.

Specifically, the Policy Statements in §§ 5H1.1 through 5H1.6 currently reflect the view that offender characteristics should not "ordinarily" be considered relevant in fashioning the sentence or in departing. Courts have differed widely in their approaches to both the degree of deference to be accorded these policy statements and the breadth of what "ordinarily relevant" encompasses. Id. We suggest that the present policy statements of §§ 5H1.1 through 5H1.6 be replaced with the following policy statement:

> Characteristics personal to the offender, such as: military record; employment history; age; physical, mental and emotional condition (including substance dependence and particular vulnerability); community service and humanitarian accomplishments; family situation; and other such matters are relevant in all cases to fixing the sentence within the calculated guideline range. Such characteristics are grounds for departure up or down from a calculated guideline range when they demonstrate significant past conduct that is inconsistent with the asocial or antisocial nature of the defendant's criminal conduct, or when they are present to a degree that makes the imposition of sentence within the guideline range inconsistent with the principles of sentencing as set forth in 18 U.S.C. § 3553.

We think the language quoted above will not only help judges achieve a proper exercise of their sentencing discretion, but will also promote the overall fairness of sentencing while preserving the concept that the Guidelines shape the "heartland" of sentencing.

With warm regards from the judges of this District, I am

Sincerely yours,

Alexander Harvey, II
Chief Judge

cc: All Judges

PCRE- 11/6/90

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NACDL

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National Association of Criminal Defense Lawyers

December 11, 1990

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

Dear Chairman Wilkins:

I am in receipt of a copy of a November 16, 1990 letter forwarded to you by Paul Borman, Chairman of the ABA's Sentencing Guideline Committee, in which Mr. Borman communicates a number of suggestions and requests regarding the Commission's current guideline amendment process. On behalf of the Post Conviction Committee of the National Association of Criminal Defense Lawyers, I am writing to express our enthusiastic support of the matters contained therein and to urge the Commission to affirmatively act on each of Mr. Borman's recommendations.

While we feel that Mr. Borman has identified a number of critical matters that clearly merit Commission attention, please permit me to express particular interest in several of the items therein noted.

We believe that it is most important for the Commission to secure information and comment on what we perceive are some of the disparate procedures and practices of certain U.S. Attorney Offices throughout the nation. Of particular concern are the requirement of the waiver of appeal rights as a condition of the acceptance of plea agreements, the development of policies that specifically limit the extent of departures under §5K1.1, and the withholding of agreements pursuant to §1B1.8 where the office has previously determined that it will make a §5K1.1 motion. It is our position that such practices and procedures impact negatively on the uniform implementation of the guidelines and serve to introduce the precise kinds of disparity that the guidelines were meant to eliminate.

Additionally, we believe that it is most important for some comment to be secured on the issue of limiting the initiation of §5K1.1 departures by prosecution motion in non-mandatory minimum cases. We believe that the guidelines should be amended to permit the courts to make such a reduction on their own or in response to the defense and feel that this issue warrants input from the public.

Moreover, in a matter not addressed by Mr. Borman, we believe that some scrutiny should be given to the guidelines related to marijuana plant offenses. We find it most troubling that an individual found to possess 49 marijuana plants is considered to be involved with 4.9 kilograms of the substance, while that same individual would be held responsible for 50 kilograms if he or she had just one more plant.

Finally, permit me to note that the Committee has just initiated a project to secure information concerning other problems that the criminal defense bar is having with individual guidelines and guideline procedures. In the most recent edition of the Association's publication The Champion, a request was made for feedback in this regard. While the responses anticipated most probably will not be available in time for the current round of amendments, I trust that we will be in a position to share this information in the near future.

We thank you in advance for the consideration that we know will be given to this correspondence and look forward to continuing our relationship with you and the Commission. Please contact me directly if you have any questions or need any additional information.

Sincerely yours,

ALAN J. CHASET
Chairman
Post Conviction Committee
921 King Street
Alexandria, Virginia 22314
(703) 683-3375

PC RI 110/91

NACDL

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STATEMENT OF

ALAN J. CHASET

ON BEHALF OF THE

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON PROPOSED AMENDMENTS

TO THE UNITED STATES SENTENCING GUIDELINES

WASHINGTON, D.C.

MARCH 5, 1991

Judge Wilkins and Members of the Commission, my name is Alan Chaset, and I am pleased to testify today on behalf of NACDL on the Commission's new package of proposed guideline amendments. I am a partner in the Law Offices of Alan Ellis, P.C., with offices in Alexandria, Virginia, Mill Valley, California and Philadelphia, Pennsylvania, and was formerly privileged to serve as a member of the staff of the Commission. My practice is substantially limited to federal post-conviction matters, including the representation of offenders under the sentencing guidelines. For the past three years, I have served as the Chair or Vice Chair of the NACDL Sentencing and Post Conviction Committees and have had the pleasure of working with members of the Commission and its staff in matters concerning the drafting of guidelines and proposed amendments. I also have had the distinct privilege of serving on the Commission's Practitioners' Advisory Group.

My testimony today is presented on behalf of more than 20,000 criminal defense lawyers who practice in every State and Federal District throughout the nation. As you know, NACDL is the only national bar association devoted exclusively to the defense of criminal cases. Its goals are to assure justice and due process for persons accused of crime, to foster the independence and expertise of the criminal defense bar, and to preserve the adversary system of criminal justice. The membership of NACDL and its forty State and Local affiliates includes criminal defense practitioners, public defenders, law professors and law students.

who have expressed the position that proposals being considered for the May 1st submission to Congress should be circulated and published for comment no later than December 15th of the preceding year. We recognize that the Commission has taken steps to commence the amendment process earlier and we applaud the fact that this year's proposals came out in mid-January. The format for this year's amendments, while still a bit confusing, is a clear improvement over prior submissions. The illustrations make it easier to decipher the proposed changes and the Commission has attempted (although not always succeeded) to give more elaborate and detailed reasons for most (but, unfortunately, not all) of the amendments. The Commission can and should do more.

For example, at several places throughout the package, the Commission makes reference to various studies and other documents available for review at the Commission's offices. Since it is most difficult for all but a very few to come to Washington to inspect and review such materials and since the Commission will not provide copies of same to requesters, it is clear that more detail as to the contents of those studies and documents should be included within the amendment notice itself. Alternatively, those items themselves should be published and distributed separately.

Furthermore, the Commission remains dutybound to conduct extensive empirical research in monitoring sentencing trends

Next, as in prior sets of amendments, the Commission seeks to further limit the dwindling ability of the trial courts to exercise discretion at sentencing by proposing changes to guidelines where the courts might otherwise employ a departure or exercise sound judgement. NACDL is concerned that the Commission is, at best, overreacting and, at worst, attempting through the amendment process to become the ultimate guideline court of last resort. The criticism here should also be read as a function of the above articulated request to limit changes in the Manual generally. According to the Commission's own statistics and pronouncements, departure activity remains most limited. Facts and circumstances differ greatly from case to case and courts should be ordinarily able to distinguish the heartland when it sees it and to act accordingly. And the courts themselves should be given a chance to disagree and to work things out as the issues percolate through the system.

Finally, NACDL has continued to note with interest the apparent impact of the Department of Justice on this judicial branch agency. While we applaud the fact that a federal defender has been serving on loan as part of the staff and while we are most pleased with the development and growth of the Practitioners' Advisory Group, more balance is still needed to assist and inform the deliberative process. We believe that the Commission should support such a goal by seeking the establishment of an Ex Officio position for a defense

such Congressional action should be an important factor in the overall decision to amend, the Commission must demonstrate empirically and otherwise why such changes are warranted. And the Commission must next demonstrate why the new specific offense characteristics are the kinds of relevant factors that should be used to differentiate amongst cases similarly to the process that was used to craft the original set of base levels and specific offense characteristics. While Option 2 (with a 2 level increase) appears the more appropriate and reasonable approach and would be less factually complicated to apply, the Commission has not provided enough justification to permit the making of a more informed assessment.

3. Amendment No. 4, with changes to §§2B1.1, 2B4.1, and 2F1.1

We recognize the fact of the specific instructions contained in the Crime Control Act of 1990, and we acknowledge that such instructions are preferable to the Congress's previous preference for straight statutory mandatory minimums, because they at least permit departures where appropriate in extraordinary cases. However, we express our hope that whenever Congress takes such action to clamp down on the "Crime du Jour"--which commonly occurs without benefit of any hearings or opportunity for public comment--the Commission will move subsequently to inform the Congress of any possible adverse consequences, particularly with

change. The Commission has yet to demonstrate with any data why the current provisions do not adequately reflect the seriousness of this offense; the mere statement is insufficient. As to the proposed change under 7(B), NACDL is opposed for the reasons stated above. As to 7(C), NACDL is opposed out of a concern that it will encourage prosecutors to pick and chose amongst potential robbery counts, leaving the "weaker" cases to get factored into the sanction equation under a less stringent preponderance standard.

5. §2B3.2 Extortion by Force or Threat of Injury or Serious Damage (Amendment No. 8)

NACDL opposes each of the proposed amendments here, especially since the Commission has not provided any basis as to why the increases are necessary and in the amounts proposed, as to what the data has demonstrated in that regard and as to why departures are not otherwise appropriate to sanction these unusual cases. We are particularly concerned with the vagueness of some of the language contained therein. Under 8(A), an "implied threat" must be more particularly limited to avoid its application to almost every extortion situation; under 8(C), the terms "organized criminal activity," "over time," and "a period of time" are too ambiguous to avoid disparate application. As to the question raised under 8(D), it would appear that §5K2.5 should be sufficient here to capture other losses to the victim.

In the specific context of the mitigating role adjustment (§3B1.2), the guidelines frequently fail to adequately account for the actual nature and extent of the defendant's participation in the offense. One of the principal factors used in determining a defendant's level of participation or role is culpability, a complex factual determination rather than a conclusion of law. U.S. v. Buenrostro, 868 F.2d 135 (5th Cir. 1989). As a factual determination, however, appellate courts are loath to reverse a sentencing judge's findings here unless they are clearly erroneous.

Reacting to this problem, departures are seemingly available where the defendant's role in the offense is inadequately accounted for under Chapter 3B of the guidelines. The adequacy of the role adjustment may be a factor for departure under 18 U.S.C. §3552(b). See e.g. U.S. v. Crawford, 883 F.2d 963 (11th Cir. 1989).

However, as noted in Professor Deborah Young's observations entitled "Rethinking The Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability," 3 Fed. Sent. R. 63 (1990), the various mechanisms used to date "come nowhere close to meeting a standard of proportionate justice." Id. at 64. While Ms. Young cites two examples of trial courts attempting to avoid excessive quantity based sentences, she notes that such "visible" adjustments are rare. "Instead, efforts to adjust

For many of the reasons addressed within the comments to proposed amendment 11 above, NACDL strongly supports Option 1 and the concept of capping the sanctions for certain offenses as contained therein. We would like to see this rubric become a road revisited and well traveled in the future.

9. §2D3.5 Violation of Recordkeeping or Reporting Requirement (Amendment No. 16)

Without any express approval or disapproval of the offense level here, NACDL seeks clarification as to why the Commission has seen fit to offer guidelines for these misdemeanor offenses.

10. §2J1.3 Perjury (Amendment No. 19)

While Option 2 appears preferable, we question the need to amend the guidelines on the basis of such a small number of cases.

11. §2J1.10 Harboring a Fugitive (Amendment No. 20)

NACDL opposes this proposed new guideline. The "Reason for Amendment" section does not adequately explain how the harborer is presumed to know the fugitive's pending charge. The existing provision, which ties this conduct to Accessary After the Fact, requires proof of such knowledge. Such a provision appears to be

14. §2R1.1 Bid-Rigging, Price Fixing or Market-Allocation Agreements Among Competitors (Amendment No. 25)

Given the small number of cases that are prosecuted annually here, NACDL believes that the Commission should permit additional experience with the existing guidelines before embarking on the changes as proposed.

15. Proposed Amendments Concerning Chapter Four (Amendment No. 29)

As to Proposed Amendment 29(A), NACDL opposes adding criminal history points for sentences that included periods of unsupervised probation. While the Commission indicates that this proposal is a mere clarification, we are concerned that it is more than that; it curtails the current judicial flexibility to differentiate rationally between the severity of offenses for which prior probationary sentences have been imposed. We also object to the disparate impact vis a vis more affluent defendants sentenced to pay fines rather than bear a probationary sentence.

As to proposed Amendments 29 (B) and (C), we oppose the changes as unnecessary. §4A1.3 appears adequate to address these rare situations, providing the sentencing judge with the discretion to take into account facts and circumstances peculiar to the case being considered rather than mandating an enhanced

tinker with the Sentencing Table as it relates to defendants with high numbers of criminal history points and strongly opposes each of the options. As noted above in related contexts, we believe that §4A1.3 is presently still adequate to address this problem and to provide the courts with the opportunity to weigh and consider all the facts and circumstances related to a particular offender's criminal history. The Commission has heretofore failed to provide data within the amendment package as to the number of cases where the need for such changes might have occurred and has failed to demonstrate what the impact of each of the options might have been in those instances.

Combining the proposals here with those recommended in amendments 29 and 30 would significantly lengthen sentences without any clear rationale. At some number of criminal history points, this particular offender characteristic reaches the point of diminishing returns and cannot rationally support increasing sanctions any further. Without more information on the inadequacy of current procedures to handle extensive criminal histories through departures, no changes should be made.

18. §5E1.1 Restitution (Amendment No. 32)

NACDL is opposed to this proposed change to the restitution guidelines because of its mandatory nature. Nowhere is it made clear why the present discretionary provisions are inadequate.

restrictions contained within the applicable policy statements are insufficient, the Commission is seeking to exclude the consideration of such factors as age, mental, emotional and physical conditions from being realistically factored into the sentencing decision even in unusual situations when those factors should rationally be considered.

Individual objections to each of the subparts here can be offered, but our broader--and greater--concern is that the sentencing process is desperately in need of more "humanizing," not less.

We firmly believe that the congressional mission of eliminating unwarranted sentencing disparity does not necessitate the elimination of all sentencing disparities; those which are rationally related to the individual's offense and level of personal culpability must be not only tolerated, but encouraged. By shutting off such options and mandating "cookie cutter" justice for dissimilarly situated individuals convicted of committing the same offense, the Commission, we fear, is creating a new breed of disparity.

We believe it is no better to treat offenders arbitrarily differently than to treat them arbitrarily the same.

21. §5K1.1 Substantial Assistance to Authorities

heroin and marijuana for purposes of setting such equivalencies.

As to proposed amendment 37(P), NACDL opposes this change. §4A1.3 can be used to address this problem and will still permit the sentencing judge to consider all relevant facts and circumstances.

As to proposed amendment 37(T), NACDL opposes the change as unnecessary. The Commission's mission would be better served by concentrating on the fleshing out of a definition of "sophisticated means" rather than by infecting another guideline with this ambiguous term.

As to proposed amendment 37(X), NACDL supports all efforts to provide additional grounds for downward departures. As to §5K2.15, however, the requirement that "full" restitution must be made before this departure can be considered discriminates against defendants who are financially able to only partially make the requisite payments; we believe that it should apply also to those who make "good faith efforts" to make such restitution prior to the discovery of the offense.

On behalf of NACDL, I thank you for this opportunity to offer our comments, suggestions and criticisms and look forward to our continuing relationship with the Commission on these and other matters.

PCIL - 111/91

RESOURCE ECONOMETRICS

531 Gainsborough Drive • East Lansing, MI 48823 • (517) 332-0970

December 26, 1990

Attn: Communications Director
Guidelines Comment
US Sentencing Commission
1331 Pennsylvania Ave., NW, Suite 1400
Washington, DC 20004

Dear Commissioners:

I write to call your attention to an inconsistent and misleading procedure in the present sentencing guidelines (*Guidelines Manual*, Nov., 1990) in cases involving endangered species, and to suggest how these problems could be addressed. I recommend that special guidelines be established for endangered species.

Under the Endangered Species Act, interstate commerce in plants and animals or parts thereof of listed endangered species is prohibited. Because trade is prohibited, there is no market, and therefore no market value, for these plands and animals. However, the guidelines recommend that the offense level be based in part on the "market value of the specially protected fish, wildlife, or plants..." (§2Q2.1. (3) (A), page 2.145). This is obviously impossible. Provision §2Q2.1. (3) (B) could apply instead, but it does not specifically address the Endangered Species Act, and does not fully consider the appropriate public values. Only provision §2Q2.1. (3) (A) potentially addresses the relative values of various species.

Economists have means of estimating "non-market" or "market-equivalent" values--prices or values equivalent to those that would be found in freely operating markets for goods and services that in fact have no markets or that have only distorted markets. There are numerous precedents in which courts have accepted market-equivalent values in place of market values in instances in which realistic market values are not available. For instance, see *State of Ohio, v. USDI*, Federal Reporter 880 F.2d 432 (D.C. Cir. 1989). Further, market-equivalent values could be estimated for endangered species. However, in this case the sentencing guidelines are misleading because the guidelines imply that an inappropriate market-equivalent value be estimated. To see why, we must examine the philosophy guiding the sentencing guidelines and the public purpose of the Endangered Species Act.

It seems obvious from the present guidelines that the severity of a given sentence is intended to reflect the degree of public injury resulting from the crime. Since market values in some cases indicate the appropriate degree of injury, it may be appropriate to link the severity of some sentences with the market values of the crimes. This holds for endangered species if we substitute market-equivalent values for market values.

However, it is not obvious what aspect of the plants or animals is to be evaluated. The

sentencing guidelines imply that the market value of trading the plants/ animals is the appropriate value, but such values, if available, would not reflect the kind of public injury against which the Endangered Species Act was intended to protect. The act prohibits interstate trade, importation, and possession of endangered species or parts thereof. However, these prohibited acts do not by themselves injure the public. Other plants/animals are regularly traded and imported with no significant injury to the public. Instead, it is the *taking of endangered plants/animals from the wild*, dead or alive, that may injure the public. The main value of concern to the American public for endangered species is the meaningful existence of these species. People believe that humankind has a responsibility to try to maintain the existence of all species with which we can reasonably co-exist. The loss of a species or even a noticeable reduction in the integrity of a species offends public sensibilities and significantly reduces the value people derive from the natural world. The Endangered Species Act prohibits trade and importation only because Congress lacks jurisdiction over the taking of most plants/animals from the wild, especially plants/animals that reside in other countries. Prohibiting trade and commerce is intended to lessen any unjustified taking of such plants/animals from the wild.

It follows that the appropriate market-equivalent values for determining the severity of sentences for violations of the Endangered Species Act would include the corresponding losses in public value due to the taking of the plants/animals that were imported, traded, or possessed without permit. That is, the appropriate value includes both (1) the market-equivalent value of trading the plants/animals, and (2) the market-equivalent value of increased endangerment of a species due to the loss of one or more individual plants/animals--which we could refer to as *endangerment value.*

Endangerment value is usually not reflected in the value of trade for the plants/ animals. The existence of a species is not a good or service one can own to the exclusion of other people. There are no private property rights for the *existence* of a species. Therefore, the existence of a species has no market and no market value. The value of the existence of a species is generally a purely non-market value. Little or none of this value is passed along to buyers or sellers in markets for trading in these plants/animals. For instance, hunters, trappers, and gatherers are not required to compensate an owner, the local community, or the world community for further endangering the species in exchange for their acts of removing endangered plants/animals from the wild, although harvesting rights, if sold, would command higher prices for scarcer plants/animals.

Economists refer to the market-equivalent value of the existence of an entire species as its *existence value.* Endangerment value, then, would be the value of the increased probability that the entire existence value would be lost. Other values could also be lost in addition to endangerment value: some or all of the values of various future consumptive and non-consumptive uses of the species, such as viewing, hunting, medical and other discoveries, and useful interactions of the animal with other

components of its ecosystem.

Economic studies have shown that the value to the US public of the existence of a single endangered species could be several billions of dollars, even for plants/animals that exist only outside the US. The loss of a single plant/animal from a wild endangered species population could increase the risk that the entire multi-billion dollar value would be lost. Thus, even if the loss of one plant/animal increased the probability of loss of the whole species by only 1/100 of 1 percent, the market-equivalent endangerment value of this loss could still be several hundred thousand dollars, comparable to an increase in offense level of 8 to 11 levels.

Endangerment value is part of the market-equivalent value of the cost of taking any endangered wild plant/animal. It expresses much or all of the loss imposed on the public as a result of the taking of the plant/animal. Other values that could be relevant for the purposes of the Endangered Species Act might include the plant/animal's market value as a trophy, museum display, or uses in clothing or drugs, the market value of the hunting/fishing experience in taking the plant/animal, and similar values or their market equivalents. Endangerment value is also part of the replacement cost of such an plant/animal. That is, since trade is prohibited and the plant/animal's market value is not available, one might instead inquire as to the cost of replacing the plant/animal as an indicator of its market value. To replace the plant/animal, one must either remove another plant/animal from the wild or obtain one from a captive stock. In either case, removal further endangers the entire species and incurs endangerment value.

Including such values as part of the sentencing guidelines would directly address the public policy purpose of the Endangered Species Act and appropriately consider the public values at stake. However, even if the guidelines clarified this point, the information needed is not yet available. Economists have not yet estimated the specific market-equivalent values that would be needed to enable judges to follow the guidelines in sentencing individuals for specific crimes. That is, they have not estimated the values to the US public of the existence of any exotic plants/animals, nor have they yet directly estimated the value of the loss of a single plant/animal from any wild endangered species population.

Under the present sentencing guidelines, the appropriate values are not even being considered. For instance, this was true in the sentencing hearing in *USA vs. Paul W. Asper* last month in the US District Court of the Middle District of Pennsylvania. I served as an economics consultant and expert witness for the United States regarding that hearing. The valuation question for *Guidelines* provision §2Q2.1. (3) (A) focused on the market value of mounted trophies of several endangered species which Mr. Asper had illegally imported and possessed. The court established that the trophies had no market value by virtue of the legal prohibition of interstate commerce in these species. Therefore, the court proceeded to estimate the replacement costs of the

trophies instead. However, endangerment value (the impact on the US public of removing such animals from the wild) was not even introduced by the government as part of replacement cost because such values have not yet been estimated. Instead, Judge Muir was trying to determine only the cost of going to the countries in which the animals were found, hunting and mounting the trophies, and shipping them to the US. The fact that the animals were endangered had practically no bearing on these costs.

I recommend that the Sentencing Commission either establish a schedule of values of endangered species recommended for use for purposes of sentencing, or a schedule of recommended offense levels for each endangered species.

I would be happy to provide further information, and to suggest procedures for establishing such schedules or for estimating endangered species values. For more details on the difficulties of applying the Sentencing Guidelines in *USA vs. Asper*, I suggest you contact either Mr. Robert R. Long, Jr., Assistant US Attorney, Middle District of Pennsylvania, Federal Building, 228 Walnut Street, P.O. Box 11754, Harrisburg, PA 17108 (phone: 717-782-4482), or Mr. S. Jonathan Blackmer, Trial Attorney, US Department of Justice, Land and Natural Resources Division, Benjamin Franklin Station, P.O. Box 7369, Washington, DC 20044-7369 (phone: 202-633-3923).

Sincerely,



Daniel R. Talhelm
President

cc: Long, Blackmer

TCRL - 12/91

Jones and Welch

ATTORNEYS AND COUNSELORS AT LAW

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December 27, 1990

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

ATTN: Communications Director

Re: Sentencing Guidelines: Section 4-A-1.2(f)

Dear Sir:

Enclosed is a copy of a particular objection to the guidelines relating to differentiating between "deferred adjudications" and "pre-trial diversions."

I would hope the Commission would consider amending the Guidelines to provide that any sort of deferred adjudication is not counted as a conviction, for the reasons enunciated in the enclosed motion.

Respectfully,

Knox Jones

KJ:sr

encls.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA	*	
VS.	*	CR. NO. 89-30044-06
ROLAND RAMOS	*	

OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT

TO THE HONORABLE WILLIAM D. STIEHL, UNITED STATES DISTRICT JUDGE:

Now Comes ROLAND RAMOS, by and through his undersigned counsel of record, filing this, his Objections To Presentence Investigation Report, and respectfully showing the Court as follows:

I.

Paragraph No. 24 of the Presentence Report increases Defendant Ramos' criminal history category by one point. The Court's probation officer, Mr. Laub, interprets Section 4A-1.2(f) of the Sentencing Guidelines, to require such a one-point increment. Counsel must acknowledge with candor that Mr. Taub's interpretation may be technically correct. Even so, the result is ostensibly unfair and unjust. The language in this section is somewhat ambivalent. It first states:

"Diversion from the judicial process without a finding of guilt (e.g. "deferred prosecution" is not counted" (Emphasis supplied). Mr. Ramos was not "found guilty" (42.12(5) Texas Code Crim. Procedure)

The applicable section then goes on the state:

"A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted as a sentence under 4A-1.1(c), even if a conviction is not formally entered, except that diversion from juvenile court is not counted."

II.

Enclosed for the Court's perusal is a copy of Section 42.12(5) of the Texas Code of Criminal Procedure. The Court will see that the only way to get a deferred adjudication in Texas (State Court) is via 42.12(5) which requires a judicial disposition, per se. Had Mr. Ramos received a "deferred adjudication" i.e. a "pre-trial diversion" for the same offense in Federal Court, there would have been no "judicial disposition". Mr. Ramos would have simply been placed on informal probation-- and for a period of one year or less, as the Court knows.

III.

The bottom line is that Mr. Ramos will face up to another year and a half in jail because he received a "deferred adjudication" in state court rather than a "pre-trial diversion" in Federal Court. Because of this one point increment, his criminal history category is three, rather than two. (Paragraph 26). On its face, this appears to be a denial of equal protection which this Court has plenary power to correct.

Wherefore, Premises Considered, Defendant respectfully

requests that the Court disallow the one point increment referred to in paragraph 24 of the Presentence Report, establish Defendant's criminal history category at II rather than III, and assess Defendant's sentence within the applicable guideline range between 151 and 188 months.

Respectfully submitted,

JONES & WELCH
817 Pecan
McAllen, Texas 78501
(512) 686-1119

By: _____
Knox Jones #1588
Texas Bar No. 10949000

Counsel for Defendant

PCRT-113/91

United States District Court

NORTHERN DISTRICT OF TEXAS
AMARILLO, TEXAS 79189

CHAMBERS OF
JUDGE MARY LOU ROBINSON

December 28, 1990

United States Sentencing Commission
Attn: Communications Director
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, DC 20004

Re: Guidelines

Dear Sir/Madam:

I have received a letter asking for comments on the Guidelines.

The Guidelines have operated generally well in all areas except where drugs are concerned. With regard to drugs, the Guidelines seem to place far greater emphasis on the quantity of drugs involved than on the degree of responsibility of the defendant and the different layers of responsibility in the drug distribution and transportation network.

In some cases, severe penalties are mandated for persons with relatively limited involvement in drug offenses. Further, the Guidelines do not seem to provide sufficient leeway to assess appropriate penalties for persons with different degrees of involvement in the same overall offense. This problem is exacerbated when persons with a high degree of culpability have plea bargained for offenses with statutory maximums below the Guidelines.

With the increasing criminal cases and particularly the increase in drug cases with multiple counts and multiple defendants, it is not practical to reject plea bargains in every case where the plea bargain does not permit just sentences based on the relative responsibility of the individual defendants. The Guidelines themselves need to provide more leeway for the court to set sentences based on relative responsibility where drugs are concerned.

Very truly yours,

Mary Lou Robinson

MLR:sw

(RL-1/4/91

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
FREDERIC N. SMALKIN
UNITED STATES DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
(301) 962-3840
FTS 922-3840

January 31, 1991

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

Attention: Communications Director

Re: Sentencing Guidelines - Proposed
Amendments to Take Effect May 1, 1991

Dear Chairman and Members of the Commission:

I have reviewed your proposed amendments to be reported to the Congress on or before May 1, 1991. I should like to take this opportunity to comment.

First, as a general observation, it seems to me that the Sentencing Guidelines are quickly sinking, under the weight of numerous and complex amendments, to a level of complexity and opacity rivalling, perhaps, only the Tax Code. The practical utility of the Guidelines could thus well suffer from these constant and numerous amendments.

As a second general observation, I should think that, as long as amendments are necessary, the Commission, as an agency within the Judicial Branch, ought to give priority and great weight to the proposals for Amendment (copy attached) generated by the Judicial Conference Committee on Criminal Law and Probation Administration, and approved by the Judicial Conference at its September, 1990 Session. I should hope that these suggestions receive rapid and appropriate consideration.

Turning to specific comments, I have several. The first relates to proposed § 3B1.2. This guideline should certainly be amended, because the current version places too great an emphasis on the quantity of drugs in the overall conspiracy in drug cases, resulting in wildly disproportionate sentences in the case of minor participants, such as spouses or acquaintances, whose roles are essentially to facilitate the participation of their partners or friends, who are the really culpable parties.

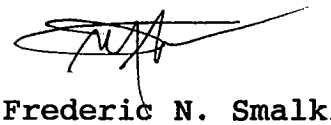
Next, the guideline and commentary as to § 5G1.3 need no amendment, as Congress has specifically vested discretion in the matter of consecutive vs. concurrent sentences in the courts, not in the Sentencing Commission. The proposed amendment purports to

be justified on the ground that "[t]his guideline has been criticized as leaving too much discretion to the sentencing court." Might one ask by whom it has been so criticized? It seems that, having identified a remnant of judicial discretion in the sentencing process, some unidentified critic feels obliged to extirpate it. In my judgment, the amendment is not necessary.

The third specific comment is on the new proposed § 5H1.11, which disallows the court from considering, except in atypical circumstances--which some appellate courts seem never to find--an individual's military, civilian, charitable, or public service, or other "prior good works." This proposed guideline is not in any way mandated by 28 U.S.C. § 994(d), and it gratuitously takes away from an individual--whether he or she be rich or poor, black or white--the benefit of his or her prior contributions to the community, with no sound reason to do so.

Finally, the proposed new § 5K2.15 as to the making of restitution, while apparently well-intentioned, should not require that full restitution have been made, but simply meaningful restitution, before discovery of the offense.

Very truly yours,



Frederic N. Smalkin
United States District Judge

FNS/skp

Attachment

cc All Fourth Circuit District Judges

COMMITTEE ON COURT SECURITY

LEGISLATION TO AUTHORIZE JUDICIAL OFFICERS TO CARRY FIREARMS

The Judicial Conference approved a legislative proposal of the Committee on Court Security that would authorize federal judicial officers to carry firearms. The proposed legislation would overcome what are often varied and conflicting provisions of state law on firearm possession, so as to allow all judicial officers who so desire to carry firearms to enhance their personal security.

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

SENTENCING GUIDELINES REVISION - RECOMMENDATIONS TO THE SENTENCING COMMISSION

The Judicial Conference authorized the Committee on Criminal Law and Probation Administration to act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the Sentencing Guidelines, including proposals that would increase the flexibility of the Guidelines. The Conference also approved submission to the Commission of the following specific proposals:

1. Change the minimum imprisonment requirement of §§ 5C1.1(c)(3) and 5C1.1(d)(2) from "at least one-half of the minimum term" to "at least 1 month", to allow the sentencing court to determine the appropriate mix of imprisonment and confinement conditions when imposing a "split sentence."

2. Modify §§ 5B1.1(a)(2) and 5C1.1(c), and eliminate § 5C1.1(d), to permit probation with confinement/home detention conditions as a within-guidelines sentence in the ten guideline cells (those with minimum terms of from seven to ten months) for which a "split sentence" is the only current alternative to imprisonment for the full guideline term.

3. Permit probation without confinement/home detention conditions at two additional offense levels (seven and eight) for Category I offenders by changing the ranges in the cells to zero to six months.

4. Modify § 5H1.1 to permit greater flexibility to consider age as a basis for departure or the use of sentencing options.

5. Modify Chapter 5, Part H by adding an application note clarifying that offender characteristics that are not ordinarily relevant to sentencing may be considered if, alone or in combination, they are present to an unusual degree.

6. Promulgate a two-part policy statement to replace the current § 4A1.3, to clarify that departures due to the inadequacy of the criminal history score may be based on either degree of risk or type of risk.

7. Rewrite the relevant conduct guideline (§ 1B1.3), and accompanying commentary, to clarify that judges have flexibility to individualize the offense level according to the harm for which the defendant was personally culpable.

8. Reconsider the acceptance of responsibility guideline (§ 3E1.1) with particular attention as to whether the two offense level adjustment should be increased, whether a greater adjustment should be available for higher offense levels than for lower offense levels, and whether a range of adjustments (rather than a fixed two offense level adjustment) should be made available.

FEDERAL COURTS STUDY COMMITTEE RECOMMENDATIONS

On recommendation of the Committee, and also of the Committee on Defender Services, the Judicial Conference *supported* the following FCSC recommendations:

1. Initiatives should be taken that would coordinate prosecution efforts with local authorities in seeking to limit federal drug prosecutions to charges that cannot or should not be prosecuted in state courts.

2. The Attorney General should convene a conference on the problems of complex criminal trials.

PCR I- 11/9/91

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DES MOINES, IOWA 50309

November 6, 1990

CHAMBERS OF
WILLIAM C. STUART
Senior Judge

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

In Re: Sentencing Guidelines

Gentlemen:

I assume that U.S. v. Streeter, 907 F.2d 781 (8th Cir. 1990), has been called to your attention.

In that case the Eighth Circuit Court of Appeals held "that the Drug Quantity Table as it existed at the time that Collins was sentenced, is invalid to the extent that it automatically equates one marijuana plant with 100 grams in cases involving fewer than 50 plants."

In U.S. v. Prine, 909 F.2d 1109 (8th Cir. 1990), the Court stated: "Because Streeter requires that the actual weight of the plants must be used to determine the offense category when less than 50 plants are involved, this Court will vacate the sentence of both defendants."

In the Prine case, the original weight of the marijuana plants included stocks, stems and dirt on the roots. There is no way that the weight of the marijuana can be actually ascertained.

This holding also places the law enforcement officers in a dilemma. Should they seize a marijuana crop when it is young or wait until it matures? I hope the Commission will work on a more practical guideline.

Very truly yours,

W. C. Stuart

WCS:bc

PCRI-120/91

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA
WASHINGTON, DC 20001

CHAMBERS OF
GEORGE H. REVERCOMB
UNITED STATES DISTRICT JUDGE

November 6, 1990

Mr. Paul Martin
Communications Director
United States Sentencing Commission
1331 Pennsylvania Ave., N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Martin:

I am responding to Judge Wilkins' solicitation of comments regarding the Sentencing Guidelines.

I am one of many judges who strongly dislike the Guidelines and the significant restraint they place on the courts. In my experience, application of the Guidelines often finds defense counsel and prosecutors engaged in a hypertechnical debate at sentencing over the wording of one of the Guideline provisions and its intended application. This practice, which is often unavoidable given the fact that the Guidelines do not and cannot anticipate the factors involved in every sentencing, replaces the traditional goal of sentencing, that of fashioning an appropriate punishment, with an absurd exercise in statutory construction.

As an example of this phenomenon, I offer my recent opinion in a case involving the interpretation of a footnote to the Drug Equivalency Tables. (This opinion, which has been appealed, also identifies a significant section of the Guidelines needing clarification.) To the extent that it discusses the arguments presented at sentencing, the opinion reflects the kind of detailed arguments regularly presented to this Court in "aid" of its application of the Guidelines.

In attempting to limit unwarranted sentence disparity, the Guidelines have created for sentencing Courts an entirely new judicial function--the need to define the intention of the Sentencing Commission. This Court's energy would be much more effectively directed at considering and applying its <u>own</u> judgment.

Sincerely,

George H. Revercomb

encl.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
OCT 15 1990
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

AMIN SHABAZZ

and

RICHARD McNIEL

Criminal Action No. 90-0132

MEMORANDUM AND ORDER

Defendants in this action have pled guilty to violations of the Uniformed Controlled Substances Act. Mr. Shabazz entered a guilty plea to one count of Unlawful Conspiracy to Distribute Dilaudid (hydromorphone hydrochloride) in violation of 18 U.S.C. § 371, and Mr. McNiel pled guilty to one count of Distribution of Dilaudid in violation of 21 U.S.C. §§ 841(a) and (b)(1)(C). The defendants have challenged the offense level determinations relevant to their sentencing under the United States Sentencing Guidelines.

Because base offense levels for drug offenses are correlated to the weight of the drugs involved in the offense, the issue presented by this case is whether the quantity of drugs to be measured includes the entire weight of the mixture containing the controlled substance or whether only the weight of the controlled substance itself is to be considered. The difference in these quantities in this case is significant.

Defendants' crimes involved the distribution of Dilaudid, a pharmaceutically manufactured prescription drug. The controlled substance in Dilaudid tablets is hydromorphone. While a Dilaudid tablet weighs approximately .09 grams, the hydromorphone in each Dilaudid tablet weighs only .004 grams. The defendants argue that the amount of drugs considered in determining their offense levels must be calculated based on the net weight of the hydromorphone involved in the offense and cannot be based on the gross weight of the Dilaudid tablets. If the Court were to accept defendants' argument, the Guideline sentencing range applicable to Mr. Shabazz would be 15-21 months rather than 51-63 months, and Mr. McNiel's range would be 10-16 months rather than 27-33 months.

Section 2D1.1(a)(3) of the United States Sentencing Guidelines governs the determination of base offense levels for these defendants. According to that section, a crime's base offense level is determined by calculating the weight of the drugs involved and then comparing the weight to the ranges of weights listed in the Drug Quantity Table. Sentencing Guidelines § 2D1.1(a)(3)(C). A footnote to the Drug Quantity Table states: "Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." This footnote requires that offense level determinations be based on the gross weight of any mixture or substance containing a controlled substance listed in the Drug Quantity Table; the Drug Quantity Table, however, only lists weight ranges for certain controlled

substances. In cases such as this, where the substance involved is not listed in the Drug Quantity Table, resort must be had to the Drug Equivalency Tables set forth in Note 10 to the Commentary to Section 2D1.1.[1] The defendants argue that the footnote cited above only applies to the specific substances listed in the Drug Quantity Table and does not apply to the controlled substances appearing in the Drug Equivalency Tables.

Because the footnote, which appears at the end of the Drug Quantity Table, refers to substances "set forth in the table," it is not unreasonable to read the note as applying only to those substances listed in that Table. However, in light of the relationship between Section 2D1.1 and its Commentary, the Court cannot adopt such a technical reading of the footnote. The Drug Equivalency Tables contained in the Section's Commentary are not distinct from the Drug Quantity Table; rather, they must be read as a supplement to Section 2D1.1, providing a means of referencing controlled substances not specifically listed in the text of that Section to the Drug Quantity Table. In this sense, the Drug Equivalency Tables provide an extension of the scheme established

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[1] Defendants argue that the calculation of the weight of the controlled substance in this case is governed by Note 11 of the Commentary to Section 2D1.1 rather than Note 10. Note 11, by its own terms, applies "[i]f the number of doses, pills, or capsules but not the weight of the controlled substance is known . . . ." In this case, defendants claim, the number and weight of the Dilaudid tablets was known, but not the weight of the controlled substance in the Dilaudid tablets. The defendants concede, however, that the weight of hydromorphone in the Dilaudid tablets is readily ascertainable from the manufacturer's markings on the tablets. Therefore, according to defendants' own evidence, Note 11 does not apply.

in the Drug Quantity Table. Accordingly, the substance of the footnote to the Drug Quantity Table applies equally to the Drug Equivalency Tables. See United States v. Bayerle, 898 F.2d 28, 31 (4th Cir. 1990) (applying gross weight standard to the determination of heroin equivalency of Dilaudid and Dolaphine tablets).

This conclusion is not contradicted by the fact that the substances listed in the Drug Equivalency Tables are listed according to the weight of the active ingredient rather than according to the name of the drug itself. In this case, hydromorphone, rather than Dilaudid, appears on the list. It is consistent with the "gross weight" scheme of the Guidelines to refer to the controlled substance rather than to its form as a mixture in providing equivalencies to drugs listed in the Drug Quantity Table. For example, as required by the gross weight rule, Dilaudid tablets containing .004 grams of hydromorphone would be converted to the same heroin equivalency as Dilaudid tablets with a stronger dosage as long as the tablets weighed the same amount. Moreover, because two different drugs may contain the same controlled substance, it is more efficient for the Drug Equivalency Tables to refer to the controlled substance rather than the particular drug form.

Finally, the specific language of Note 10 supports the Court's conclusion: "The Drug Equivalency Tables set forth below provide conversion factors for other substances, which the Drug Quantity Table refers to as "equivalents" of these drugs. For

example, one gram of a substance containing oxymorphone, a Schedule I opiate, is to be treated as the equivalent of five grams of a substance containing heroin in applying the Drug Quantity Table." This example clearly represents the intention of the Guidelines Commission that drug equivalency conversions be made to the gross weight of the mixture containing the controlled substance listed in the Drug Equivalency Tables.

Defendants claim that the Court's reading of Guideline Section 2D1.1, which requires that the gross weight of the drugs be considered in determining base offense levels for substances listed in the Drug Equivalency Tables, contradicts the statutory scheme of 21 U.S.C. § 841(b). According to defendants, that section, which prescribes penalties for certain drug offenses according to the weight of the drugs involved, does not impose a "gross weight" standard for all controlled substances. Defendants' argument is based on the fact that Subsections 841(b)(1)(A) and 841(b)(1)(B) specifically refer to weights of "mixtures or substances" containing certain controlled substances, whereas Subsection 841(b)(1)(C), which applies in this case, does not include similar language. Because of this discrepancy in language, defendants claim that Congress intended that a "net weight" standard be used for controlled substances listed in the latter subsection.

Contrary to defendants' suggestion, Subsection 841(b)(1)(C) does not mention weights at all; rather, it is a catch-all provision establishing maximum sentences for offenses involving controlled substances not covered by Subsections 841(b)(1)(A), (B)

or (D). The subsection provides no suggestion one way or another whether sentences imposed within its limits are to set according to gross weight or net weight. Thus, reliance on this statutory language is misplaced.[2] See United States v. Gurgiolo, 894 F.2d 56, 60-61 (3rd Cir. 1990) (rejecting argument that language of § 841(b)(1)(C) created exception to "gross weight" rule).

For the foregoing reasons, the Probation Department correctly determined the base offense levels for the defendants based on the weight of the Dilaudid tablets and was not required to limit its measurement to the weight of the hydromorphone contained in the tablets.

10/15/90
DATE

JUDGE GEORGE H. REVERCOMB
UNITED STATES DISTRICT COURT

[2] Defendants suggest that the relevant statute and Guideline reflect a legislative policy to treat pharmaceutically manufactured drugs, like hydromorphone, differently than drugs which are illegal per se. Insufficient ambiguity exists in the statutory or Guideline language, however, to require this Court to examine the legislative intent underlying the language.

cc:

Kathleen Brandon
Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20001

Diane S. Lepley
505 Second Street, N.W.
Washington, D.C. 20001

Jensen E. Barber
505 Second Street, N.W.
Washington, D.C. 20001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
U.S. POST OFFICE & COURT HOUSE
P.O. BOX 3684
LITTLE ROCK, ARKANSAS 72203

G. THOMAS EISELE
CHIEF JUDGE

October 9, 1990

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

Dear Billy:

Thank you for your letter of September 12, 1990, seeking my thoughts on certain guideline sections. I respectfully decline to be drawn into such an enterprise.

It is my personal view that the sentencing guidelines law has been a total disaster. It is also my view that Congress should do away with the mandatory, mechanical system and, in fact, establish sentencing guidelines more or less in accordance with the views expressed by the Federal Courts Study Committee. (My disagreement with the Federal Courts Study Committee is that it chose to go along with the Attorney General and a few members of the Commission in advocating further "study.") I would hope that the self interest in the new bureaucracy which you head would not prevent an objective evaluation of the actual operation of the present system by truly independent outside experts. I am confident that such a study would reveal that the objectives of the law are not being achieved, that there is more disparity in sentences than under the old system, and that the rights of the inhabitants of this land are being trivialized by this inhuman system.[1] At some point, we should transfer the sentencing power back to independent judges, albeit in

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1 This is not to suggest that I believe the present system results in longer and more severe sentences than were imposed under the old system or than would be imposed under a true guidelines system. It does in some cases but in others it results in much milder sentences. It is simply idiosyncratic with the results being primarily dictated by the Executive Branch acting through the prosecutors. The true merits of the case, as often or not, have little to do with the ultimate sentence. And, of course, the due process abuses should be apparent to anyone schooled in our American jurisprudence.

keeping with <u>true</u> sentencing policy guidelines established by the Congress and with sentences being subject to appellate review.

With kindest personal regards, I am

Sincerely yours,

Tom

G. Thomas Eisele

PCR I - 120/91

United States District Court
Northern District of Illinois
211 South Court Street
Rockford, Illinois 61101

Chambers of
Judge Stanley J. Roszkowski

November 8, 1990

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

Attn: Mr. Paul Martin, Communications Director

Dear Mr. Martin:

Pursuant to your request, I submit the following suggestions for amending the sentencing guidelines:

1. I would amend § 3E1.1 "Acceptance of Responsibility" in order to give the sentencing judge greater latitude in evaluating the defendant's acceptance of responsibility and in placing a value on that acceptance. Under the present guideline the court is limited to reducing the offense by two levels. It seems to me that the sentencing court should be given greater latitude in evaluating the extent of the defendant's acceptance of responsibility. (For example: a defendant under the present guidelines who has an offense level of 22 and a criminal history category of I can only receive a reduction from 41 - 51 months to 33 - 41 months, a minimal reduction, at best.) I suggest that this section be changed to expand the number of offense levels which can be used for reduction to a range of 2 - 6, or any level in between, to be determined at the discretion of the sentencing judge. (Taking the same hypothetical example above, the defendant could receive a reduction from 41 - 51 months to 21 - 27 months, depending on the extent of his recognition of and acceptance of personal responsibility.) As the commentary under this guideline so rightly observes, "The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility." At the present time, although the judge may evaluate the defendant's acceptance of responsibility, he or she has very little ability to grant a reduction commensurate with the extent of that acceptance.

2. I believe that § 3B1.2 "Mitigating Role" should be more fully explained in the commentary. I note a great deal of confusion among lawyers, probation officers and judges in attempting to distinguish between minimal and minor. The application notes merely state that for purposes of § 3B1.2(b), "a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal," while "subsection (a) applies to a defendant who plays a minimal role in concerted activity." I fail to see the difference. I think different wording might be helpful. Webster defines minor as "lesser in size, amount, importance, etc." and minimal "the smallest quantity, number, etc. possible." While there is arguably some distinction, it appears to be a distinction without a difference. I would suggest that perhaps a different word be substituted for either "minor" or "minimal." For example: perhaps the word "lesser" or a similar word could be used instead of "minor." In addition, I believe that a more thorough explanation should be made in the application notes.

I hope these suggestions will prove to be helpful. Thank you for your continuing efforts to improve the guidelines.

Very truly yours,

Stanley J. Roszkowski

STANLEY J. ROSZKOWSKI, JUDGE
UNITED STATES DISTRICT COURT

SJR:llw

cc: Mr. William T. Foster
Mr. Richard Bockover
Mr. Steve Osborne

United States District Court
Northern District of Illinois
211 South Court Street
Rockford, Illinois 61101

Chambers of
Judge Stanley J. Roszkowski

April 18, 1991

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

Attn: Mr. Paul Martin, Communications Director

Dear Mr. Martin:

Pursuant to your request for comments on the sentencing guidelines, I would like to add to comments I have made on previous occasions.

Rather than duplicate the effort of U.S. Probation Officer Richard Bockover, I am enclosing his excellent letter of January 31, addressed to Deputy Chief Witkowski, which is self-explanatory. I would only add that I agree with its contents and conclusions. In particular, I believe that departures should be a matter of particular concern to the commission. As Mr. Bockover points out, the criminals who are "the most culpable and the most likely to be recidivists are the very ones who receive the least custody sentence and are the first to be released to the community." I have refused to go along with the government's recommendations on many occasions for this reason.

Thank you for your consideration of this matter.

Very truly yours,

Stanley J. Roszkowski

STANLEY J. ROSZKOWSKI, JUDGE
UNITED STATES DISTRICT COURT

SJR:llw

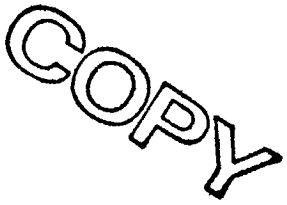
Encls.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
PROBATION OFFICE

WILLIAM T. FOSTER
CHIEF PROBATION OFFICER

U. S. COURT HOUSE
219 S. DEARBORN STREET
CHICAGO 60604
312-435-5700

Rockford, Illinois
January 31, 1991



Gregory Witkowski
Deputy Chief U.S. Probation Officer
Room 1100 - U.S. Courthouse
219 S. Dearborn
Chicago, Illinois 60604

Dear Mr. Witkowski:

This is in response to our conversation of January 28, 1991, regarding my concerns about the United States Sentencing Commission's departure policies (5K1.1).

Realizing that departures are not a part of the United States Probation Officer's responsibilities, our Court in the Northern District of Illinois, Western Division, has still repeatedly asked for the opinion of the United States Probation Officer relative to a departure sentence. In discussing these departures with the Assistant United States Attorneys in the Northern District of Illinois, Western Division, it seems that there is no uniform policy among the Judicial Districts on how or when to use departures. The meaning of "substantial assistance to authorities" seems to be non-definitive and discretionary. In our division, it appears that substantial assistance to authorities is applicable whether it is making a telephone call, agreeing to testify against codefendants, wearing a recording device, or risking one's life. If the particular Assistant United States Attorney deems it "substantial assistance", he then has the flexibility to request the departure.

The amount of sentence reduction in a departure also seems to have no uniformity among the various Judicial Districts. It is my understanding that the United States Attorney's Office for the Northern District of Illinois allows the Assistants to recommend up to a 50% reduction in the amount of custody after they calculate the guidelines. Many times the recommended departure sentence falls below the statutory minimum sentence required by law. To my knowledge, there is no system used by the Assistant United States Attorneys in calculating the amount of recommended reduction in the sentence and therefore most of the defendants in the Western Division are given consideration for the 50% reduction regardless of the extent of their cooperation. Furthermore, it has been my experience that the less culpable defendants, who possess the least amount of criminal information, are not able to qualify for a departure and are sentenced within the appropriate guidelines range, while the more culpable defendants, who possess a greater amount of criminal information, are given lesser sentences. This seems to hold true whether or not these defendants have an

extensive prior criminal record. Therefore, the criminals who are the most culpable and most likely to become recidivists are the very ones who receive the least custody sentence and are the first to be released to the community. In my opinion, these departures are creating the very disparate sentences that the Sentencing Guidelines Act was supposed to abolish.

I would like to suggest that the Sentencing Commission consider the possibility of formulating specific definitions for varying degrees of cooperation. This would then be coupled with a defendant's criminal history level, which would only allow a defendant to receive a departure of a certain number of offense level reductions. It seems that the Sentencing Commission has done this in arriving at regular guidelines sentences and even for revocation proceedings. There doesn't seem to be any reason why the Sentencing Commission could not create a specific set of guideline characteristics for departures. It is my understanding that other Judicial Districts (Madison and Milwaukee, Wisconsin) have had to implement some guidelines and are refusing to depart unless the cooperating defendant's information leads to the arrest or indictment of another individual. If the departure is found warranted by the Court, there is still only a specific number of offense level reductions that the Court will entertain and this is after the guidelines have been calculated by the United States Probation Office. I find it somewhat aggravating and frustrating to expend numerous hours in completing a guidelines presentence investigation during which I gather extensive prior criminal records and background information only to have the Assistant United States Attorney essentially disregard the report and still recommend the departure because of a pre-plea agreement he has made with the defendant. It also seems unfair to me that the departure issue primarily pertains to the more serious offenders (primarily drug traffickers). The typical offender who acts alone in an offense, such as embezzlement by a bank teller or theft by a postal employee, are normally not eligible for a departure because they cannot provide any "substantial assistance to authorities". Therefore, they are almost always sentenced within the guidelines range, while some of the more dangerous offenders are not.

Please understand that I am not opposed to the policy of departures, and realize their importance within the Criminal Justice System. However, I feel that this part of the Sentencing Guidelines Act needs to be better defined and controlled or we are going to see the same degree of disparity in the future as may have existed in the past.

Thank you for your time and consideration in allowing me to express my opinion about this issue.

Sincerely,

Richard Bockover

Richard Bockover
U. S. Probation Officer
Tel: 815-987-4363

RB:gm

c.c. William Foster, CUSPO, Chicago, IL

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
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Ilene H. Nagel
Benjamin F. Baer (ex officio)
Paul L. Maloney (ex officio)

April 25, 1991

Honorable Stanley J. Roszkowski
United States District Court
211 South Court Street
Rockford, Illinois 61101

Dear Judge Roszkowski:

Thank you for your thoughtful comments on the sentencing guidelines and for forwarding to us the letter from U.S. Probation Officer Richard Bockover. The two letters have been circulated to the Chairman, Commissioners and staff for their review.

Thank you for taking the time to respond.

Sincerely,

Michael Courlander
Public Information Specialist

PCRI-1319,

Thomas R. Brett
Judge

United States District Court
Northern District of Oklahoma
333 West Fourth, Room 4-508
United States Courthouse
Tulsa, Oklahoma 74103

November 6, 1990

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

Gentlemen:

This letter is written out of our concern for the sentencing mandates promulgated by the United States Sentencing Guidelines.

While the Guidelines appear admirable in their intent, in practical application they leave much to be desired.

As specified in Title 28, United States Code, Section 991(b), the Sentencing Guidelines are designed to:

1. Effectuate the purposes of sentencing enumerated in Title 18, United States Code, Section 3553(a)(2). In brief, those purposes are just punishment, deterrence, incapacitation, and rehabilitation;

2. Provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct, while permitting sufficient judicial flexibility to take into account relevant aggregating and mitigating factors; and

3. Reflect, to the extent practical, advancement in the knowledge of human behavior as related to the criminal justice process.

It is the second goal of the Guidelines that causes a great deal of concern for many who are mandated to uphold the sentencing laws as enacted by the Congress of the United States.

Certainty and fairness in sentencing, absent unwarranted disparity, is surely a worthy goal. However, the Guidelines do not allow sufficient flexibility. A prime example of the lack of adequate flexibility lies in the Commission's Guidelines relating to relevant conduct, (USSG 1B1.3). 1B1.3(a)(1) states that for sentencing purposes a defendant shall be held accountable for "all

acts and omissions committed or aided and abetted by the defendant, or for which the defendant would otherwise be held accountable . . . ." Application Note 1 under this section states that the phrase "would be otherwise accountable" includes the "conduct of others in furtherance of the execution of the jointly undertaken criminal activity that was reasonably foreseeable by the Defendant. . . ."

With that Guideline in mind, consider the scenario of a large scale drug conspiracy wherein there are defendants with varying degrees of culpability who distribute approximately 6 kilograms of cocaine base. At the lowest end of the scale of culpability is a defendant who was generally aware of the scope of the conspiracy, but declined to participate in any of the overt acts with the exception of a few sales totaling 1 gram. Because this defendant was aware of the scope of the conspiracy, he, according to 1B1.3, is to be held accountable for the total amount of drugs involved in the conspiracy.

In this case, assuming all personal characteristics of the defendants are the same, and each pleads not guilty and is found guilty, a defendant who actually sold the majority of the 6 kilograms is at an offense level of 40 and would receive a sentence of between 290 and 365 months, while the defendant who made the sales totaling 1 gram would receive a sentence of between 188 to 235 months, at an offense level of 36 (due to a 4 point reduction as a minor participant.)

The Guidelines permitting adjustment for defendants who play a minor role in the offense (USSG 3B1.2) do not adequately reflect the minor defendant's actual participation in the offense as compared with the other defendants. Since the black community seems to be more involved with crack cocaine, the harshness of the above example falls on young blacks who get caught up as lesser participants in a drug ring. The above example is not a sentencing guideline anomaly, but basic to the limitations on judicial departure. Also, the prosecutor has considerable discretion in the ultimate sentence by the initial selection of the particular charge.

In short, the Sentencing Guidelines should allow judges the flexibility to individualize the offense level according to the harm for which the defendant was personally culpable and be given discretion in assessment of the defendant's potential for future danger to the community.

Because the Sentencing Guidelines require the court to view criminal defendants as faceless integers, the 65% federal prison overcrowding is likely to continue its upward spiral. All this is

under the rubric of law and order, with too little thought being given ultimate cost to society. Individual lives are destroyed when "sentencing by the numbers" is carried too far. Trial judges must be given more discretion in departing both upward and downward under the Guidelines.

Sincerely yours,

James O. Ellison
United States District Judge
Northern District of Oklahoma

Thomas R. Brett
United States District Judge
Northern District of Oklahoma

cc: The Honorable William H. Rehnquist
The Chief Justice of the United States
The Supreme Court of the United States
One First Street NE
Washington, D.C. 20543

P.S. See the attached recent New York Times article.

Criticizing Sentencing Rules, U.S. Judge Resigns

Special to The New York Times

SAN DIEGO, Sept. 29 — Federal District Judge J. Lawrence Irving, who has presided over a series of highly publicized cases in San Diego, has announced that he is resigning because he believes Federal sentencing guidelines are too harsh.

"If I remain on the bench I have no choice but to follow the law," Judge Irving said Thursday, when his resignation was announced. "I just can't, in good conscience, continue to do this."

Judge Irving said he believed he was the first Federal judge in the nation to resign over sentencing guidelines. The giidelines, which went into effect on Nov. 1, 1987, require longer minimum sentences and no parole, even for first offenders. Judges are left with little or no discretion to modify sentences.

Judge Irving once ruled the Federal guidelines unconstitutional, but was overruled by higher courts. In January 1989, the Supreme Court upheld the constitutionality of the guidelines.

"I've had a problem with mandatory sentencing in almost every case that's come before me," he said.

Split Sentence in Drug Case

As an example he cited a 19-year-old man charged with possession and intent to distribute cocaine.

"The judge, under the old law, gave him a split sentence: six months in prison with five years' probation," the judge said. "The young man understood that if he violated probation he'd go back to prison to serve out the rest of his term.

"He did his six months, and after that he remained free of drugs — we know this because of regular testing," the judge continued. "He completed his education, got married, had a child and became a productive, tax-paying member of society."

Under mandatory sentencing guidelines, the judge said, the defendant would have been sentenced to 20 years in prison with no possibility of parole.

"That's heavy," he said. "And that's my problem. I just can't do it anymore."

Colleagues' Support Cited

In an interview on Friday, Judge Irving said he had received dozens of calls from judges as far away as Little Rock, Ark., who support his stand.

While mandatory sentencing was the main reason for his resignation, the judge said, security problems had also taken a toll on his family. Federal marshals have guarded him and his family while he presided over a number of drug cases involving many defendants.

Judge Irving, a former civil lawyer, was named to the Federal bench in July 1982 by President Ronald Reagan.

The judge said he expected to continue doing mediation work for the courts, and might join a private law firm in San Diego. His resignation is effective on Dec. 31.

PCRT - 12/4/91

United States Court of Appeals
for the Third Circuit

CAROL LOS MANSMANN
CIRCUIT JUDGE

U.S. COURTHOUSE
PITTSBURGH, PA 15219
412-644-3574

November 8, 1990

Mr. Paul Martin
Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004

Dear Mr. Martin:

In response to the Commission Chairman's request for comments on current problems concerning Sentencing Guideline sections or policy statements, I address three problems that may require review or clarification. I suggest that the Commission reexamine these issues.

Drug Rehabilitation

18 U.S.C. § 3553(b) allows a judge to take into account any aggravating or mitigating circumstances of a kind or to a degree not considered by the Commission in formulating the Guidelines. This section has required judges to determine whether the Commission considered drug rehabilitation in its formulations. See United States v. Pharr, No. 90-1284 (3d Cir. filed Oct. 19, 1990).

The Guidelines do not provide a clear answer to this question. Section 5H1.4 (policy statement) states that drug dependence and alcohol abuse are not reasons to depart from the

Guidelines. Section 5K2.13 (policy statement) provides that a lower sentence may be warranted if a defendant commits a non-violent crime while suffering from a reduced mental capacity except in cases in which the reduced capacity was caused by drugs or other intoxicants. Do these policy statements prevent a judge from taking drug rehabilitation into account under section 3553(b)?

Courts disagree on whether the Commission previously considered drug rehabilitation in formulating the Guidelines and on whether it is proper to consider drug rehabilitation in sentencing. Some courts do not allow consideration of rehabilitation, U.S.A. v. Pharr, No. 90-1284 (drug rehabilitation is not a proper consideration); U.S. v. Van Dyke, 895 F.2d 984 (4th Cir. 1990) (rehabilitative efforts previously considered by the Commission under section 3E1.1, Acceptance of Responsibility), cert. denied, ____ U.S. ____ (Oct. 1, 1990), while others do allow it to be considered. United States v. Maddalena, 893 F.2d 815 (6th Cir. 1989) (judge may consider drug rehabilitation); United States v. Harrington, 741 F. Supp. 968 (D.D.C. 1990) (same); United States v. Floyd, 738 F. Supp. 1256 (D. Minn. 1990) (same); United States v. Rodriquiz, 724 F. Supp. 1118 (S.D.N.Y. 1990) (same).

The Commission needs to clarify its position on whether drug rehabilitation should be considered in sentencing. This requires an evaluation of the problems rehabilitation presents a judge in sentencing. Departing from the Guidelines for

rehabilitation in one sense rewards the defendant with a drug problem at the time he or she commits crime because the defendant without a drug problem is unable to receive a similar downward departure. See United States v. Pharr, No. 90-1284, slip op. at 9. On the other hand, rehabilitative efforts are an indication that the defendant recognizes the impropriety of his or her conduct. Defendants who exhibit similar recognition, by affirmatively accepting responsibility for their criminal conduct, receive a downward reduction under section 3E1.1. The same societal interests served by a reduction under section 3E1.1 may be served by a downward departure for rehabilitation.

The facts surrounding the defendant's rehabilitative efforts may also call attention to different underlying policy concerns. For example, if the defendant has made a sincere effort to rehabilitate prior to the commission of the crime, such efforts may alter the judge's view of the punishment the defendant deserves. Taking rehabilitative efforts into account, therefore, may further the purpose of fair punishment. For an example of a similar factual setting, see United States v. Maddalena, 893 F.2d 815, 816 (the Cir. 1989).

Section 4A1.3 Upward departure when criminal history category does not adequately represent the seriousness of defendant's prior crimes.

Section 4A1.3 allows the judge to depart from the guidelines if the criminal history category, determined under

section 4A1.2, does not represent the true seriousness of the defendant's prior criminal record. In determining the extent of the departure, the section explains that the judge should "use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable." Problems arise, however, when a defendant has a criminal history category of VI (the highest category), and the judge determines that the category underrepresents the seriousness of the defendant's prior crimes. What does the judge use as a reference in departing above the guideline range for the highest criminal history category? Also, what limit is there on the judge's departure?

This section should be reexamined to provide more guidance to judges who determine that a departure above the highest criminal history category is required. Perhaps there is need for more categories, and broader ranges within those categories, to give judges the ability to significantly depart where needed.

5K1.1 Departure for cooperation

Section 5K1.1 allows the judge to depart downward from the guidelines upon a motion by the government that the defendant has provided "substantial assistance." This section raises several issues which require clarification. Some judges have reported situations where they believe the defendant that he has done everything possible to co-operate but the government, perhaps vindictively, is refusing to make a 5K1.1 motion. Does

the judge lack the power to depart absent a government motion? The language of section 5K1.1 seems to answer this question in the affirmative. Still, section 5K1.1 does not completely resolve the question of whether a judge can consider cooperation at all, in the absence of a government motion. 18 U.S.C. § 3661 states that there is no limit on the conduct a judge can consider in sentencing. Can a judge consider cooperation under § 3661 without a government motion?

One possible answer to this question is to read section 5K1.1 as prohibiting a judge from departing from the Guidelines absent a government motion. While this seems a bit inconsistent with section 3661, 18 U.S.C. § 3553(b) and the plain language of section 5K1.1 limit a judge's discretion in taking into account conduct or circumstances previously considered by the Commission. This does not mean that judge could never consider cooperation absent a government motion, only that a judge may not depart absent a motion. A judge still could consider a defendant's cooperation under section 3661 in sentencing within the appropriate range provided by the Guidelines. See U.S. v. Bruno, 897 F.2d 691 (3d Cir. 1990).

The proper use of cooperation in sentencing needs to be clarified for judges. The Commission should consider providing in addition to section 5K1.1 some guidance on the use of cooperation absent a government motion.

Thank you for this opportunity to express current concerns about the Guidelines. I hope these remarks will be of help to the Commission.

Very truly yours,

Carol Los Mansmann

Carol Los Mansmann
United States Circuit Judge

CLM:cal

PCRT-126/91

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Chambers of
Robert D. Potter
Chief Judge

Phone # (704) 371-6343
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November 13, 1990

Mr. Paul Martin, Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Mr. Martin:

At the request of Judge Wilkins in his letter of September 27, 1990, I have discussed his request with the Probation Officers and we would make the following suggestions for amendment considerations:

Section 2T3.2 - Receiving or Trafficking in Smuggled Property (Pg. 2.166) seems to lack clarity. Since there is no tax or duty on controlled substances (drugs), it is difficult to apply a value from the Tax Table which the above Guideline refers you to (2T4.1). The Probation Office has no set way of determining the market value, as is suggested in the commentary or any other value, unless it is specifically provided by the investigators, which is often not the case. It seems there should be a way of calculating a specific Base Offense Level in the Section -- there needs to be more guidance rather than indicating the court should impose a sentence above the Guidelines.

Suggestion: Promulgation of a Guideline to focus on determining the Base Offense Level by the type of drugs smuggled in, the "street value" or "market value" of the drugs and then go to the Tax Table for determining the Base Offense Level. For example, if a defendant smuggled 2000 pounds of marijuana and the fair market or street value for the marijuana is $6000.00, then, go to the Tax Table, Section 2T4.1 would be determined by 2T4.1(C) which specifies more than $5000 the Offense Level is to be set at VIII.

This may be a long shot and probably too simple for the Commission to consider.

It seems to continue to be a problem for officers to place defendants in their proper role in drug conspiracies (2D1.1) and to determine their role in the overall conspiracy without making each defendant in multi-defendant indictments responsible for the entire amount of drugs in each conspiracy. I realize the Guidelines already deal with aggravating and mitigating circumstances which can be applied various ways under the "Role in the Mr.

Offense" section. However, since most individuals in a drug conspiracy have a specific job, for example, kingpin or leader, driver, "mule", loader, off-loader, etc., I am wondering if it would be fairer for the Commission to give some consideration to placing a cap on some of the least culpable individuals in the conspiracy that would place them further away from the kingpin or leadership role. This becomes quite key in a conspiracy involving 15 individuals with the last five of those individuals having been responsible solely for following the instructions of the leaders of the conspiracy or those most culpable. For example, a conspiracy involving 500 kilograms of cocaine which carries a Base Offense Level of 40 and the #1 defendant has no arrest record; then defendant #15 also pleads guilty to the drug conspiracy, has no arrest record just like the #1 defendant, but the most consideration he can get under Section 3B1.2 (mitigating role) is a -4, unless the court chooses to depart, which I do not believe is viewed by most courts as the appropriate thing to do in drug cases, unless there is unusual cooperation on the part of a defendant.

Our reason for this concern is that a number of defendants who play very small roles in major drug conspiracies seem to end up with Offense Levels very close to those who are the most culpable, i.e., a once or twice participant who drove a truck or picked up a package, etc. I am not sure as to how this could be done, but I do feel it is something that should be clarified.

Sentencing Commission Should Establish Guideline For Illegal Distribution of Anabolic Steroids. No guideline exists for violation of 21 U.S.C. § 333(e), Illegal Possession of Anabolic Steroids. Application notes lead to the conclusion that Guideline 2N2.1 is not an applicable Guideline for this violation. We currently have a pending case in this District and concern about abuse of these drugs by athletes would hint that we can anticipate prosecution throughout other Districts.

Proposed Chapter 7 Amendments (Violation of Probation and Supervised Release) (Proposals Placed on Hold by the Sentencing Commission Earlier This Year, 1990). The Commission proposed amendments early in 1990, which were placed on hold for further consideration. These amendments classify the violations into three classes and then specify to the Court a range of punishments. Under the current system, if the Court finds that the defendant has violated his probation then the Court may sentence under the original sentence range, as calculated by the Guidelines at the time of sentencing. This appears to be consistent with determinate sentencing, allowing the defendant to know at the time of sentencing his/her range of punishment.

The present scheme of punishment for supervised release violations in 18 U.S.C. § 3583(e)(3) is simple, fair and sound! The proposal to revoke supervised release and then sentence to a new term of supervised release is inconsistent with the concept of determinate sentencing in which the defendant does not receive added punishment after the sentence begins and has some reasonable expectations as to when the sentence will end.

After careful review, we suggest that Robbery under 2B3.1 Base Offense Level should be increased from 20 to 22. The logic for this increase is not based on the brandishing dangerous weapons but is based on the fact that an individual who approaches anyone and either orally or in writing, demands money or announces robbery, it would stand to reason that there is automatically expressed a threat of bodily injury or even death if the demands are not met. I am sure that practically all individuals who give up valuables when demanded to do so would agree wholeheartedly. I do not feel that this should be listed under specific offense characteristics as it is in 2B3.1(b)(2). That section should remain as is.

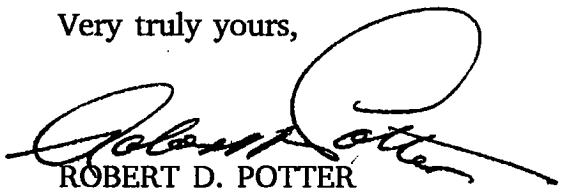
Another section that continues to bother us is Section 5E1.2(f) which states if the defendant establishes "(1) he is not able and even with the use of a reasonable installment schedule is not likely to become able to pay all or part of the fine required by the preceding provisions or (2) imposition of a fine would unduly burden the defendant's dependents, the Court may impose a lesser fine or waive the fine."

We now refer to 5H1.5 which concerns previous employment record. In this section, it specifically states "that an employment record is not ordinarily relevant in determining whether a sentence should be outside the Guidelines or where within the Guidelines the sentence should fall." It appears that there is a reverse incentive built into these two sections. For example, if an individual has never been regularly employed in legitimate work, he would have no assets and therefore would be unable to pay the fine. On the other hand, if an individual has been regularly employed, met his responsibilities, worked diligently and been frugal with his earnings, he could be fined substantially and thereby punished more severely than the irresponsible or unproductive individual. However, I see no way that any concessions can be made for this, since under the law, 28 U.S.C. § 994(e) states that it is inappropriate to consider among other things employment in a term of imprisonment or length of term of imprisonment.

Perhaps the Sentencing Commission cannot take any action on its own in order to correct this injustice, but it may be a matter which the Commission can call to the attention of Congress.

We hope the above comments will be helpful to the Commission.

Very truly yours,



ROBERT D. POTTER

RDP/lmh

cc: Honorable William W. Wilkins, Jr.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
H. LEE SAROKIN
JUDGE

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February 4, 1991

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

Attention: Communications Director

I submit the following three situations for your consideration:

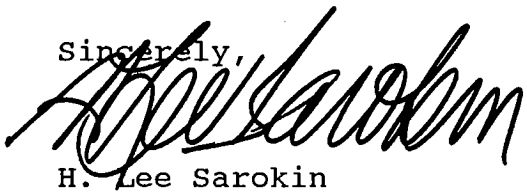
1. Frequently an indictment charges a conspiracy alleging a specific quantity of illegal drugs. During the course of the trial varying testimony is presented as to the amounts intended or involved. Thus a conviction is not necessarily dispositive of the issue of quantity for sentencing purposes. It might be appropriate to pose an interrogatory to the jury determining the quantity involved, if they otherwise find a defendant guilty. Otherwise the court is required to make that determination at the time of sentencing.

2. Likewise, I am concerned with the frequency with which the government enters into plea bargain agreements and stipulates the amount of drugs involved for guidelines purposes, but then proceeds to assert and attempts to prove a greater amount against those defendants who elect to go to trial. Apart from whether or not such stipulations should estop the government from such conduct as a matter of law, there is a serious question whether this practice should be dealt with as a matter of policy.

3. In many cases the amount of drugs is initiated by the undercover agent acting in the capacity of a purchaser or seller. In other words, the government agent has the ability to fix the level of punishment by increasing the amount he seeks to purchase or sell. In many instances the quantities requested reflect the defendant's original intentions and/or sources, but frequently it is the agent who enhances the level by discussing larger quantities than those offered, sought by or available to the defendant.

Although clearly not an entrapment scenario in the traditional sense, a defendant is enticed into buying or selling more than he wants or has available and thereby is subjected to a much harsher sentence solely by virtue of the government's injecting larger quantities into the conversations. This is particularly true in respect to conspiracy counts where defendant can promise to deliver much more than he can obtain just for the purpose of satisfying someone who appears to be a large prospective purchaser.

Sincerely,



H. Lee Sarokin

HLS/jm

UNITED STATES SENTENCING COMMISSION
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Paul L. Maloney (ex officio)

February 14, 1991

Honorable H. Lee Sarokin
United States District Court
Room 329 U.S. Post Office Building
Newark, NJ 07102

Dear Judge Sarokin:

I recently received your letter responding to my earlier request for comment on the operation of the sentencing guidelines. Thank you for taking the time to respond. Your letter has been circulated to all Commissioners.

With highest personal regards, I am

Sincerely,

Billy Wilkins

William W. Wilkins, Jr.
Chairman

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February 27, 1991

BY HAND

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

Attention: Paul K. Martin
Communications Director

Re: Sentencing Guidelines for United States Courts; Mandatory Probation And Suspension And Debarment From Government Contracting

Gentlemen:

The purpose of this letter is to comment on the proposed sentencing guidelines as they may relate to the imposition of mandatory probation for government contractors convicted of a second or subsequent violation of the criminal False Claims Act, the False Statements Act or other criminal felony statute relating to government procurement.

I am Chairman of the Suspension and Debarment Committee of the Public Contract Section of the ABA. However, the comments in this letter are presented on my own behalf and have not been approved by the Section. In that regard, I am appending a letter sent by the Section to Honorable Charles E. Schumer, Chairman of the Subcommittee on Criminal Justice of the House Judiciary Committee. I believe the Section's letter to be relevant to the question of mandatory probation, particularly with regard to the adequacy of existing regulations to protect the interests of the United States in its relations with contractors. I ask you to consider the position set out in that letter with specific reference to the comments therein under heading I.

1. In General

It is my understanding that, at the suggestion of the House Judiciary Subcommittee on Criminal Justice and the Department of Justice, the Commission is considering a requirement for mandatory probation of government contractors after a second or subsequent conviction of violation of the criminal False Claims Act, the Criminal False Statements Act or other criminal felony statute relating to government procurement. I understand this effort to arise from concerns expressed by certain members of Congress that too many convicted DoD and other government contractors manage to escape debarment or suspension from government contracting and thus continue to do business with the Government. See, e.g., 136 Cong. Rec. E1484 (daily ed. May 10, 1990.) I further understand that the proponents of this position believe that placing contractors under the supervision of the Federal courts will alleviate this perceived problem.

I submit that mandatory probation is both unnecessary and inappropriate. It is unnecessary because existing regulations adequately address the underlying concerns. It is inappropriate because mandatory probation would deny executive agencies the flexibility necessary to deal with the contractor in a manner determined to be in the government's best interest, as discussed in more detail below.

2. There Is No Evident Need For Mandatory Probation Since The Debarment Regulations Adequately Address The Underlying Concerns

Under Subpart 9.4 of the Federal Acquisition Regulation (FAR) (copy enclosed), Executive agencies have ample authority to debar or suspend contractors who have committed additional relevant offenses that indicate that they are presently not responsible contractors for further awards. This authority is used with some frequency and I am aware of no evidence that the Department of Defense or Federal acquisition agency is lax in its application. This point is discussed in detail under heading I of the enclosed letter to Honorable Charles E. Schumer, dated September 26, 1990. I will not pursue it further here, except to note that the letter to Congressman Schumer was composed by attorneys from both the private sector and the Department of Defense with substantial experience in suspension and debarment proceedings and policy.

3. Inclusion Of A Mandatory Probation Requirement In The Sentencing Guidelines Would Deny Executive Agencies The Flexibility Necessary To Deal With The Government Contractor In A Manner Determined To Be In The Government's Best Interest.

Executive branch agencies, and particularly the Department of Defense, have long experience in reaching and supervising administrative settlements with errant government contractors, and in managing such settlements in a way calculated to further the best interests of the government. These settlements virtually always address the concerns now being expressed by the proponents of mandatory sentencing. Thus, such settlements require the contractor to adhere to the highest ethical standards, to make full and prompt restitution for any infringement of civil or criminal law, to make available reports of internal inquiries and investigations, whether or not such inquiries and investigation would ordinarily be subject to the attorney-client or other privilege, and to take appropriate disciplinary action, including discharge, with regard to employees who engaged in the improper conduct. These settlement agreements are rendered eminently enforceable not only by the threat of further prosecution but by the high probability that the contractor will be deprived of its economic life if any of the terms of the agreement are violated.

In light of the demonstrated expertise and experience in administrative settlements with and oversight of contractors which the executive branch acquisition agencies have acquired over the years, it seems redundant now to place responsibility for exactly the same functions on an overloaded Federal Court system. This redundancy is particularly apparent when, as in this instance, the functioning of the system will depend on U.S. attorneys who will necessarily be required to consult with the executive acquisition agencies they are representing in probation proceedings before Federal courts. These are the same agencies which, but for the mandatory probation requirement, would themselves be policing the contractor. Thus, the injection of the Federal courts and U.S. attorneys into the management of the acquisition process only creates another layer of responsibility to be managed by entities which are already overworked and are not expert, and have no reason to be expert, in questions of acquisition policy and procedure.

It seems clear that the Federal interest or purpose being served by a contractor performing a contract under the aegis of an executive branch agency is best determined by that

agency. I ask the Commission to consider the probability that the proposed addition to the acquisition process of this new layer of management may well lead to confusion of the aims of that process, while failing to add anything to the achievement and maintenance of its integrity.

In sum, I submit that, consistent with the position taken by the Public Contract Section of the ABA in the enclosed September 26 letter to Congressman Schumer, mandating probation is unnecessary. Further, and on my own behalf, I suggest that the imposition of mandatory probation would not only be redundant but would quite possibly have a deleterious effect on the government acquisition process.

Sincerely,

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON

W. Bruce Shirk

Enclosures

1989-90

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September 26, 1990

BY FEDERAL EXPRESS

Honorable Charles E. Schumer
Chairman, Subcommittee on Criminal Justice
The Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Re: H.R. 4795, 101st Cong., 2d Sess., A Bill To Amend 18 U.S. Code To Provide An Additional Sanction Against Federal Contractors Committing Federal Offenses In Connection With Those Contracts

Dear Mr. Chairman:

The purpose of this letter is to present to you the American Bar Association ("ABA") Section of Public Contract Law's ("the Section") comments on proposed H.R. 4795. These comments are presented on behalf on the Section and have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the position of the ABA. These comments are, however, consistent with the principles of a proposed Debarment and Suspension Reform Act approved by the ABA House of Delegates in January, 1982.

H.R. 4795, entitled by its sponsors the "Federal Contract Crimes Sentencing Act," would add a new section 3560 to 18 U.S. Code, as follows:

> (a) In General.-The court, in imposing a sentence on a person who is convicted of a second or subsequent contract exclusion offense within a

> 10-year period, shall order that such person be excluded from Government contracting and Government-approved subcontracting for a period of not less than 5 years after the date the conviction becomes final.
>
> (b) National Security Exception. - The court shall not make an order under subsection (a) of this section if the Attorney General certifies in writing that to make such an order would be harmful to national security.
>
> (c) Definition. - As used in this section, the term 'contract exclusion offense' means an offense under section 201, 371, 641, 1001, 1002, 1031, 1341, or 1343 of this title that involves a Federal Government contract or subcontract.

The Section of Public Contract Law opposes the enactment of H.R. 4795 for three principal reasons: (1) there is no evident need for this legislation since Department of Defense ("DoD") regulations adequately address the underlying concerns; (2) the Bill would deny DoD and other agencies flexibility in debarring only those particular segments of a company responsible for the wrongdoing while sparing the innocent segments; and (3) the Bill would transform the character of administrative debarment from protection of the Government's proprietary interests into a punitive sanction with adverse legal consequences under the Eighth Amendment and the Double Jeopardy Clause of the Fifth Amendment. We discuss these in turn. There are, in addition, technical problems with the wording of the Bill which we will address separately when appropriate.

1. <u>There Is No Evident Need for this Legislation Since the Debarment Regulations Adequately Address the Underlying Concerns</u>

Under Subpart 9.4 of the Federal Acquisition Regulation (FAR) (copy enclosed), Executive agencies have ample authority to debar or suspend contractors who have committed additional relevant offenses that indicate that they are presently not responsible contractors for further awards. Thus, for example, FAR 9.406-4(b) states that "[t]he debarring official may extend the

debarment for an additional period, if that official determines that an extension is necessary to protect the Government's interest" for reasons other than the "facts and circumstances upon which the initial debarment action was based."

Our impression is that the DoD and other Executive agencies are, and have been, vigilant in protecting the Government's interests by debarring contractors who have committed procurement fraud, and by suspending contractors who are suspected, upon adequate evidence, of having committed such fraud. In actual practice, these preventive measures are taken unless the debarring and suspending officials are persuaded that the particular contractor has removed from Government contracting all persons involved in the alleged wrongdoing and has taken all other remedial actions necessary to establish that it is presently a responsible contractor. The debarment and suspension process is directly supported by the ongoing investigative efforts of the Inspectors General and other investigative agencies of the Executive branch which refer procurement fraud cases to the appropriate debarring and suspending officials of the Executive agencies. The semi-annual reports of DoD, for instance, show, that at least over the last five years, DoD alone has debarred and suspended several hundred firms each year (645 during the first half of fiscal 1990) from all government contracting. In fact, the number of debarments has climbed steadily over the last fifteen years.

It is evident that Congressman Miller, the principal sponsor of the Bill, nevertheless believes that too many convicted DoD contractors manage to escape debarment or suspension and continue to do business with the Government. *See* 136 Cong. Rec. E1484 (daily ed. May 10, 1990). We believe the DoD's debarment regulations adequately address this concern by providing that when there is a relevant felony conviction as listed in FAR 9.406-2, "for any decision not to debar or to debar for one year or less, the mitigating factors must demonstrate clearly to the debarring official's complete satisfaction, that the contractor has eliminated such circumstances' ["within the contractor's organization that encouraged the belief that the acts or omissions on which the organization's conviction was based would escape accountability or be condoned"] and has implemented or agrees to implement remedial measures." DoD FAR Supplement 209.406-1(d) (copy enclosed herewith). In addition, this regulation further provides:

> Whenever, following a felony conviction, the debarring official determines that debarment is not

> necessary to protect the government's interests, the debarring official shall require the contractor to enter into a written agreement, which includes (i) a requirement for the contractor to establish (if the contractor has not already established such standards of conduct and internal control systems) and/or maintain effective standards of conduct and internal control systems as outlined in 203.7000, and (ii) other requirements as the debarring official deems to be appropriate.

DoD FAR Supplement 209.406-1(e) (copy enclosed herewith together with DoD FAR Supplement 203.7000).

We are not aware of any significant indications that DoD is failing to comply with these regulations or that these regulations do not adequately protect the Government's interests in the circumstances that have prompted the Bill's sponsorship. We are equally unaware of debarment laxity in the other Executive agencies, and Mr. Miller asserts none.

2. The Bill Would Deny Executive Agencies the Necessary Flexibility to Debar Only Those Particular Segments of the Company Responsible for the Wrongdoing, While Sparing the Innocent Segments

A related concern is that the Bill, in mandating that "such person be excluded from Government contracting and Government-approved subcontracting for a period of not less than five years after the date the conviction becomes final," will preclude the agency's flexibility in limiting the scope of debarment to the particular segment, division or subsidiary of a government contractor that is not presently responsible in the wake of having been convicted for a second or subsequent contract exclusion offense. We see no need to punish separate and severable elements of a contractor's organization that have no responsibility for the particular offenses, so long as the top management did not know and had no reason to know of them. It would not be in the public interest to debar an entire company and put thousands of employees out of work who had nothing to do with the wrongdoing. The Bill needlessly denies this flexibility that is essential to administrative debarment by the Executive agencies.

3. The Bill Would Transform the Character of Administrative Debarment into a Punitive Sanction with Adverse Consequences Under the Eighth Amendment and the Double Jeopardy Clause of the Fifth Amendment

A fundamental premise of administrative debarment and suspension is that "[t]he serious nature of debarment and suspension requires that these sanctions be imposed for the Government's protection and not for purposes of punishment." FAR 9.402(b). *Accord*, *Robinson v. Cheney*, 876 F.2d 152, 160 (D.C. Cir. 1989) ("affording the contractor this opportunity to overcome a blemished past assures that the agency will impose debarment only in order to protect the Government's proprietary interest and not for purpose of punishment"); *Gonzalez v. Freeman*, 334 F.2d 570, 576 (D.C. Cir. 1964) (debarment "not intended to punish"). This premise is fundamental to the authority for administrative debarment and suspension because only Congress can impose punishment for offenses it establishes.

Debarment is a protective measure, not punishment. This concept has permitted agencies to use debarment effectively with only minimum notions of due process. We are concerned that the Bill would blur the long-standing distinction between an administrative debarment to protect the Government from contracting with nonresponsible business organizations on the one hand, and criminal justice punishments on the other. By requiring that all repeat offenders be excluded from Government contracting for at least five years as part of the sentence to be imposed for the particular felony conviction, the Bill necessarily treats administrative debarment as an additional form of punishment for that conviction.

This mandatory exclusion penalty raises a serious Eighth Amendment issue. The Eighth Amendment bars cruel and unusual punishments. The Supreme Court has applied that bar to penalties that are disproportionate to the crimes committed, based on "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentence imposed for the same crime in other jurisdictions." *Solem v. Helm*, 463 U.S. 277, 292 (1983).

In several recent cases, the courts have, ruled that the forfeiture of assets following a criminal conviction triggers Eighth Amendment scrutiny. *E.g., United States v. Busher*, 817 F.2d 1409, 1413-16 (9th Cir. 1987); *United States v. Horak*, 833 F.2d 1235, 1251 (7th Cir. 1987). Indeed, one court applied the Eighth Amendment to reduce the forfeitures required by the Racketeer-Influenced and Corrupt Organizations Act ("RICO"), cutting some $17 million in statutorily required forfeitures to approximately $1.5 million. *United States v. Regan*, 726 F. Supp. 447, 456-60 (S.D.N.Y. 1989).

Because the mandatory debarment or exclusion penalty of the Bill may be so harsh, it also is subject to Eighth Amendment limits. For example, mandatory exclusion of a Government contractor for not less than five years for a criminal offense committed by a relatively low-level employee acting alone would almost certainly put the contractor out of business. The penalty would be grossly disproportionate to the wrong done. The Bill thus would likely not survive a court challenge on these grounds.

In addition, by so treating debarment as punishment, the Bill would threaten the validity of administrative debarment based on a relevant criminal conviction under the Double Jeopardy Clause of the Fifth Amendment in the light of the Supreme Court's recent decision in *Halper v. United States*, 490 U.S. ___, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). In that case, the manager of a medical laboratory, Irwin Halper, had been convicted on 65 counts of inflating Medicare claims, and sentenced to two years in prison and fined $5,000. The total value of those 65 false claims was $585. Thereafter, the Government sued Halper under the Civil False Claims Act, seeking more than $130,000 in penalties based on the statutory penalty of $2,000 per false claim.

The Supreme Court ruled that the Civil False Claims Act penalty violated the Double Jeopardy Clause of the Fifth Amendment. The unanimous ruling stressed that a punitive civil sanction triggers the Double Jeopardy Clause even though it is labeled "civil" (104 L. Ed.2d at 501): "Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case ***serves the goals of punishment.***" (emphasis added). Regardless of the label, the Court continued, a civil sanction is really punitive if it "cannot fairly be said ***solely*** to serve a remedial purpose, but rather can be explained only as ***also*** serving either retributive or deterrent purposes." *Id.* at 502 (emphasis added).

Halper was applied in *United States v. Sanchez*, 47 Cr. L. Rep. 1026 (S. D. Tex., Apr. 11, 1990), which barred the criminal prosecution of an individual who had been subjected to a civil penalty of $232,000 for smuggling marijuana. Because the Court found the initial penalty to be "punitive in nature" and unrelated to any loss by the Government, the subsequent criminal prosecution was barred by the Fifth Amendment.

Since the Bill treats debarment as a punitive, there is a substantial concern that the courts, following *Halper*, would find that an administrative debarment based on a relevant criminal conviction is equally punitive so as to trigger the Double Jeopardy clause because, in the words of the Court in *Halper*, that sanction "as applied in the individual case serves the goals of punishment." (104 L. Ed. 2d at 501). Congress should not create the large risk of such devastating consequences to the validity of the majority of administrative debarments imposed under FAR Subpart 9.4. and we would be pleased to testify along the foregoing lines should you hold hearings on the Bill.

Sincerely,

Norman L. Roberts
Chair
Section of Public
Contract Law
American Bar Association

Atch: FAR Subpart 9.4 and DoD FAR
Supplement Subparts 209.4 and 203.70

cc: All Section Officers & Council Members
W. Bruce Shirk, Esq.
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MEL:ABA17A.doc

[¶ 29,868]

9.308 Contract clauses.

9.308-1 Testing performed by the contractor.

(a) (1) The contracting officer shall insert the clause at 52.209-3, First Article Approval—Contractor Testing, in solicitations and contracts when a fixed-price contract is contemplated and it is intended that the contract require (i) first article approval and (ii) that the contractor be required to conduct the first article testing.

(2) If it is intended that the contractor be required to produce the first article and the production quantity at the same facility, the contracting officer shall use the clause with its Alternate I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before first article approval, the contracting officer shall use the clause with its Alternate II.

(b) (1) The contracting officer shall insert a clause substantially the same as the clause at 52.209-3, First Article Approval—Contractor Testing, in solicitations and contracts when a cost-reimbursement contract is contemplated and it is intended that the contract require (i) first article approval and (ii) that the contractor be required to conduct the first article test.

(2) If it is intended that the contractor be required to produce the first article and the production quantity at the same facility, the contracting officer shall use a clause substantially the same as the clause at 52.209-3, First Article Approval—Contractor Testing, with its Alternate I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before first article approval, the contracting officer shall use a clause substantially the same as the clause at 52.209-3, First Article Approval—Contractor Testing, with its Alternate II.

[¶ 29,868.10]

9.308-2 Testing performed by the Government.

(a) (1) The contracting officer shall insert the clause at 52.209-4, First Article Approval—Government Testing, in solicitations and contracts when a fixed-price contract is contemplated and it is intended that the contract require first article approval and that the Government will be responsible for conducting the first article test.

(2) If it is intended that the contractor be required to produce the first article and the production quantity at the same facility, the contracting officer shall use the basic clause with its Alternate I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before first article approval, the contracting officer shall use the basic clause with its Alternate II.

(b) (1) The contracting officer shall insert a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, in solicitations and contracts when a cost-reimbursement contract is contemplated and it is intended that the contract require first article approval and that the Government be responsible for conducting the first article test.

(2) If it is intended that the contractor be required to produce the first article and the production quantity at the same facility, the contracting officer shall use a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, with its Alternate I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before first article approval, the contracting officer shall use a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, with its Alternate II.

SUBPART 9.4—DEBARMENT, SUSPENSION, AND INELIGIBILITY

[¶ 29,869]

9.400 Scope of subpart.

(a) This subpart—

(1) Prescribes policies and procedures governing the debarment and suspension of contractors by agencies for the causes given in 9.406-2 and 9.407-2;

(2) Provides for the listing of contractors debarred, suspended, proposed for debarment, and declared ineligible (see the definition of "ineligible" in 9.403); and

(3) Sets forth the consequences of this listing.

(b) Although this subpart does cover the listing of ineligible contractors (9.404) and the effect of this listing (9.405(b)), it does not prescribe policies and procedures governing declarations of ineligibility. [FAC 84-46, 54 FR 19814, 5/8/89, effective 6/7/89]

[¶ 29,870]

9.401 Applicability.

This subpart does not apply to the exclusion of participants or principals from Federal financial or nonfinancial assistance programs and benefits pursuant to Executive Order 12549. Such exclusions are contained with the list entitled Parties Excluded from Nonprocurement Programs of the lists of Parties Excluded from Federal Procurement or Nonprocurement Programs. [FAC 84-46, 54 FR 19814, 5/8/89, effective 6/7/89]

[¶ 29,871]

9.402 Policy.

(a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart.

(c) When more than one agency has an interest in the debarment or suspension of a contractor, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(d) Agencies shall establish appropriate procedures to implement the policies and procedures of this subpart. [FAC 84-46, 54 FR 19814, 5/8/89, effective 6/7/89]

[¶ 29,872]

9.403 Definitions.

"Adequate evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred.

"Affiliates." Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (a) either one controls or has the power to control the other, or (b) a third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.

"Agency," as used in this subpart, means any executive department, military department or defense agency, or other agency or independent establishment of the executive branch.

"Civil judgment" means a judgment or finding of a civil offense by any court of competent jurisdiction.

"Contractor," as used in this subpart, means any individual or other legal entity that (a) submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract or (b) conducts business with the government as an agent or representative of another contractor.

"Conviction" means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere.

"Debarment," as used in this subpart, means action taken by a debarring official under 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor so excluded is "debarred."

"Debarring official" means (a) an agency head or (b) a designee authorized by the agency head to impose debarment.

"Indictment" means indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

"Ineligible," as used in this subpart, means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority other than this regulation and its implementing and supplementing regulations; for example, pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the Service Contract Act, the Equal Employment Opportunity Acts and Executive orders, the Walsh-Healey Public Contracts Act, the Buy American Act, or the Environmental Protection Acts and Executive orders.

"Legal proceedings" means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.

"Parties Excluded from Procurement Programs", formerly referred to as the Consolidated List of Debarred, Suspended, and Ineligible Contractors means a list compiled, maintained, and distributed by the General Services Administration, in accordance with 9.404, containing the names of contractors debarred, suspended, or proposed for debarment by agencies under the procedures of this subpart, as well as contractors declared ineligible under other statutory or regulatory authority other than Executive Order 12549. The list of Parties Excluded from Procurement Programs is contained within the lists of Parties Excluded from Federal Procurement or Nonprocurement Programs.

"Preponderance of the evidence" means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

"Suspending official" means (a) an agency head or (b) a designee authorized by the agency head to impose suspension.

"Suspension," as used in this subpart, means action taken by a suspending official under 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting; a contractor so disqualified is "suspended." [FAC 84-46, 54 FR 19814, 5/8/89, effective 6/7/89]

[¶ 29,873]

9.404 Parties excluded from procurement programs.

(a) The General Services Administration (GSA) shall—

(1) Compile and maintain a current, consolidated list of all contractors debarred, suspended, proposed for debarment, or declared ineligible by agencies or by the General Accounting Office;

(2) Periodically revise and distribute the list and issue supplements, if necessary, to all agencies and the General Accounting Office; and

(3) Include in the list the name and telephone number of the official responsible for its maintenance and distribution.

(b) The list entitled Parties Excluded from Procurement Programs shall indicate—

(1) The names and addresses of all contractors debarred, suspended, proposed for debarment, or declared ineligible, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The name of the agency or other authority taking the action;

(3) The cause for the action (see 9.406-2 and 9.407-2 for causes authorized under this subpart) or other statutory or regulatory authority;

(4) The effect of the action;

(5) The termination date for each listing;

(6) The DUNS No.; and

(7) The name and telephone number of the point of contact for the action.

(c) Each agency shall—

(1) Notify GSA of the information required by paragraph (b) above within 5 working days after the action becomes effective;

(2) Notify GSA within 5 working days after modifying or rescinding an action;

(3) Notify GSA of the names and addresses of agency organizations that are to receive the consolidated list and the number of copies to be furnished to each;

(4) In accordance with internal retention procedures, maintain records relating to each debarment, suspension, or proposed debarment taken by the agency;

(5) Establish procedures to provide for the effective use of the Parties Excluded from Procurement Programs, including internal distribution thereof, to ensure that the agency does not solicit offers from, award contracts to, or consent to subcontracts with contractors on the Parties Excluded from Procurement Programs, except as otherwise provided in this subpart; and

(6) Direct inquiries concerning listed contractors to the agency or other authority that took the action.

(d) The public may obtain a subscription to the list from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Order and Inquiry Desk at (202) 783-3238. [FAC 84-46, 54 FR 19814, 5/8/89, effective 6/7/89]

[¶ 29,874]

9.405 Effect of listing.

(a) Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the acquiring agency's head or designee determines that there is a compelling reason for such action (see 9.405-2, 9.406-1(c), 9.407-1(d), and 23.506(e)). Contractors debarred, suspended or proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors.

(b) Contractors included on the Parties Excluded from Procurement Programs as having been declared ineligible on the basis of statutory or other regulatory procedures are excluded from receiving contracts, and if applicable, subcontracts, under the conditions and for the period set forth in the statute or regulation. Agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors under those conditions and for that period.

(c) Contractors debarred, suspended, or proposed for debarment are excluded from acting as individual sureties (see Part 28). [FAC 84-25, 52 FR 9038, 3/20/87, effective 7/1/87; Interim rule, FAC 84-43, 54 FR 4968, 1/31/89, effective 3/18/89 for contracts issued on or after that date; FAC 84-46, 54 FR 19315, 5/8/89, effective 6/7/89; FAC 84-53, 54 FR 48982, 11/28/89, effective 2/26/90; FAC 84-57, 55 FR 21707, 5/25/90, effective 7/24/90]

[¶ 29,874.05]

9.405-1 Continuation of current contracts.

(a) Notwithstanding the debarment, suspension, or proposed debarment of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the acquiring agency's head or a designee directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by agency contracting and technical personnel and by counsel to ensure the propriety of the proposed action.

(b) Agencies shall not renew or otherwise extend the duration of current contracts, or consent to subcontracts, with contractors debarred, suspended, or proposed for debarment, unless the acquiring agency's head or a designee states in writing the compelling reasons for renewal or extension. [FAC 84-46, 54 FR 19315, 5/8/89, effective 6/7/89]

[¶ 29,874.10]

9.405-2 Restrictions on subcontracting.

(a) When a contractor debarred, suspended, or proposed for debarment is proposed as a subcontractor for any subcontract subject to Government consent (see Subpart 44.2), contracting officers shall not consent to subcontracts with such contractors unless the acquiring agency's head or a designee states in writing the compelling reasons for this approval action. (See 9.405(b) concerning declarations of ineligibility affecting subcontracting.)

(b) The Government suspends or debars contractors to protect the Government's interests. Contractors shall not enter into any subcontract equal to or in excess of $25,000 with a contractor that has been debarred, suspended, or proposed for debarment unless there is a compelling reason to do so. If a contractor intends to subcontract with a party that is debarred, suspended, or proposed for debarment as evidenced by the parties' inclusion on the list of Parties

Excluded from Procurement Programs (see 9.404), a corporate officer or designee of the contractor is required by operation of the clause at 52.209-6, Protecting the Government's Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, to notify the contracting officer, in writing, before entering into such subcontract. The notice must provide the following:

(1) The name of the subcontractor;

(2) The contractor's knowledge of the reasons for the subcontractor's being on the list of Parties Excluded from Procurement Programs;

(3) The compelling reason(s) for doing business with the subcontractor notwithstanding its inclusion on the list of Parties Excluded from Procurement Programs; and

(4) The systems and procedures the contractor has established to ensure that it is fully protecting the Government's interests when dealing with such subcontractor in view of the specific basis for the party's debarment, suspension, or proposed debarment.

(c) The contractor's compliance with the requirements of 52.209-6 will be reviewed during Contractor Purchasing System Reviews (see Subpart 44.3). [FAC 84-46, 54 FR 19315, 5/8/89, effective 6/7/89]

[¶ 29,875]

9.406 Debarment.

9.406-1 General.

(a) The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily *require* that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating factors should be considered in making any debarment decision. In this connection, the supplying of information by the contractor to the Government pursuant to the Anti-Kickback Act of 1986 (see 3.502) shall be favorable evidence of the contractor's responsibility.

(b) Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organizational elements, or commodities. The debarring official may extend the debarment decision to include any affiliates of the contractor if they are (1) specifically named and (2) given written notice of the proposed debarment and an opportunity to respond (see 9.406-3(c)).

(c) A contractor's debarment, or proposed debarment, shall be effective throughout the executive branch of the Government, unless an acquiring agency's head or a designee (except see 23.506(e)) states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(d)(1) When the debarring official has authority to debar contractors from both acquisition contracts pursuant to this regulation and contracts for the purchase of Federal personal property pursuant to the Federal Property Management Regulations (FPMR) 101-45.6, that official shall consider simultaneously debarring the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) When debarring a contractor from the award of acquisition contracts and from the purchase of Federal personal property, the debarment notice shall so indicate and the appropriate FAR and FPMR citations shall be included. [FAC 84-24, 52 FR 6122, 2/27/87, effective 2/6/87; Interim rule, FAC 84-43, 54 FR 4968, 1/31/89, effective 3/18/89 for contracts issued on or after that date; FAC 84-46, 54 FR 19315, 5/8/89, effective 6/7/89; FAC 84-57, 55 FR 21707, 5/25/90, effective 7/24/90; corrected, 55 FR 30465, 7/26/90]

[¶ 29,875.02]

9.406-2 Causes for debarment.

The debarring official may debar a contractor for any of the causes listed in paragraphs (a) through (c) following:

(a) The debarring official may debar a contractor for a conviction of or civil judgment for—

(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction

of records, making false statements, or receiving stolen property; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) The debarring official may debar a contractor, based upon a preponderance of the evidence, for—

(1) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as—

(i) Willful failure to perform in accordance with the terms of one or more contracts; or

(ii) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(2) Violations of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690), as indicated by—

(i) The offeror's submission of a false certification;

(ii) The contractor's failure to comply with its certification; or

(iii) Such a number of contractor employees having been convicted of violations of criminal drug statutes occurring in the workplace, as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504).

(c) Any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor. [Interim rule, FAC 84-43, 54 FR 4968, 1/31/89, effective 3/18/89 for contracts issued on or after that date; FAC 84-46, 54 FR 19315, 5/8/89, effective 6/7/89; FAC 84-57, 55 FR 21707, 5/25/90, effective 7/24/90]

[¶ 29,875.03]

9.406-3 Procedures.

(a) *Investigation and referral.* Agencies shall establish procedures for the prompt reporting, investigation, and referral to the debarring official of matters appropriate for that official's consideration.

(b) *Decisionmaking process.* (1) Agencies shall establish procedures governing the debarment decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures shall afford the contractor (and any specifically named affiliates) an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(2) In actions not based upon a conviction or civil judgment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, agencies shall also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of proposal to debar.* A notice of proposed debarment shall be issued by the debarring official advising the contractor and any specifically named affiliates, by certified mail, return receipt requested—

(1) That debarment is being considered;

(2) Of the reasons for the proposed debarment in terms sufficient to put the contractor on notice of the conduct or transaction(s) upon which it is based;

(3) Of the cause(s) relied upon under 9.406-2 for proposing debarment;

(4) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment, including any additional specific information that raises a genuine dispute over the material facts;

(5) Of the agency's procedures governing debarment decisionmaking;

(6) Of the effect of the issuance of the notice of proposed debarment; and

(7) Of the potential effect of an actual debarment.

(d) *Debarring official's decision.* (1) In actions based upon a conviction or judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the contractor. If no suspension is in effect, the decision shall be made within 30 working days after receipt of any information and argument submitted

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by the contractor, unless the debarring official extends this period for good cause.

(2) (i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The debarring official may refer matters involving disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(3) In any action in which the proposed debarment is not based upon a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence.

(e) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the contractor and any affiliates involved shall be given prompt notice by certified mail, return receipt requested—

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective throughout the executive branch of the Government unless the head of an acquiring agency or a designee makes the statement called for by 9.406-1(c).

(2) If debarment is not imposed, the debarring official shall promptly notify the contractor and any affiliates involved, by certified mail, return receipt requested. [FAC 84-46, 54 FR 19815, 5/8/89, effective 6/7/89]

[¶ 29,875.04]

9.406-4 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). Generally, debarment should not exceed 3 years, except that debarment for violation of the provisions of the Drug-Free Workplace Act of 1988 (see 23.506) may be for a period not to exceed 5 years. If suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(b) The debarring official may extend the debarment for an additional period, if that official determines that an extension is necessary to protect the Government's interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of 9.406-3 above shall be followed to extend the debarment.

(c) The debarring official may reduce the period or extent of debarment, upon the contractor's request, supported by documentation, for reasons such as—

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring offical deems appropriate. [Interim rule, FAC 84-43, 54 FR 4968, 1/31/89, effective 3/18/89 for contracts issued on or after that date; FAC 84-46, 54 FR 19815, 5/8/89, effective 6/7/89; FAC 84-57, 55 FR 21707, 5/25/90, effective 7/24/90]

[¶ 29,875.05]

9.406-5 Scope of debarment.

(a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(b) The fraudulent, criminal, or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individ-

ual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.

(c) The fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

[¶ 29,876]

9.407 Suspension.

9.407-1 General.

(a) The suspending official may, in the public interest, suspend a contractor for any of the causes in 9.407-2, using the procedures in 9.407-3.

(b) Suspension is a serious action to be imposed on the basis of adequate evidence, pending the completion of investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the Government's interest. In assessing the adequacy of the evidence, agencies should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as contracts, inspection reports, and correspondence.

(c) Suspension constitutes suspension of all divisions or other organizational elements of the contractor, unless the suspension decision is limited by its terms to specific divisions, organizational elements, or commodities. The suspending official may extend the suspension decision to include any affiliates of the contractor if they are (1) specifically named and (2) given written notice of the suspension and an opportunity to respond (see 9.407-3(c)).

(d) A contractor's suspension shall be effective throughout the executive branch of the Government, unless an acquiring agency's head or a designee (except see 23.506(e)) states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(e)(1) When the suspending official has authority to suspend contractors from both acquisition contracts pursuant to this regulation and contracts for the purchase of Federal personal property pursuant to FPMR 101-45.6, that official shall consider simultaneously suspending the contractor from the award of acquisition contracts and from the purchase of Federal personal property.

(2) When suspending a contractor from the award of acquisition contracts and from the purchase of Federal personal property, the suspension notice shall so indicate and the appropriate FAR and FPMR citations shall be included. [Interim rule, FAC 84-43, 54 FR 4968, 1/31/89, effective 3/18/89 for contracts issued on or after that date; FAC 84-46, 54 FR 19816, 5/8/89, effective 6/7/89]

[¶ 29,876.02]

9.407-2 Causes for suspension.

(a) The suspending official may suspend a contractor suspected, upon adequate evidence, of—

(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(4) Violations of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690), as indicated by—

(i) The offeror's submission of a false certification;

(ii) The contractor's failure to comply with its certification; or

(iii) Such a number of contractor employees having been convicted of violations of criminal drug statutes occurring in the workplace, as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace (see 23.504).

(5) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

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(b) Indictment for any of the causes in paragraph (a) above constitutes adequate evidence for suspension.

(c) The suspending official may upon adequate evidence also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor. [Interim rule, FAC 84-43, 54 FR 4968, 1/31/89, effective 3/18/89 for contracts issued on or after that date; FAC 84-57, 55 FR 21707, 5/25/90, effective 7/24/90]

[¶ 29,876.03]

9.407-3 Procedures.

(a) *Investigation and referral.* Agencies shall establish procedures for the prompt reporting, investigation, and referral to the suspending official of matters appropriate for that official's consideration.

(b) *Decisionmaking process.* (1) Agencies shall establish procedures governing the suspension decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures shall afford the contractor (and any specifically named affiliates) an opportunity, following the imposition of suspension, to submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(2) In actions not based on an indictment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the suspension and if no determination has been made, on the basis of Department of Justice advice, that substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced, agencies shall also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of suspension.* When a contractor and any specifically named affiliates are suspended, they shall be immediately advised by certified mail, return receipt requested—

(1) That they have been suspended and that the suspension is based on an indictment or other adequate evidence that the contractor has committed irregularities (i) of a serious nature in business dealings with the Government or (ii) seriously reflecting on the propriety of further Government dealings with the contractor—any such irregularities shall be described in terms sufficient to place the contractor on notice without disclosing the Government's evidence;

(2) That the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;

(3) Of the cause(s) relied upon under 9.407-2 for imposing suspension;

(4) Of the effect of the suspension;

(5) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension, including any additional specific information that raises a genuine dispute over the material facts; and

(6) That additional proceedings to determine disputed material facts will be conducted unless (i) the action is based on an indictment or (ii) a determination is made, on the basis of Department of Justice advice, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(d) *Suspending official's decision.* (1) In actions (i) based on an indictment, (ii) in which the contractor's submission does not raise a genuine dispute over material facts, or (iii) in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official's decision shall be based on all the information in the administrative record, including any submission made by the contractor.

(2) (i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The suspending official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(3) The suspending official may modify or terminate the suspension or leave it in force (for example, see 9.406-4(c) for the reasons for reducing the period or extent of debarment). However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of (i) suspension by any other agency or (ii) debarment by any agency.

(4) Prompt written notice of the suspending official's decision shall be sent to the contractor and any affiliates involved, by certified mail, return receipt requested. [FAC 84-12, 51 FR 2649, 1/17/86, effective 1/20/86]

[¶ 29,876.04]

9.407-4 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of investigation and any ensuing legal proceedings, unless sooner terminated by the suspending official or as provided in this subsection.

(b) If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests its extension, in which case it may be extended for an additional 6 months. In no event may a suspension extend beyond 18 months, unless legal proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of the proposed termination of the suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension. [FAC 84-12, 51 FR 2649, 1/17/86, effective 1/20/86]

[¶ 29,876.05]

9.407-5 Scope of suspension.

The scope of suspension shall be the same as that for debarment (see 9.406-5), except that the procedures of 9.407-3 shall be use in imposing suspension.

[¶ 29,876.06]

9.408 Certification regarding debarment, suspension, proposed debarment, and other responsibility matters.

(a) When an offeror, in compliance with the provision at 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, indicates an indictment, charge, civil judgment, conviction, suspension, debarment, proposed debarment, ineligibility, or default of a contract, the contracting officer shall—

(1) Request such additional information from the offeror as the contracting officer deems necessary in order to make a determination of the offeror's responsibility (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating debarment or suspension action, where an offeror indicates the existence of an indictment, charge, conviction, or civil judgment.

(b) Offerors who do not furnish the certification or such information as may be requested by the contracting officer shall be given an opportunity to remedy the deficiency. Failure to furnish the certification or such information may render the offeror nonresponsible. [FAC 84-46, 54 FR 19816, 5/8/89, effective 6/7/89]

[¶ 29,876.07]

9.409 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.209-5, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters, in solicitations where the contract value is expected to exceed $25,000.

(b) The contracting officer shall insert the clause at 52.209-6, Protecting the Government's Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, in solicitations and contracts where the contract value exceeds $25,000. [FAC 84-46, 54 FR 19816, 5/8/89, effective 6/7/89]

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Comments Regarding Proposed Amendments to U.S.S.G. §§ 5K1.1 and 1B1.8

The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than one hundred attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including ten previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York.

In the pages that follow, we address several proposed amendments that relate to a subject that our organization's Federal Rules Committee has been examining: the impact of the Sentencing Guidelines (and in particular, §§ 5K1.1 and 1B1.8) on defendants cooperating with the government. Due to time constraints in preparing this pre-hearing submission, the NYCDL has not been able to conduct a comprehensive analysis of the many other pending proposed amendments, so as to

include in this document our comments on those other proposals. However, we do plan to complete our review of the proposed amendments and to submit to the Commission, during the post-hearing comment period, the results of our further analysis.

Amendment 35: Substantial Assistance to Authorities (§ 5K1.1)

The Commission has proposed two noteworthy changes to § 5K1.1: First, Application Note 1 would be expanded to reflect the position adopted by many courts, that except in "an extraordinary case where the government in bad faith breaches an agreement to file the requisite motion," the sentencing court is without authority to depart below the guideline range absent a government motion pursuant to § 5K1.1. Second, the principle currently expressed in Application Note 3 to § 5K1.1 -- i.e., that the sentencing court grant substantial weight to the government's evaluation of the defendant's cooperation -- would be elevated from Commentary to Guideline Policy Statement.

With respect to the first proposed amendment, the NYCDL agrees with the Commission that the Guidelines should expressly recognize that a government motion pursuant to § 5K1.1 is not in all cases an absolute prerequisite to a downward departure based on the defendant's substantial assistance to the authorities; we believe, however, that the exception embodied in the proposed amendment is far too

restrictive and, at a minimum, should be expanded to allow downward departures where the government unreasonably declines to file a § 5K1.1 motion.

Preliminarily, it is important to note that except in the case of a departure below a statutory minimum, Congress itself has not elected to deprive the sentencing court of the authority to grant a downward departure to a cooperating defendant absent a motion by the government. In 18 U.S.C. § 3553(e), which deals only with downward departures below a statutory minimum sentence, Congress expressly made a government motion a prerequisite to such a departure: "Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person . . . ." In contrast, in directing the Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence [on cooperating defendants] than would otherwise be imposed," 28 U.S.C. § 994(n), Congress chose not to engraft as a precondition to such a downward departure any requirement that the government move the court for relief of this nature. Accordingly, except in cases involving departures below the statutory minimum sentence, the

government-motion requirement of § 5K1.1 is a creation of the Sentencing Commission[1] -- and one that we respectfully submit should be reconsidered by the Commission.

The condition precedent adopted by the Commission enables the government in most cases to foreclose entirely the court's consideration of the appropriateness of a downward departure on the basis of a factor generally agreed to be highly pertinent to the sentencing decision: the defendant's cooperation with the authorities. The pending proposal dispenses with the need for a government motion only "[i]n an extraordinary case where the government in bad faith breaches an agreement to file the requisite motion . . . ." The limited nature of the exception carved out in the pending proposal will have the untoward effect of shifting the focus of the court's inquiry away from the most pertinent issue (the nature and extent of the defendant's cooperation) to a more collateral consideration (the government's motives in refusing to make a motion under § 5K1.1). Moreover, the exception is unduly narrow, in that it precludes the sentencing court from considering the propriety of a downward departure where the government unreasonably declines to make the requisite motion, but where no claim is made that the

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[1] The proposed amendment to Application Note 1 appears to recognize this distinction between 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) ("The Commission has similarly determined that a government motion is a necessary prerequisite to a departure below the applicable guideline range based upon a defendant's substantial assistance") (emphasis supplied).

government acted in bad faith. The restrictive nature of the exception will undoubtedly increase the number of challenges to the bona fides of the government, but will leave without any redress those defendants who seek to litigate only the reasonableness of the government's position. In our view, the interests of justice are not served by so circumscribing the court's authority to grant downward departures under § 5K1.1.

The argument most often advanced in support of the government-motion requirement, and the one reflected in the proposed revision to Application Note 1, is the "assumption that the government is in the best position to supply the court with an accurate report of the extent and effectiveness of the defendant's assistance . . . ." United States v. White, 869 F.2d 822, 829 (5th Cir. 1989). However, quite apart from the government-motion requirement, § 5K1.1 expressly acknowledges the special role of the government in making assessments of this nature, and thus directs the courts to give "substantial weight . . . to the government's evaluation of the extent of the defendant's assistance . . . ." Accordingly, under § 5K1.1, the government's opinion as to the value of the defendant's cooperation is in any event afforded substantial deference. Thus, even if the Commission were to eliminate the government-motion prerequisite, consistent with the "substantial weight"

provision, a sentencing court would presumably decline to grant a downward departure over the government's objection, unless the government took a plainly unreasonable position.

Simply put, by requiring a government motion except in "extraordinary cases," the Commission goes beyond merely affording the government a reasonable degree of deference, and instead enables the government to preclude judicial consideration of a downward departure absent a showing of bad faith. The NYCDL recommends that either the government-motion requirement be dropped, or that the exception to that requirement be expanded to encompass cases in which the government unreasonably declines to make the requisite § 5K1.1 motion.[2]

The second proposed change to § 5K1.1 would elevate the "substantial weight" provision from Application Note 3 to the Guideline itself. Our principal problem with this amendment concerns ambiguities in the language of the provision. While it has been widely recognized that the government occupies a special position with respect to its ability to evaluate the defendant's cooperation, we submit that the sentencing court is better equipped, after taking into account the government's qualitative assessment, to quantify the extent of the downward departure.

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[2] At a minimum, an objective reasonableness standard should be applicable unless the parties expressly agree that another standard (such as good faith) should alone apply.

Some United States Attorney's Offices have followed a practice or policy of recommending the extent of a downward departure under § 5K1.1; for example, the prosecutor will propose that the court grant the cooperating defendant a "discount" of a specified percentage or number of months. However, the government's familiarity with the nature and value of the defendant's cooperation does not, we submit, afford it any special "expertise" in quantifying the sentencing "credit" to be earned by the defendant.

We assume that the Commission did not intend to shift this quantification function from the court to the prosecution. Nevertheless, the proposed inclusion of the "substantial weight" provision in the Guideline itself may lead some courts to believe that the government's recommendation as to the precise extent of the departure must be given "substantial weight." To avoid any such confusion, we recommend that the Commission add a clarifying Application Note to the effect that the government's recommendation as to the extent of the downward departure, while entitled to some weight, need not be given substantial weight.

Proposed Amendment 37(c):
Use of Certain Information (§ 1B1.8)

In order to "clarif[y] the operation" of U.S.S.G. § 1B1.8, which relates to the use of incriminating information pursuant to an agreement with the government, the Commission has proposed the addition of two new Application

Notes: one restricts the protections of § 1B1.8 to defendants who provide information concerning the unlawful activities of others; the other Note clarifies that the Guideline limits the court's use of such information, whether presented by the prosecutor, the probation officer, or some other party.

The provisions of § 1B1.8 first became effective on June 15, 1988, more than a year and a half following the effective date of the Guidelines. Essentially, § 1B1.8 seeks to preserve the ability of government attorneys and defense counsel to enter into agreements whereby a defendant who volunteers information to the government is appropriately assured that his truthful disclosures will not be detrimentally used against him, either to further prosecute him or to increase his sentence, provided that he has otherwise complied with the terms of his agreement with the government.

Although § 1B1.8(a) protects against the use of such information "in determining the applicable guideline range," Application Note 1, as currently in effect, advocates much broader protection, and sets forth the policy of the Commission that a cooperating defendant "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." Thus, the

Commission has apparently concluded that as a general matter, information volunteered by the defendant to the government should not be used to set a higher sentence within the applicable guideline range.[3] The last sentence of proposed Application Note 5 reaffirms this policy, by eschewing an interpretation of § 1B1.8 that would "unfairly penalize the defendant for truthfulness."

We agree with the Commission's policy in this regard and would favor a further refinement of the Commentary to prevent sentencing courts from taking into account information volunteered by a defendant, except to the extent permitted pursuant to § 1B1.8(b).

Proposed Application Note 5 is designed to prevent an end-run around the restrictions embodied in § 1B1.8, by clarifying that the Guideline acts as a limitation on the use of specified information, whether presented to the court by the prosecutor, the probation officer, or some other party. The NYCDL supports this proposal, which we believe is consistent with the policy underlying § 1B1.8.

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[3] At the higher offense levels, the difference between a sentence at the low end of a particular guideline range and one at the high end can be substantial -- indeed, as much as 81 months. See U.S.S.G. Sentencing Table, at 5.2. Thus, the use of information proffered by a defendant to increase his or her sentence within the guideline range may well constitute a not insignificant penalty in return for providing truthful information to the government.

Our only disagreement with proposed Application Note 5 is language contained in the initial sentence, which restricts the protections embodied in § 1B1.8 to agreements to provide information "concerning the unlawful activities of other persons"; this limitation is further discussed in proposed Application Note 6, which we oppose.

To be sure, the government rarely enters into cooperation agreements except with defendants believed to possess information concerning the unlawful activities of third parties. However, there are occasions on which the government may elect to enter into an agreement with a defendant to provide information about his own criminal activities -- either to enable the government to close out its investigative files or as part of an agreement by which the defendant will voluntarily make restitution to the victims of his various misdeeds. Where the parties thus agree that the information provided by the defendant should not be used against him in imposing sentence, we perceive no policy reason to exclude such agreements from the ambit of § 1B1.8. The government and the defense should be permitted to enter into such agreements with the knowledge that the Guidelines and the court will effectuate the parties' intent. Thus, we recommend that proposed Application Note 6 not be

adopted and that the first sentence of proposed Application Note 5 be amended to eliminate the final clause ("concerning the unlawful activities of others").

On a final note, we wish to alert the Commission that at least one prosecutor's office has refused across-the-board to afford any cooperating defendant the protection embodied in § 1B1.8. Consequently, even though prosecutors in that district have filed motions for downward departures pursuant to § 5K1.1, defendants who cooperate with that office may well begin with a much higher guideline range than similarly situated cooperators in other districts. This apparently aberrational policy thus fosters a form of sentencing disparity that the Guidelines were intended to eliminate.

If the Commission is not prepared to address this problem at the present time, we recommend that it be considered in connection with the next amendment cycle.[4]

[4] We further urge the Commission to amend Application Note 3 to § 1B1.8, to express the view that the Guideline applies to so-called "proffer agreements," by which many defendants provide self-incriminating information prior to entering into more formal cooperation agreements with the government. Absent the protection of § 1B1.8, proffering defendants -- like cooperating defendants prior to the enactment of § 1B1.8 -- may find themselves unfairly penalized for having provided truthful information to the government.

SCOTT D. KEITH
ATTORNEY AT LAW

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Tulsa, Oklahoma 74119-3828

918 / 599-8118
FAX 918 / 599-8119

February 14, 1991

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 24004

Attention Communications Director

Re: Federal Sentencing Guidelines

Dear Sir or Madam:

It is my understanding that you are accepting comments concerning the Federal Sentencing Guidelines. In that my law practice includes the representation of people in Federal Court in criminal matters, I appreciate the opportunity to be able to give you my feelings on this subject.

My experience has been that the utilization of the Federal Sentencing Guidelines, particularly in conspiracy cases, results in extremely harsh and unrealistic sentences. This is particularly true in cases involving the minor players in a conspiracy charge. I was recently involved in a case which highlights the inequities and harshness of these Guidelines.

In a case in the Northern District of Oklahoma, I represented a defendant in a conspiracy charge in the Summer of 1990. The individual was accused of being a middle-level participant in the conspiracy. He was convicted and received a sentence which would traditionally be considered a very harsh sentence.

However, the individual that received the most unconscionable sentence was a co-defendant named Perry Roberts. Mr. Roberts is a young black man who, by all accounts, had no leadership ability--he was simply the most insignificant of followers. He befriended another individual involved in this conspiracy and allegedly helped this other individual in completing some drug transactions. His involvement appeared to be minimal at best. However, due to the quantities of drugs involved in the overall conspiracy, Perry received a sentence of 292 months. Because of his minimal involvement in this action, this young man is sentenced to Federal prison for over 24 years.

Judge Ellison expressed great displeasure with having to follow the Guidelines on all of the sentences that came out of our case. He made a very good record for us for an appeal. However, the chances of winning these cases on appeal are very slim--the change needs to come from the Sentencing Commission itself. The Federal prisons are quickly filling up with individuals who, because of their involvement, with drugs, have received sentences

far in excess of anything needed to punish or rehabilitate these individuals. The present Guidelines in cases where large quantities of drugs are present have created sentences which have no justification, particularly in conspiracy cases. These Guidelines desperately need to be revised to bring the punishment level in line with the offense. It is common for sentences in Federal Court to result in a person serving 10 to 20 times the length of incarceration from the same crime prosecuted in State Court.

I hope these comments will be of some benefit, and if I can be of any further assistance, I will be happy to do so.

Yours truly,



SCOTT D. KEITH

SDK/jls

John S. Wryn
Reg. # 03150-046
P.O. Box 5000
Sheridan, Oregon 97378

Dear Mr. Benjamin F. Baer,

It is my understanding that Congress created mechanisms for evaluating the U.S. Sentencing Commission's work. A requirement for the Sentencing Commission is that they report to Congress of thier efforts.

I do not know if you are aware of the lengthy sentences people that are convicted of LSD offences are receiving for the weights of carriermediums included in determining the length of incarceration a person shall receive.

Inclosed please find a typed letter that has been reviewed by various Senators and State Representatives.

Sincerely Yours,

John S. Wryn

JOHN S. WRYN
REG.# 03150-046
P.O. BOX 5000
SHERIDAN, OREGON 97378

DEAR REPRESENTATIVE,

I AM INCARCERATED IN SHERIDAN FCI, SHERIDAN, OREGON. I HAVE BEEN CONVICTED IN THE DISTRICT COURT FOR MONTANA TO SERVE TWO 20YEAR PRISON TERMS WITH 10 YEARS SUPERVISED RELEASE THEREAFTER. THE CHARGES ARE CONSPIRACY TO DISTRIBUTE LSD AND POSSESSION OF LSD. MY SENTANCES ARE TO RUN CONCURRENTLY.I AM NOT GOING TO GO INTO WHETHER OR NOT THE MANDATORY MINIMUM SENTANCES ARE JUST,AS MY MAIN CONCERN IS THE SENTANCES PEOPLE CONVICTED OF LSD CRIMES ARE RECEIVING FOR THE WEIGHTS OF CARRIORS AND MEDIUMS INCLUDED TO DETERMINE THE LENGTH OF A SENTANCE.HAD NOT BEEN FOR THE WEIGHT OF PAPER AND LIQUID INVOLVED IN MY CASE I WOULD NOT HAVE FALLEN UNDER TITLE 21 U.S.C.SECTION 841 (B)(1)(A)(V) WHICH PROVIDES THE PENALTY FOR VIOLATION OF THE OFFENCE OF POSSESSION WITH INTENT TO DISTRIBUTE 10 GRAMS OR MORE OF A MIXTURE OF SUBSTANCE CONTAINING A DETECTABLE AMOUNT OF LYSERGIC ACID DIETHYLAMIDE. NEITHER WOULD I HAVE FALLEN UNDER SUBSECTION (B)(V) OF SECTION 841(B)(1) WHICH REDUCES THE SENTANCE BY 1/2 IN CASES INVOLVING 1 GRAM OR MORE OF A MIXTURE OF A SUBSTANCE CONTAINING LSD.

THE DEA CHEMIST (MR.TUCKER FROM SANFRANSISCO) HAD DETERMINED THE INDEPENDANT WEIGHT OF THE LSD MOLECULES TO BE 574,881 MICROGRAMS, WHICH IS EQUAL TO .574881 OF A GRAM.THE GUIDELINES FOR 1/2gr.DOES NOT CALL FOR A MANDATORY MINIMUM SENTANCE.IT DOES CALL FOR A SENTANCE OF APROX.2 1/2 TO 3 1/2 YEAR SENTANCE.ADJUSTMENT FOR THE ROLE IN THE OFFENCE CAN ADD MORE TIME TO THE SENTANCE.THIS SEEMS TO BE A FAIR AND JUST SENTANCE FOR THE CRIME.THIS CHEMIST CAN EASILY DETERMINE THE WEIGHT OF THE DRUG SEPERATE FROM THE CARRIOR,AS THE MOLECULES REMAIN DISTINCT RATHER THAN FORMING A CHEMICAL BOND WITH THE PAPER.

MY CASE INVOLVED 71.390 GRAMS WITH THE PAPER INCLUDED.THIS IS EQUAL TO 7139.000 GRAMS OF HEROIN.IT IS QUITE CLEAR THAT THE INCLUSION OF THE WEIGHT OF THE PAPER SUBSTANTIALLY INCREASED THE BASE LEVEL UNDER THE FEDERAL SENTANCING GUIDELINES.INCREASED APROX. 16 1/2 YEARS TIME TO BE SERVED IN PRISON AND 7 YEARS SUPERVISED RELEASE THEREAFTER.

BESIDES THE WEIGHT OF THE PAPER,THERE WAS ALSO THE WEIGHT OF A LIQUID SUBSTANCE TO MAKE UP THE TOTAL 71.390 GRAMS.THE LIQUIDS WEIGHT IS 3.1 MILLILITERS,EQUAL TO 3.1 GRAMS.THE CHEMIST(MR.TUCKER)TESTIFIED THAT THE LIQUID CONTAINED 53 MICROGRAMS PER MILLILITER OF LSD;3 DOSAGES..

A PERSON CONVICTED OF 9.9 GRAMS OF CRYSTAL(PURE LSD)WOULD NOT EVEN RECEIVE THE MANDATORY MINIMUM OF 10 YEARS UNDER TITLE 21 U.S.C.,SECTION 841.YET THIS PERSON COULD HAVE OVER 500 GRAMS IF IT WERE ON PAPER.IT SEEMS THAT I HAVE BEEN SENTANCED TO NEARLY THE REMAINDER OF MY LIFE FOR WEIGHT OF PAPER AND LIQUIDS RATHER THAN THE WEIGHT OF ACTUAL DRUG INVOLVED

I WAS INHANCED BY 10 YEARS FOR A PREVEOUS DRUG CONVICTION OF 9 YEARS AGO.THIS INHANCEMENT FOLLOWS UNDER THE MANDATORY MINIMUM OF TEN YEARS UNDER TITLE 21 U.S.C. SECTION 841(B)(1).THE PREVEOUS CONVICTION CONSISTED OF MINUTE RESIDUE OF AMPHETAMINE THAT WAS SCRAPED FROM A BOTTLE

THE CARRIORS AND MEDIUMS ARE NOT USED TO INCREASE THE SALEABLE AMOUNT OF THE LSD AS IN COCAINE AND HEROIN... I AM HOPING YOU CAN SEE THE UNJUSTNESS AND UNEQUALNESS OF SENTANCING PEOPLE CONVICTED FOR LSD CRIMES FOR THE WEIGHT OF THE MEDIUMS AND CARRIORS INCLUDED RATHER THAN THE ACTUAL AMOUNT OF DRUG INVOLVED.

SINCERELY YOURS,

JOHN S. WRYN

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN
EDWARD M. KENNEDY, MASSACHUSETTS
HOWARD M. METZENBAUM, OHIO
DENNIS DeCONCINI, ARIZONA
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HANK BROWN, COLORADO
RONALD A. KLAIN, CHIEF COUNSEL
JEFFREY J. PECK, STAFF DIRECTOR
TERRY L. WOOTEN, MINORITY CHIEF COUNSEL
AND STAFF DIRECTOR

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

August 13, 1991

Mr. John S. Wryn
#03150-046
P.O. Box 5000
FCI
Sheridan, Oregon 97378

Dear Mr. Wryn:

Thank you for your letter regarding legislation addressing the material on which l.s.d. is carried and the federal sentencing system for drug-related offenses.

On October 29, 1990, Congress passed the Comprehensive Crime Control Act of 1990 (S.3266). This legislation was a compilation of both the House and Senate versions of the crime bill. Although it did include several drug-related provisions, no amendments were added to affect existing law pertaining to l.s.d. carrier mediums. In addition, no action was taken by the Senate on S.2649, the Drug and Alcohol Abuse Treatment and Prevention Improvement Act, which was introduced by Senator Kennedy in the 101st Congress. Currently, there is no legislation pending which addresses the issue of l.s.d. carrier mediums.

Regarding your concerns about the sentencing system for drug-related offenses, I share your belief that sentencing should reflect the particular circumstances of individual cases. At the same time, however, it is important to ensure that like cases are treated alike. I supported the Sentencing Reform Act of 1984 because I believed that the guideline system could achieve both of these goals.

When the Sentencing Reform Act was passed, Congress anticipated that the system might generate criticism from a number of perspectives. Accordingly, it created mechanisms for evaluating the U.S. Sentencing Commission's work. One of the requirements was that the Commission report to Congress on its efforts. In addition, the General Accounting Office must provide a report based on its independent evaluation of the Commission's work.

Thank you again for your sending me your views on this important topic.

Sincerely,

Joseph R. Biden, Jr.
Chairman

"CEPA"
" CHRIST ETERNAL PRAYER ASSOCIATION " INC.
P.O.BOX 690411
ORLANDO,FLORIDA 32819



August 5, 1991

Commission on Civil Rights
1121 Vermont Avenue N. W.
Washington, D. C. 20425

Dear Sir:

We at "CEPA" are deeply concerned about the unconstitutionality and civil violation being committed by our lower courts concerning the Habitual Offender Statute; 775.084 in Florida. Enclosed is some information supporting our organization complaint about this illegal statute.

Furthermore; we are convinced and know this statue was primarily designed and implemented especially for "BLACKS". Upon your Commission conducting an investigation, study and survey on the number "BLACKS" compare to White that are receiving this type of cruel and unjust punishment, you will discover that our allegations are facts. Especially here in the State of Florida.

"CEPA" feels this statute should be more consistent, accurate and specially for everyone who qualify for it. Our legislature shouldn't leave the choice of who receive this statue strictly in the hands of the courts. These individual have already demonstrated and performed acts of racism, discrimination and prejudice in our lower court, which have been publicized in the media.

Its ashame that we as "BLACKS" are subjective to enough cruel and unjust punishment doing regular court proceedings, than to be inflicted and afflicted with this type of misuse and abuse of the "LAW" and authority, by the "LAW". Now we are faced with more intimidation and servitude to keep us as "VOTS" - "VICTIM OF THE SYSTEM", prolonging our incarceration, depriving us of equal rights and treatment and denying certain inmates incentive as available to others.

I have also enclosed a newspaper article concerning the Habitual Statute, but apparently it wasn't signed by the out going Governor, where even judicial officials are complaining about this statute. We at "CEPA" have confidence your office will assist and help our organization in the proper administration and equal protection of this statute.

May "GOD" continue to bless you and your Commission and our organization. Lets continue to make the American Dream of freedom, "JUSTICE" and equality a "REALITY" for all God's

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people inspite of ones race, creed, color and/or conditions. "STOP" suppressing, depressing, oppressing and repressing our people in order to enhance one career and/or status in life. "START" helping and assisting God's people into becoming a more productive, constructive and beneficial citizen of society. Instead of the continuing burden now placed on society to house and care for so many so-called misfits and unfortunates of our society.

"LOVE" in "CHRIST"

O. M. Vickson I

Rev. O. M. VICKSON I
Chairman of "BOD"
"CEO"

cc: Chief Justice Leandor Shaw
Governor Lawton Chiles
[redacted]
President George Bush

LEGISLATURE 1990

Softer habitual-offender bill goes to Martinez

By Kim Stott
Staff writer

The Senate passed a bill yesterday that Jacksonville prosecutors say would cut by half the number of criminal defendants who could be prosecuted as habitual offenders.

"I think it's devastating for the criminal justice system," said Assistant State Attorney Richard Mullaney, head of the felony division. "... The long-range consequence for the state of Florida is negative."

The House already has passed the bill, which now goes to Gov. Bob Martinez.

The bill would change the habitual-offender law passed in 1988, which allowed tougher sentences for criminals who are repeat offenders.

The new bill restricts the criteria for repeat offenders by requiring that the new offense must be one of several violent crimes, including murder, sexual battery, robbery and arson — regardless of criminal history.

Although disappointed in the new bill, prosecutors noted that it does not take effect until after next year's legislative session. Chief Assistant State Attorney John Delaney said prosecutors will lobby legislators next year to try to repeal the measure.

Under the new bill, someone with a violent criminal history who commits a nonviolent crime could not be prosecuted as a habitual offender, although some repeat drug offenders still could be prosecuted under the law.

As an example of what's wrong with the bill, prosecutors point to Johnnie Fort, recently charged in Jacksonville with possession of a firearm by a convicted felon.

Fort, whose background includes murder, robbery and escape, could not be prosecuted as a habitual offender on that charge, Assistant State Attorney Jon Phillips said, because the charge is not on the bill's list of violent crimes.

Phillips, who heads a special repeat offender court in Jacksonville, said the changes "eviscerate" the existing law "and take it two steps backward."

But Chief Assistant Public Defender Bill White said the new bill "makes the law more honest."

"You just don't punish the person as a violent offender just because of their past," he said. If someone is charged with a nonviolent crime, "It's hard to call that person a habitual violent offender," he said.

After the 1988 law passed, Jacksonville was one of two counties in Florida to set up a special repeat offender court. The other court is in Pinellas County.

The caseload has been so heavy in Jacksonville that officials recently added a second judge to hear repeat offender cases.

"It's the one tool that's working," Delaney said.

According to a legislative analysis of the new bill, Jacksonville sent more habitual offenders than any other county to Florida prisons last year. Duval County accounts for 22 percent of the habitual offenders sent to prison, while Dade County is not even on the list of the top 14 counties.

Marilyn Harrell
#26973-037
Box A, Cottage 3
Alderson, WV 24910

July 8, 1991

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

Attention: Michael Courlander

Dear Sir:

In the June 28th issue of the FEDERAL REGISTER you requested comments on some of the things currently being addressed by the Sentencing Commission. Will you please accept the following remarks in your consideration of these focused items:

Regarding a 2 point reduction for "acceptance of responsibility", this is too low. First of all, it's not an option to people who are not guilty, but because of co-defendants who are, they are sentenced in a conspiracy action. The resulting 2 points equate to less than six months reduction in sentence. When faced with long-term sentences as a co-conspirator, the defendant is encouraged not to cooperate until after sentencing, when they may receive an offer of considerably more time from the overall sentence. Also, comments here suggest that with such a small offering, many have stated that it is not "better to tell the truth". This is encouraging people not to plead, but rather to go through the expense of a lengthy trial.

Regarding alternatives to imprisonment, there are a number of ways that are more effective in the prevention of criminal activity. Shock incarceration (six months) is more than adequate, based on what I have observed among the women inmates. This does not completely demoralize the individual, but is distasteful enough to make the person not want to be in the prison setting, but not too long to completely obliterate any potential future the individual might have. One of the greatest problems is the "overkill"--wherein an inmate loses every material thing, often children are displaced, the reputation is tarnished to the point that a job is difficult (particularly in the current job marketplace), and with fines and restitution, the person is left without certain basic abilities to support themselves. I am enclosing a copy of alternatives presented to Senator Joseph Biden recently which you might find of interest.

Criminal history - crimes committed as a juvenile should not comprise the whole picture, however, this should strongly evaluated since many of the women facing several years imprisonment have never been in trouble before and then find themselves facing years of incarceration under these guidelines. If the individual has a base offense level of 20 or above, half should be deducted for first time offenders.

Currently the judges feel that they are unnecessary and the entire burden of sentencing seems to be in the hands of the prosecutors. This is akin to having the wolf guard the henhouse. Giving the judiciary more latitude in departures--both upward and downward--will return the responsibility for sentencing to the judges, where it rightfully belongs. This is one of the single greatest areas that have resulted in the vast overpopulating of the prisons with no hope to those incarcerated. And, quite frankly, there are currently thousands of people serving unjust sentences at great public expense who really should not be in prison. They are being taught to have an intense distaste for the government and are returning to society with vastly altered attitudes about our government and this country, in general. Some are returning with an education in crime that they did not possess when they entered the system which will put further burdens on the system in the future.

Regarding the role in the offense in drug cases is probably the current most unfair aspect of the sentencing guidelines. We have one woman here who has received over two years for one trip involving drugs. Her co-defendants, who were involved for ten years or more, got less time and are currently no longer incarcerated. There are many such cases.

Obviously, regarding a 4-year mandate, this is an absolute must. It is a means to check on the system and bring disparities to the attention of the lawmakers in order that a system of checks and balances remain in place.

The "mandatory-minimum" is just too broad and all encompassing. Each case must be judged on it's own merit and states, such as Michigan, need to brought more in line with federal sentencing.

I appreciate the opportunity to respond and respectfully request that my comments be made a permanent part of the record regarding testimony in these matters. You have a difficult job and I'm sure you are doing everything possible to create equity within the system. You have my prayers and carry the hopes on your shoulders of many who are currently in the system under unfair sentencing. Thank you for caring.

Very sincerely,

Marilyn Harrell

Marilyn Harrell

MSH:em

Enclosures

PROPOSALS TO ASSIST IN REINTEGRATING EX-OFFENDERS

Based on what I have seen in housing ex-offenders in the past is a lack of self-esteem on the part of the prior inmate. I provided jobs in construction, cleaning, driving, security, childcare, bulk mailing, moving, automotive repair, and clerical. Most of the positions offered opportunity for unskilled people with some training. They were given housing and food free. No money was taken from the ex-offenders and savings accounts were opened for each one. They were paid $6 per hour up to $10. Few went beyond that, however, with the housing and clothing and food already taken care of, they were able to save enough to move on to their own care in a short time and the salaries were periodically increased to assist them once they became independent. They had access to company transportation or were given opportunities to save with the company matching their savings if they found a suitable car/truck. If the vehicle they wanted to purchase required repairs, it is taken to the automotive repair shop and the repairs are done and payroll deducted on a small weekly sum.

Health care and life insurance was offered as a benefit package.

I found that if we got a house that was structually unsound and gravely in need of repair, the cost of the house plus $25,000 could completely renovate it to above-standard condition. It took an average of $5,000 to outfit each house with complete furnishings and necessities such as dishes, pots and pans, initial food stock (condiments, etc.) and the miscellaney that accompany setting up a new household. The average cost per residence is based upon $900/monthly in either rent or debt reduction. The average cost per resident in the houses was $1,000 monthly. This included the rent/debt reduction on the house, salary for

one house manager at $200/week, utilities--including telephone and cable television, food, clothing, health insurance (individual plan), and miscellaneous expenses for clothing and dental. Transportation was run through the corporation. This was an average cost in an expensive area (Metropolitan Washington, D.C.) and could be trimmed considerably in less costly areas. It would be more advantageous if these homes were in more rural areas to prevent the enticements of drugs. All housed were expected to acquire GED (which was provided free of charge two nights a week) and to attend church (of their choice) on Sunday mornings. They were expected to keep their particular houses clean and shared in the cooking and meal planning as well. The house manager assigned special nights for the selection of television viewing. Each house was equipped with washer and dryer and each person was outfitted with clothing to fit their individual needs. Approximately $100 per week was given to each house for "entertainment", such as movies, sports events, etc. and the majority would select the activity for the week and the house manager would be responsible for acquiring tickets and transporting them to the event and back home. People in various fields, such as psychology and theology, would make frequent trips to the houses and counsel with the people in an attempt to raise the level of their self-esteem and assist them in working through any problems they may have.

There are many problems with Half-way houses, however, the most serious is the fact that people are unable to prepare themselves for their departures from those circumstances. This usually leads to the recividism and is not really necessary since there are alternatives. Home confinement is also not an answer because it involves the entire

family in circumstances of incarceration and will be too costly for the average ex-offender.

Using the concept mentioned above, housing could be set up--not specifically for the ex-offenders, but rather as jobs for ex-offenders. The housing could be set up (using the President's Points of Light Foundation, for example) to care for the following social-types of situations:

1. Housing for elderly (or daycare for elderly as a place for loved ones to drop off their elderly parents, for example, to be cared for during the day by people in the houses.
2. Foster homes for children (those with AIDS or abused situation).
3. Contracting for the restoration of homes and buildings by people who cannot afford to make the repairs themselves or that have local municipal code violations.
4. Shopping for elderly and infirm.
5. Meal preparation for homeless as well as delivery.
6. Restoration of vehicles or repairs.

There are a number of social services that can be accomplished which not only provide underprivileged with much needed care, but leave the ex-offender with a feeling of being useful rather than a "drain on society". In this way, they are housed and able to get back on their feet. The root cause of recividism, in my opinion, is the inability of the ex-offender to re-integrate successfully into society.

Housing can be secured from the stock of vacant foreclosed properties. Vehicles and household goods can be taken from seized, government property and then supplemented with new.

Also, though this is not at issue here, the government should re-institute the "emergency fund" at HUD to keep people from losing their homes. Every bit as effective as HUD's S.R.O.'s, federally owned land could be converted to Trailer Parks and require that all trailers have sprinkler-systems installed. The government should participate in the sales of these trailers and monitor the parks, once opened to curtail drug activities, etc. through the National Park Services. This would significantly dent the numbers of homeless and give those that are marginally homeless an option.)

In conclusion, the foregoing suggestions have been implemented and proven to work. I have no recividism that I am aware of from the people taken into my housing with one exception--Wilfredo Diaz. He had a problem with stealing automobiles and it was more a compulsion than a need. He was doing very well with that one small exception. Drug use was found in our houses, however, constant urine monitoring and more care in the selection of house managers would probably stem this greatly. We used ex-offenders as managers and this is a little too much responsibility initially. I don't say that they can't be trusted for future management responsibility, however, there needs to be at least a two year track record to be able to trust someone with that type of problem.

I really believe that the concept worked and could solve a lot of our crime problems and create the atmosphere for individuals to succeed under the most difficult social stigma. Please give this matter some serious consideration since, though I was very wrong to use government money to conduct this experiment without authorization, I did, in fact,

create the model for this type of program and I believe it will be greatly beneficial both the government and the individuals participating.

Using the President's current Non-Profit budget of $9.25 Million and taking each representative to apoint one from their district to handle the administration of this program, they could be paid approximately $21,100 annual income to start and private citizens could be encouraged to donate the balance of their annual income. The final cost would be less than half the current cost to incarcerate a prisoner and would be an invaluable service to the community, reduce greatly the recividism and truly create the "gentler, kinder nation" that this President stated he wanted to achieve. Thank you for your consideration.

Statement of

Barry J. Portman
Federal Public Defender
Northern District of California

on behalf of

Federal Public and Community Defenders

before the

United States Sentencing Commission
Washington, D.C.

March 5, 1991

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

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[1]U.S.S.G. Ch. 1, Pt. A(4)(a), at 1.4.

[2]Id. at 1.5.

[3]Id.

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

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[4]18 U.S.C. § 994(g).

[5]Id.

[6]See 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

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

[8]See id. at Appendix B.

[9]The "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,

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[10] See 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.

[11] Id. at Appendix E.

[12] Emphasis 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 §

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[13]See 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%).

[14]See 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

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[15]The 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

[16] See 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.

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[17]The "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.

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[18]It 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.

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[19]Young, 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

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[20]Memorandum 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).

[21]Id.

[22]Id.

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

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[23]See 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

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[24]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 N, appendix P.

[25]The 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

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

[26] 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 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

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[28]See id. at 28-32.

[29]The 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.

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

[31]There 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

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[32]For § 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

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[33]Even 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".

[34]The 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.

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

[36]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.

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

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

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

[39]U.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.

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[40] Id. ("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").

[41] See 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

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[42]The 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

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

[44]Option 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]

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[45]See 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).

[46]Id. at 3.

[47]Id. 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.

[48]Commission 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.

[49]See 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

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[50]Recidivism 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

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[51]United 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

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[52]There 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

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[53]U.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

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[54]Application 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."

[55]Application 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]

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[56]See 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 form such testimony or other information) may be used against the witness in any criminal case".

[57]U.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.

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[58]The 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".

[59]See 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.

PCRI 152/91

STATEMENT

of

HON. VINCENT L. BRODERICK, CHAIRMAN, COMMITTEE ON CRIMINAL LAW & PROBATION ADMINISTRATION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

and

HON. MARK WOLF, CHAIRMAN SUBCOMMITTEE ON SENTENCING GUIDELINES AND PROCEDURES

before the

UNITED STATES SENTENCING COMMISSION

March 5, 1991

We appreciate the opportunity to appear before the Commission to comment on various proposed amendments to the Sentencing Guidelines. We speak on behalf of the Committee on Criminal Law and Probation Administration, a Committee of the Judicial Conference of the United States. Federal judges are in a unique position to assess the Guidelines. We see them in operation every day. We bear primary responsibility for their implementation. Because of this close involvement, the Judicial Conference, through our present Committee and its predecessors, has maintained a working relationship with the Commission. We recognize that the Sentencing Guidelines are a permanent part of the federal criminal law landscape, and we are anxious to work with the Commission to make them as effective as possible. We welcome this and other opportunities to work with the Commission in the development of a fair and workable guideline system.

We want to emphasize this point of "development." Congress in establishing the Sentencing Commission recognized that there would be a process of development. Thus it conferred upon every sentencing judge the authority to depart from the Guidelines, up or down, if the judge found that there existed a circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the relevant Guidelines, provided that the judge also found that the existence of that circumstance should result in a departure. This concept of

departure is essential to the future resiliency and health of the Guidelines. Departures will be considered by the Sentencing Commission in refining and fine-tuning the Guidelines in the future: the interplay between departures and the Sentencing Commission's oversight will result, in time, in the Sentencing Guidelines reflecting, in fact, a process of common law growth.

In September of 1990, the Judicial Conference of the United States sent to the Commission eight recommendations for amendments to the Guidelines. These recommendations, which were formally adopted by the Judicial Conference, were addressed to problems identified by members of our Committee, drawing on the experience of sentencing judges. Many of these same problems had also been identified by the Federal Courts Study Committee (FCSC). A principal problem which these recommendations addressed was a lack of flexibility on the part of the judge at the low end of the Guidelines. Most judges agree with Congress that the Guidelines should "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." Most judges also believe that under the Guidelines there is too little flexibility in sentencing first offenders. A copy of the Judicial Conference's recommendations, which were delivered to the Commission in September 1990 and which we understand are presently under study by the Commission, is attached to this statement.

At the urging of the Committee on Criminal Law and Probation Administration Committee, the Judicial Conference took no action on several measures with respect to the Sentencing Guidelines urged by the FCSC, such as the recommendations to make the Guidelines merely advisory, and to establish a distinct standing Committee to study proposed Guidelines. Instead, the Judicial Conference authorized our Committee to recommend specific guideline amendments, as needed, to address problems we perceived with the Guidelines, and to comment directly to the Commission, when we deemed it appropriate, on Guideline matters.

Today we are faced with 51 pages of amendments to the Guidelines proposed by the Commission in January of 1991. Obviously, the time has been too short for any comments we make to reflect a position with respect to these proposed amendments which has been taken by the Judicial Conference, which does not meet until next week, or even by our own Committee, which does not meet until June. Thus, what our comments do reflect are the views of our Subcommittee on Sentencing Guidelines and Procedures.

We derive from these proposed amendments the strong sense that the members of the Commission and we in the judiciary seek the same goals: the development of a system of sentencing which is fair and efficient, and which reflects, to the extent possible, proportionality, uniformity, and honesty. The goal is not easy to achieve. Indeed Congress has charged the Commission in carefully chosen words to recognize that disparities (but not unwarranted disparities) will persist, and that the establishment of general sentencing practices does not eliminate the need, on occasion, for a judge to consider individualizing disparities:

> "The purposes of the United States Sentencing Commission are to---
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> (1) establish sentencing policies and practices for the federal criminal justice system that---
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> (B) provide certainty and fairness in meeting the purposes of sentencing , avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices;
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28 U.S.C. §991(b).

We understand that we are not the only constituency with which the Commission must be concerned. The Commission in fact is directed, in fulfilling its duties and exercising its powers, to consult not only with the Judicial Conference, but also with representatives of the Bureau of Prisons, the Department of Justice, and the Federal Public Defenders. But we draw attention to the numbers of amendments which have been made since November, 1987, and we suggest that some attention need be given to whether the present amendment process lends itself to meaningful input by any of the constituencies.

In the comments which follow we direct our attention to three areas which the proposed amendments point up: that of the amendment process; lack of flexibility in sentencing; and plea negotiation.

The Amendment Process

Understanding the goals of the guideline system. In order to decide what amendments are needed, we need to understand what the Guidelines are trying to do, and how well they are working. The Guidelines are part of a complex system. Their effectiveness depends on their interaction with other sentencing statutes and with the policies and practices of prosecutors, probation officers, defense attorneys, and judges. Attempts to correct problems in one area can create new ones in another. No significant amendment can be considered in isolation.

To weigh the costs and benefits of the present proposals, we need to understand how they fit into the Commission's view of problems with the current system, and its vision of a better one. The Commission outlined the purposes of the Guidelines and its resolution of major policy issues in Chapter 1 of the Guidelines Manual. It has since published annual reports containing data on the operation of the system. But hard data on how the system as a whole is working are sorely needed. The proposals before us are not accompanied by a comprehensive evaluation of the Guideline system, nor by a comprehensive explanation of how the amendments will help accomplish the Commission's goals. The brief "Reason for the Amendment" published after each proposal is only somewhat informative.

The amendments appear to be piecemeal. This would not be unusual in cases of technical amendments or those that clarify a simple ambiguity in application, though a piecemeal approach still creates problems for judges and probation officers and prosecutors and defense counsel who must struggle to stay abreast of each round of changes. Some of the amendments seem to be reactions to individual court decisions rather than part of a comprehensive program of refinement and evolution. Some amendments appear designed to advance a particular policy agenda---further to reduce prosecutorial and judicial discretion, or to ensure real-offense sentencing without regard to offender characteristics. But there is no public study of plea bargaining, no comprehensive analysis of how judges have exercised their departure power, and no invitation to public debate on whether this is the direction in which the system should be going.

The Commission has requested comment on several areas of special interest to the judiciary. Proposals concerning the appropriate sentence for multiple counts of perjury (**proposed amendment 19**) would undoubtedly benefit from the comment of judges familiar with such cases. The organizational Guidelines now under consideration raise a multitude of

issues of concern to the bench. We cannot arrange a helpful response to your requests, however, unless we are given sufficient time and data. Absent personal experience in these areas, and absent time to elicit views of judges who have had such experience, and absent the data which underlie the making of the proposals, we cannot usefully respond (except as to organizational proposals, to the limited extent we already have).

We understand that to a certain extent the amendment process is driven by statutorily ordained time tables, but we strongly suggest that a more extended public gestation period for analysis and development of meaningful comment on proposed amendments will in the long run be in the interests of the Commission, and will result in the development of the Guidelines in the directions anticipated by Congress.

Our suggestion is, therefore, that there should be a more extended period for public comment on proposals by the Commission to amend the Guidelines. We also urge the Commission to propose amendments in related packages. This would permit the "Reason for Amendments" section to contain a more general discussion of the problems and policy goals each package is designed to address.

The Commission has proposed amendments in areas that we believe are the unique province of the court, and which are the subject of rapidly developing case law. For example, proposed additions to Chapter 6 of the Guidelines state the Commission's view of what standard of evidence is required by due process and who should bear the burden of persuasion (**proposed amendment 36**). We suggest that the development of sentencing procedures are beyond the Commission's statutory authority, and that difficult questions of procedural fairness are best left to resolution through traditional case-by-case adjudication.

We believe the Guidelines are here to stay, and that they work. As developed under the Commission's empirical approach, they tell judges what the average imprisonment for various types of crimes and offenders has been. They thus help judges identify in each case the fair sentence, and they restrain those who might otherwise have imposed an atypical sentence due to lack of familiarity with general practice or idiosyncratic sentencing philosophy. The departure power gives judges the additional discretion they need when the Guidelines have not taken into account an important factor present in a given case. The Guideline system will be accepted and faithfully implemented when it adheres to this approach.

The Guidelines will create problems if they attempt to limit the judge's ability to fashion a fair sentence. The Judicial Conference recommendations are aimed at giving judges greater flexibility to tailor sentences to the individual, either within the guideline structure or through reasoned departure. They are largely aimed at the first offender end of the sentencing scale, where the considerations are prison or no prison. They seek to ensure that explicit incentives will be found within the Guidelines so that prosecutors will not resort to, and judges will not accept, plea agreements that misrepresent the real offense. These concerns need attention if the system is to be fair and workable. The proposed amendments do not adequately address them: certain proposals may exacerbate the problems or create new ones.

We turn now to a consideration of certain of the current proposals that affect sentencing flexibility and the plea negotiation process.

Flexibility in Sentencing

Offender Characteristics. A major goal of the Judicial Conference's recommendations was to increase judges' flexibility to take into account offender characteristics. We note with approval that the Commission has proposed eliminating language in Chapter 5, Part H, that attempts to keep judges from considering offender characteristics when choosing a sentence from within the Guideline range **(proposed amendment 34(A))**. However, the overall and ultimate thrust of the Commission's proposed amendments may be to prevent or deter judges from considering individual characteristics.

Thus Recommendation 5 of the Judicial Conference asked the Commission to accord judges greater flexibility to consider the youth of an offender, but the Commission has proposed the opposite **(proposed amendment 34(a))**. Where the Judicial Conference asked for greater flexibility to depart if an offender has combinations of characteristics that make a sentence outside the Guidelines better suited to the purposes of sentencing (listed at 18 U.S.C. 3553(a)), the Commission proposes to add to the list of characteristics that *cannot* be considered by eliminating consideration of characteristics such as exemplary military service and good works, which many judges believe are relevant to the purposes of sentencing **(proposed amendment 34(C))**.

Many of the proposed amendments to Part H appear designed to "plug holes" that have been opened by judicial departures from the

Guidelines. It has always been our view, which we understood that each of the Commissioners shared, that departures are crucial to the creative evolution of the Guidelines. If this is so, is it useful to correct departures with which the Commission may disagree by immediate amendment of the Guidelines? Will this not have a chilling effect upon other judges who may contemplate departures in conscientious attempts to accommodate the Guidelines to individual offenders? Is the departure power so subject to abuse that an amendment is required instructing judges that "physical...appearance, including physique," is not ordinarily a basis for departure? **(Proposed amendment 34(B).)**

The Commission's proposed restrictions on the consideration of offender characteristics go well beyond those required by 28 U.S.C. 994. They will stunt the development of a common law of sentencing, as envisaged in the Sentencing Reform Act. Departures are now subject to review by the Courts of Appeals, which have required that judges give detailed statements of reasons and that the degree of departure be structured. We ask the Commission to allow, and indeed encourage, this emerging area of law to develop. We urge you not to respond by amendment to every case where a judge has considered a factor the Commission believes is inappropriate.

We also ask that the Commission adopt the Judicial Conference's Recommendation 5 to add an application note to Part H of Chapter 5, which will make it clear that factors that are not ordinarily relevant "may be considered if the factors, alone or in combination, are present to an unusual degree and are important to sentencing purposes in the individual case:" This would help reinforce the position that while offender characteristics are not *ordinarily* relevant, they may be considered in the unusual case.

We applaud the Commission's addition of two new policy statements on grounds for departure; restitution prior to the discovery of the offense and voluntary disclosure of the offense **(proposed amendment 37(x))**. These additions should add needed flexibility to recognize the remedial efforts of offenders. However, as proposed the amendments contain so many conditions that they may as a practical matter actually limit the availability of departure on these grounds. The statement on restitution limits the departure to situations where there has been full restitution. We urge the Commission to also permit significant restitution to be recognized, particularly since restitution may be limited by ability to pay. Similarly, the limitation to offenses that are totally unplanned and isolated seems unnecessary. The statement on voluntary disclosure limits the departure to

cases that were unlikely to have been otherwise discovered. Few offenses fall into this category. Early disclosure can limit harm and should be encouraged. We urge the Commission to allow judges to tailor the departure to the individual circumstances of each case when a defendant has made significant remedial efforts.

Sentencing Options. The Guidelines not only radically reduce the proportion of offenders for whom probation is an option, but they also virtually rule out judges' ability to consider many of the factors they believe are most important to the decision of prison or probation: factors such as the threat to the community posed by the defendant; his potential for rehabilitation; the effect imprisonment is likely to have on the defendant's family, and on his post-release life. Consequently, this is the area where acceptance of the Guidelines by judges has proven most difficult, and where judges see the greatest need for change. This is especially so since many judges believe that the present Guidelines do not conform to the statutory requirement that they "reflect the general appropriateness of imposing a sentence other than imprisonment" for first offenders (U.S.C. 28 994(j)) nor do they "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons..."(U.S.C. 28 994(g).

The Judicial Conference recommendations now pending before the Commission seek to increase the availability of sentencing options at lower guideline ranges, especially for first offenders. They recommend that the Commission redefine the split sentence (**recommendations 1 and 2**); that the Guidelines provide a probation option for Category I offenders up to offense level 8 (**recommendation 3**), which would add two new cells to the probation range; and that the Guidelines provide for the option of probation with confinement conditions for 10 additional cells in the sentencing table (**recommendation 4**). We ask the Commission to consider as soon as possible these, and other recommendations from your Alternatives to Incarceration Task Force, that seek to expand sentencing options with particular emphasis on the lower end of the sentencing range.

This round of amendments proposes a new category VII for offenders with very serious records (**proposed amendment 31**). The Commission's monitoring data show there have been 13 upward departures from Category VI based on the seriousness of the offender's criminal record. We suggest that the Commission allow judges to exercise their departure power as needed rather than build more rigidity into the sentencing table. We also urge the Commission to consider the Judicial Conference recommendation to amend policy statement §4A1.3 to

encourage judges to consider both the length and nature of a defendant's criminal record so that departures protect the public from the most dangerous repeat offenders (**recommendation 6**).

Individualizing Culpability. The Commission has requested comment on "whether the Guidelines place too great a reliance on drug quantity in punishing drug offenders, particularly for less culpable aiders and abettors" (**proposed amendment 11**). They do. The Guidelines often force judges to impose draconian sentences on "mules" or other marginally involved participants which are grossly disproportionate to their culpability or threat to the community. We applaud the Commission's examination of this issue.

Our committee in fact struggled with this problem when developing the Judicial Conference's recommendations to the Commission. At that time we studied two approaches: 1) Providing a 6-point reduction under the mitigating role guideline §3B1.2 for "passive participants," or 2) limiting the amount of drugs included in a defendant's relevant conduct to that which a defendant was actually aware of, or might have foreseen. We preferred the second approach because the drug amounts included in defendants' relevant conduct are often so high, and so arbitrarily related to their culpability, that a fixed reduction from that level would still not bear a rational relationship to the punishment they deserve. We appreciate that concepts such as "foreseeability" have problems of their own, however, and share the Commission's interest in finding some principled way of defining the class of less culpable defendants and assigning appropriate punishment.

In proposed amendment 15, the Commission introduces a third approach that might be used for this problem: 3) Cap the base offense level for defendants playing limited roles in various types of crimes. For example, if the defendant has "no role other than renting or allowing use of the premises," (**proposed amendment 15, option 1**) then the offense level is 4 levels below the table from §2D1.1, but not greater than 16. A similar amendment might work for defendants having "no role other than delivery."

This is a problem which deeply disturbs judges, and we shall welcome the opportunity to work with the Commission and its staff in seeking a solution. This third approach has promise, but in the absence of more comprehensive analysis we are reluctant to endorse it at this time.

Relevant Conduct. The Commission's central principle for individualizing punishment and implementing "modified real-offense sentencing" (initial Guidelines Manual, page 1.5; phrase deleted in later amendments) has been the relevant conduct guideline §1B1.3. It permits judges to look beyond the counts of conviction to impose a sentence (within statutory limits) that is more appropriate to a defendant's actual criminal behavior. But how does one define the scope of conduct to be assessed against each defendant? The distinctions in the Guideline and its application notes have too often confused instead of clarified. And the Commission appears to be changing its own policies regarding the types of charge bargains to be respected by the Guideline. The esoteric distinctions and shifting policies have led to serious confusion and disparate application.

In some cases, the relevant conduct principle has appeared to include too much. The initial training provided probation officers often led them to assess to each participant the total harm caused by a criminal enterprise. Later training and Guideline amendments emphasized that relevant conduct is not necessarily the same for each participant, but how to draw the line has proved troublesome. The Guideline instructs that all acts actually committed or "aided and abetted" or for which a defendant is "otherwise accountable" shall be included in the base offense level (§1B1.3(a)(1)). For so-called "aggregable" offenses, any conduct that is part of a common "course of conduct" or "scheme or plan" as the offense of conviction is included (§1B1.3(a)(2)). For jointly-undertaken criminal activity, judges are encouraged to draw lines based on "foreseeability" and the "scope of the defendant's agreement" (application note 1). Since aggregable crimes such as the importation of drugs are also often jointly undertaken, there appear to be confusing if not competing definitions governing the scope of each defendant's culpability.

In other cases, the principle has appeared to include too little. The Commission is apparently concerned that the common "course of conduct" or "scheme or plan" principle has not always led to enhancement for possession of a firearm unless it was present during the act constituting the count of conviction (**proposed amendment 37(F)**). The proposed change, however, would do little to clarify the real cause of the confusion--the relevant conduct Guideline. What we need is clarification of how the distinctions in that Guideline are to work for firearms possessed by co-conspirators. If the firearm was used by one defendant in the course of a common plan to import drugs, but was not part of the defendant's agreement, is it included? What if the defendant was not aware of the gun, and could not have foreseen it? We urge the Commission not to expand the

cases when a firearm enhancement is to be applied without clarifying when it should be excluded.

Since the common "course of conduct" or "scheme or plan" principle is limited to aggregable offenses, prosecutors have been able to exclude from consideration at sentencing firearms or robberies that were part of the real offense conduct by reaching plea agreements that drop those counts. This latter problem is addressed by the Commission in this round of amendments **(proposed amendment 7(C)).** Regardless of whether the policy of reducing the effectiveness of this type of charge agreement is a good one, we are convinced that this method of doing so is not. The proposed amendment would add a special instruction to the robbery Guideline that creates yet another distinction specific to robberies---those that are, or are not, part of the "same series." This standard is parallel with, but not synonymous to, the common "course of conduct" or "scheme or plan" principle that applies to aggregable offenses. The use of a time interval to differentiate series seems arbitrary. The amendment would lead to very awkward application of the multiple count rules when the defendant is convicted of more than one robbery. We urge the Commission not to add confusing special cases.

The Judicial Conference's recommendation 7 was intended to help clarify some of the confusion surrounding relevant conduct. It sought consistent treatment of all types of offenses by moving the distinctions from Application Note 1 into the text of the Guideline. We urge you to consider it as part of a thorough re-examination of the language and structure of the relevant conduct Guideline. Also useful would be a clear statement of the current policy goals meant to be implemented through this Guideline, and how the distinctions it contains are part of a rational plan for the regulation of plea agreements as well as sentences.

Plea Negotiations

Judicial review of plea agreements. A number of amendments in this and previous cycles move the Guidelines further toward a real-offense sentencing system. Cross-references to the drug tables added to the Guidelines for "Use of a communication facility" or "Managing a drug establishment" eliminate base offense level caps for these crimes and peg the punishment to the amount of drugs within the scope of relevant conduct. The Commission clearly has a legitimate concern; disparity is created if some defendants are arbitrarily allowed to plead guilty to a lesser offense when the real offense conduct was more serious. The

"Thornburgh Memorandum" to federal prosecutors states that "charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt about the government's ability to prove a charge for legal or evidentiary reasons." But there is an exception if an office is "particularly over-burdened" and there is little doubt that plea agreements that limit the defendant's exposure to punishment are still common.

The Sentencing Commission has encouraged judges to defer acceptance of all pleas pending receipt of the PSR and to reject agreements that fail to "adequately reflect the seriousness of the actual offense behavior." (Policy statement §6B1.2(a)) We know of no data on how frequently pleas are rejected, but reports from probation officers and judges around the country confirm our sense that many judges are reluctant to engage in detailed review of plea agreements. Many judges believe that charging and bargaining decisions are the province of the prosecutor. They question whether they have the authority or resources to review decisions not to bring or to drop charges. They do not want to re-open investigations, second-guess the prosecutor about the availability of persuasive evidence, or tell the government how to use its time.

Detailed review of plea agreements and implementation of real-offense sentencing will increase the burdens on judges. The FCSC found that 90% of judges believe the Guidelines have already made sentencing more time-consuming. The Commission initially moved away from a real-offense system because "it found no practical way...to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process" (Guidelines Manual 1.5). We urge the Commission not to change its policy toward charge bargains without a thorough analysis of the entire plea negotiation system.

Incentives for guilty pleas. A concern of our Committee and the FCSC is that the Guidelines may also increase the number of cases going to trial. The federal bench is already burdened with an increasing workload, especially in the criminal docket. Since historically about 90% of all cases are resolved with a guilty plea, a drop of even a few percentage points in this rate could dramatically increase the number of trials.

The Commission has reported that the Guidelines have had no effect on the percentage of cases resolved through guilty plea (Sentencing Commission Annual Report). However, the FCSC reported that half the judges surveyed stated that the Guidelines had decreased the percentage of guilty pleas in their caseloads, and that 70% of judges surveyed believe the Guidelines had reduced the incentives to plead guilty. Recommendation

8 of the Judicial Conference, which suggests that the Commission reconsider the "Acceptance of Responsibility" Guideline, was predicated on the assumption, which we believe is solidly grounded, that at the upper end of the Guideline range the incentives within the Guidelines are sometimes not adequate to induce a timely plea. Recommendation 8 would increase the incentives to plead guilty *within the Guidelines.*

Absent incentives within the Guidelines to induce pleas at the upper ranges, surrogate incentives may operate outside the Guideline system. For example, if charge dismissals become an ineffective incentive, prosecutors can resort to pre-indictment or collateral bargains that are virtually unreviewable, such as promises not to indict family members. In other cases, defendants may be misled into thinking they have won a bargaining concession, when in fact the relevant conduct included in the remaining counts incorporates all the conduct in the dismissed charges. Judges at the Sentencing Institute held for the Fifth Circuit last September were concerned about the poor "quality of justice" afforded these defendants. As defense attorneys become more familiar with the Guidelines, these deals may become less frequent. But can we say we have achieved honesty in sentencing when defendants are misled in plea negotiations?

In some districts the major tool to induce bargains is the departure under 5K1.1 for substantial assistance to the government. Our Committee engaged in lengthy consideration of problems created by this guideline. On the issue of whether a motion by the government should be required for this departure (**proposed amendment 35**), we concluded that requiring a motion would prevent courts from having to make difficult determinations of the extent of a defendant's cooperation. We are in substantial agreement with the Commission's resolution of this issue.

Encouraging meticulous implementation of the Guidelines. When the Guidelines attempt radical changes from traditional plea negotiation and sentencing practices, they encounter resistance from prosecutors and from judges. If the Guidelines don't provide adequate bargaining incentives, prosecutors may use their charging and bargaining discretion to avoid strict application of the statutes and Guidelines.

The jury is still out on whether the Guidelines have attained the acceptance and refinement needed to fulfill the purposes of the Sentencing Reform Act. Tables of so-called judicial "compliance rates," as found in the Commission's Annual Reports, tell us very little if the charges, facts, and Guidelines on which sentence calculations are based have already distorted the real picture of the defendant's conduct. We need a study at least as

comprehensive as that now underway by the General Accounting Office--- which compares the investigating officer's files, the original indictment, the plea agreement, the presentence report, and the final sentence. Only then can we answer the important question: Have the Guidelines truly eliminated unwarranted disparity without creating more problems than they solve?

If the Guidelines are to be strictly applied, we believe the Commission must accommodate, within the Guideline structure, the need of prosecutors and judges for negotiating and sentencing flexibility. The Committee's approach has been to work with the Commission for the elimination of mandatory minimum statutes, for the creation of explicit bargaining incentives and options within the Guidelines, and to encourage departure where appropriate. We undertake to continue to work closely with you as we both strive for a better federal criminal justice system.

RECOMMENDATIONS OF THE JUDICIAL CONFERENCE
OF THE UNITED STATES TO THE
UNITED STATES SENTENCING COMMISSION

Recommendation #1: Redefine the "Split" Sentence in a Probation Sentence

This proposed revision redefines the split sentence as the imposition of at least 1 month of imprisonment rather than the current requirement of imprisonment for at least one-half of the minimum term. The Judicial Conference believes that the proposed change would do little to diminish the punishment meted out to these offenders. The punitive value of short periods of incarceration is greatest at the start, with the "clanging of the prison doors," netting diminishing returns (at great cost) after that.

§ 5B1.1(a) Imposition of a Term of Probation

Subject to the statutory restrictions in subsection (b) below, sentence of probation is authorized: ... (2) if the minimum term of imprisonment ... is at least one but not more than ~~six~~ *ten* months, provided that the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in § 5C1.1(c)(2)...

Recommendation #2: Redefine the "Split" Sentence in a Supervised Release Sentence

The rationale for redefining the split sentence for a supervised release sentence is the same as for a probation sentence. Currently, the definitions of this sentencing option are equivalent for probation and supervised release and in the proposed revision, the definitions would also correspond.

§ 5C1.1(c) Imposition of a Term of Imprisonment

If the minimum term of imprisonment ... is at least one but not more than ~~six~~ *ten* months, the minimum term may be satisfied by (1) a sentence of imprisonment; (2) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in § 5C1.1(e); or (3) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e)

provided that at least ~~one-half of the minimum term, but in no event less than~~ one month~~,~~ is satisfied by imprisonment.

Recommendation #3: **Permit Straight Probation at Two Additional Offense Levels for Category I Offenders**

Category I of the Criminal History Score includes first offenders. This recommendation permits probation without confinement conditions at two additional offense levels for this category only (i.e., moving two cells from Zone B to Zone A) by changing the current range.

Judges have the greatest sentencing flexibility when the guideline range permits, but does not require, straight probation. Within these ranges, the decisions of whether to imprison and, if not, what conditions to impose, are left to the discretion of the court. Since the guideline table is expressed in "months of imprisonment," and all of the ranges include a term of imprisonment, all cells in the table would seem to be subject to the statutory requirement that the maximum of the range not exceed the minimum by the larger of 6 months or 25 percent (28 U.S.C. 994(b)(2)). Therefore, the only way to increase the availability of probation without conditions specifically deemed the equivalent of prison is to increase the number of 0-6 cells in the guideline table. Accordingly, the Judicial Conference recommends a revision to Offense Levels 7 and 8 in Category I only.

In the Sentencing Table at Category I:

Offense Level	Current Range	Recommended Range
7	~~1-7~~	0-6
8	~~2-8~~	0-6

Recommendation #4: **Combine Zone B and C in the Sentencing Table**

This revision would combine Zones B and C to permit probation with community confinement/home detention conditions to substitute for imprisonment in 10 additional guideline cells. This change would remove the requirement for some term of imprisonment in cells with minimum terms of from 7 to 10 months, while maintaining the availability of the "split sentence" where it is now permitted.

§ 5C1.1(d) Imposition of a Term of Imprisonment

Delete this provision:

(d) ~~If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than six months but not more than ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(c), provided that at least one-half of the minimum term is satisfied by imprisonment.~~

Adoption of Recommendations 1 - 4 would modify the Sentencing Table at the lower end of the guidelines in the following fashion:

	Criminal History Category (Criminal History Points)					
Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10,11,12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
A 4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	~~1-7~~0-6	2-8	4-10	8-14	12-18	15-21
8	~~2-8~~0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
B 10	6-12	8-14	10-16	15-21	21-27	24-30
& 11	8-14	10-16	12-18	18-24	24-30	27-33
C 12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
⇩	⇩	⇩	⇩	⇩	⇩	⇩

Recommendation #5: Revise the Policy Statement Pertaining to Age

The Judicial Conference believes that judges need greater flexibility to consider age as a basis for departure or when determining length or type of confinement, and to consider other offender characteristics when present in unusual degrees or combinations.

The Commission's policy statements regarding age restrict judicial discretion beyond that required by the statute. Section 994(e) does not define age as a factor that is generally inappropriate for consideration in sentencing. But policy statement 5H1.1 directs that age is not ordinarily relevant for deciding whether a departure or the use of sentencing options may be appropriate (except that a departure may in some cases be appropriate for offenders who are "elderly and infirm"). Further, the Commission's restrictions on consideration of age are confusing in light of the distinctions found in 994(e). For example, the policy statement for age is more restrictive than the ones for factors statutorily restrained by the "general inappropriateness" standard. The Commission directs that family and community ties and employment record may be relevant to whether the use of sentencing options is appropriate while the policy statement for age states that it is not ordinarily relevant to either a decision to depart or for the use of sentencing options.

The following revisions are recommended to make the guidelines more consistent with statutory language and less restrictive in the use of offender characteristics in the sentencing decision.

5H1.1 Age (Policy Statement)

Age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. ~~Neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines propose sentencing options.~~ Age may be a reason to go below the guidelines ~~when the offender is~~ *if combined with another factor (e.g. young and naive* or elderly and infirm) and where a form a punishment (e.g. home confinement) might be equally efficient as and less costly than incarceration. ~~If, independent of the consideration of age, a defendant is sentenced to probation or supervised release,~~ Age may also be relevant in the determination of the length and conditions of supervision.

Application Note (to Chapter 5, Part H):

1. Those offender characteristics that are not ordinarily relevant when determining whether a sentence should be outside the guidelines, or where within the guidelines a sentence should fall, or the type of sentence to be imposed when the guidelines provide sentencing options, may be considered if the factors, alone or in combination, are present to an unusual degree and are important to sentencing purposes in the individual case.

Recommendation #6: Delineation of Policy Statements Pertaining to Departure for Dangerousness

The Judicial Conference is concerned that the guidelines do not give enough flexibility to depart upward based on offender dangerousness. The guidelines address the concept of dangerousness at two places: the Career Offender provisions (§ 4B1.1) and the Adequacy of Criminal History Category (Policy Statement § 4A1.3). The former, however, only applies when the current offense involves violence or drug trafficking. The latter addresses both the degree of risk and type of risk, and, although obviously contemplated as the vehicle for addressing dangerousness, is not explicit.

The proposed revision would clarify the Commission's position on dangerousness by dividing its current policy statement on the adequacy of the criminal history category into two parts, one focused on the degree of risk (i.e., over- or under-representation of the likelihood that the defendant will commit further crimes); the other on the type of risk (i.e., if the defendant does re-offend, what type of crime is s/he likely to commit). In the following recommended amendment, current text that is moved rather than deleted is indicated by a strikethrough bracketed by asterisks.

§ 4A1.3 Adequacy of Criminal History Category: (Policy Statement)

(a) Degree of Risk If reliable information indicates that the criminal history category does not adequately reflect ~~*the seriousness of the defendant's past criminal conduct or*~~ the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

(~~a~~ 1) prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses);

(~~b~~ 2) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;

(~~c~~ 3) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;

(~~d~~ 4) whether the defendant was pending trial, sentencing, or appeal on another charge at the time of the instant offense;

~~*(e) prior similar adult criminal conduct not resulting in a criminal conviction,*~~

A departure under this provision is warranted when the criminal history category significantly under-represents ~~*the seriousness of the defendant's criminal history* or~~ the likelihood that the defendant will commit further crimes. Examples might include the case of a defendant who (1) had several previous foreign sentences for serious offenses, (2) had received a prior consolidated sentence of ten years for a series of ~~serious assaults~~ *criminal acts*, ~~(3) *had a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding,*~~ (~~4~~ 3) committed the instant offense while on bail or pretrial release for another ~~serious~~ offense or (~~5~~ 4) for appropriate reasons, such as cooperation in the prosecution of other defendants, had previously received an extremely lenient sentence for a serious offense. The court may, after a review of all the relevant information, conclude that the defendant's criminal history was significantly more ~~serious~~ *extensive* than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines. However, a prior arrest record itself shall not be considered under § 4A1.3.

There may be cases where the court concludes that a defendant's criminal history category significantly over-represents ~~*the seriousness of a defendant's criminal history* or~~ the likelihood

that the defendant will commit further crimes. An example might include the case of a defendant with two ~~minor misdemeanor~~ convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. The court may conclude that the defendant's criminal history was significantly less ~~serious~~ *extensive* than that of most defendants in the same criminal history category (Category 11), and therefore consider a downward departure from the guidelines.

(b) Type of Risk. If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct, the court may consider imposing a sentence departing from the otherwise applicable guideline range. *Such information includes the nature of the criminal conduct underlying a defendant's prior convictions, and* prior similar adult criminal conduct not resulting in a criminal conviction, *that establishes a pattern of particularly harmful or very minor criminal behavior.*

An upward departure may be warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history. *Examples might include offenders with a history of repetitive assaultive behavior, of repetitive sophisticated criminal behavior (e.g. a series of sophisticated frauds or* a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding), *and those with unusually extensive and serious prior records.*

A downward departure may be warranted when the criminal history category significantly over-represents the seriousness of the defendant's criminal history. *Examples might include offenders whose points result from unusually harsh sentencing for misdemeanors or from a string of convictions for relatively minor, victimless crimes such as prostitution.*

(c) In considering a departure under ~~this provision~~ *these provisions* the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For

example, if the court concludes that the defendant's criminal history of III significantly under-represents the seriousness or *extensiveness* of the defendant's criminal history, and that the ~~seriousness of the~~ defendant's criminal history most closely resembles that of most defendants with a Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category IV criminal history to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for a Category VI criminal history is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a decision above the guideline range for a defendant with a Category VI criminal history may be warranted. However, this provision is not symmetrical. The lower limit of the range for a Category I criminal history is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for a Category I criminal history on the basis of the adequacy of criminal history cannot be appropriate.

Recommendation #7: Include the Definition of "Otherwise be Accountable" from the Commentary in § 1B1.3 to the guideline.

The Judicial Conference proposes that the Sentencing Commission revise the relevant conduct guideline (1B1.3) and accompanying commentary to clarify that judges have flexibility to individualize the offense level according to the harm for which the defendant was personally culpable.

Commentary accompanying the guideline defines the phrase "otherwise be accountable" in (a)(1) as follows, "Conduct 'for which the defendant would be otherwise accountable,' as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced procured, or willfully caused." Foreseeability is also addressed in the commentary. The proposed amendment would make the Commission's definitions of "otherwise be accountable" and forseeability part of the guideline itself.

In addition, these revisions would clarify that the foreseeability standard applies to (a)(2) aggregable offenses. At present, the first illustration in the commentary suggests that defendants who aid and abet a joint criminal activity are liable for the full amounts of drugs or money, notwithstanding

claims that they were not aware of and could not reasonably foresee the amounts involved.

The purpose of Recommendation #7 is to clarify that defendants in all types of offenses are to be punished only for criminal acts and harms which were reasonably foreseeable, or of which they were personally aware. It would give judges flexibility to tailor the offense level, especially that part due to the aggregation of amounts of drugs or money, according to the part of the total for which each defendant should be held culpable.

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

(a) Chapters Two (Offense Conduct) and Three (Adjustments).

(1) all acts and omissions committed or aided and abetted by the defendant, ~~or for which the defendant would otherwise be accountable,~~ or *counseled, commanded, induced, procured, or willfully caused by the defendant, or in the case of joint criminal activity, reasonably foreseeable acts of others in furtherance of the jointly undertaken criminal plan,* that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

(2) solely with respect to offenses of a character for which 3D1.2(d) would require grouping of multiple counts, all such acts and omissions and *amounts* that were part of the same course of conduct or common scheme or plan as the offense of conviction, ***and of which the defendant was aware or which were reasonably foreseeable to the defendant.***

Recommendation #8: **The Sentencing Commission Should Consider Modification of the Offense Level Adjustment for Acceptance of Responsibility.**

The acceptance of responsibility guideline allows for a reduction of two offense levels (or roughly a 25 percent reduction) when a defendant "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his

criminal conduct." The guideline appears intended to accomplish three things: 1) encourage guilty pleas, 2) provide an incentive for cooperation with authorities and 3) recognize sincere remorse. In the United States Sentencing Commission amendments forwarded to Congress this spring, the Commission revised Application Note 2 to make clear that the two-level reduction is "not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt." As a corollary, Note 3 was amended to provide that entry of a guilty plea prior to trial and truthful admission of "related conduct" constitute "significant evidence" of acceptance of responsibility. Both notes provide "overrides" for unusual circumstances, for example, where a defendant goes to trial only to press a constitutional challenge to a criminal statute.

The effect of the amended notes read together is that a timely plea of guilty with admission of related conduct will likely result in a sentence reduction, while putting the government to its proof, regardless of other indices of acceptance or responsibility, ordinarily will not. This appears to respond to perceived concerns that there has been disparity in application of the acceptance of responsibility guideline where some defendants, even after going to trial, were given the reduction while others were unaccountably denied the reduction after entry of a guilty plea.[1] The amendment focuses this guideline almost entirely on the reward of a guilty plea.

However, this new focus may not be effective to achieve the multiple purposes of the acceptance of responsibility guidelines. The two-level reduction is seen by many judges as insufficient to encourage plea agreements particularly at higher offense levels. The Commission's own study of past practice showed that the average time served when a conviction results from a guilty plea was 30 to 40 percent below what would otherwise have been served.[2] It also appears that there were greater reductions where offenders faced longer sentences.

Moreover, to receive the reduction the defendant must acknowledge involvement in both the offense of conviction and

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1. For a discussion of different uses of this adjustment in districts in the Eighth Circuit, see United States v. Knight, ___F.2d ____ No. 89-1799 (June 1, 1990).

2. The United States Sentencing Commission Supplemental Report on the Initial Sentencing Guidelines and Policy Statements, June 18, 1987, pp. 48-50.

"related conduct."[3] This makes the incentive especially weak when, in order to qualify, defendants must acknowledge wrongdoing to related conduct that can result in offense level increases of more than two levels. In addition, requiring admissions to related conduct may result in continued disparate application, as it is not always clear what degree of admission of such conduct is required. The Judicial Conference therefore recommends that the Commission consider increasing the two-level adjustment for acceptance of responsibility and also give consideration to providing that greater adjustments be available for higher offense levels to encourage entries of pleas in cases where defendants, who in anticipation of long periods of incarceration may, without adequate incentive, go to trial.

The amended guideline also reduces the incentive for defendants to take other affirmative actions demonstrating acceptance of responsibility, such as payment of restitution or resignation from the office or position held during the commission of the offense. (See list of factors in the current guideline commentary, section 3E1.1, Application Note 1.) The Judicial Conference recommends that the Commission consider revising this guideline--or adding another--to recognize and encourage affirmative actions demonstrating acceptance of responsibility other than entry of a plea of guilty.

The Judicial Conference also recommends that the Commission reconsider utilizing a range of several offense levels for acceptance of responsibility to provide for more individual consideration of varying degrees and demonstrations of acceptance. We are aware that such an approach was considered by the Commission in its 1987 Revised Draft Sentencing Guidelines but not adopted. We believe such an approach provides much needed flexibility in allowing the court to address the various elements of acceptance of responsibility and does not implicate the 25 percent rule set forth in 28 U.S.C. § 994(b)(2). Section 994(b)(2) provides that "if a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range...shall not exceed the minimum by...25 percent or 6

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3. There is a split in the circuits as to whether it is constitutional to require admission of criminal conduct beyond the offense of conviction as a condition of giving the acceptance of responsibility. Compare United States v. Oliveras, ___F.2d___, No. 89-1380 (2d Cir. June 4, 1990) and United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989), holding that acceptance of responsibility should be assessed solely with respect to actual charges to which the defendant pleads guilty, with United States v. Gordon, 895 F.2d 932 (4th Cir. 1990), holding that the defendant must accept responsibility for all criminal conduct.

months." This section addresses the actual imprisonment range, and not the multiple determinations needed to arrive at such a range. Moreover, it is specifically limited to such ranges that include a term of imprisonment indicating that not all determinations be limited by the 25 percent restriction.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
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January 24, 1991

Mr. Paul Martin
Communications Director
U. S. Sentencing Commission
1331 Pennsylvania Ave., N.W., Suite 1400
Washington, D.C. 20004

RE: **5K1.1 Departures**

Dear Mr. Martin,

While compiling statistics for the 1990 Flint Office Annual Report, I monitored the number of 5K1.1 departures. I thought that you might be interested in the results, especially if this is occurring nationwide. We realize that the Flint, Michigan office is too small a sample to detect any trends.

The Flint office completed 62 guideline presentence reports during 1990. 28 of those cases had 5K1.1 departures. That equates to a 45%, 5K1.1 departure rate.

A further breakdown shows that 38 of the 62 cases were drug related violations. 10 of the 38 were convicted by trial. 28 were convicted by plea. Of those 28 plea convictions, 25 received 5K1.1 departures. That means that 89% of the drug cases convicted by plea got a 5K1.1 departure.

Many of these departures have been substantial. We have seen 50% to 66% reductions from the computed minimum of the guideline range. The amount and degree of the reduction seems to be wholely dependent upon the individual prosecutor. It would appear that our prosecutors are using the 5K1.1 departure as a plea motivation. It would also appear that great disparity in sentencing could occur as a result of such a system.

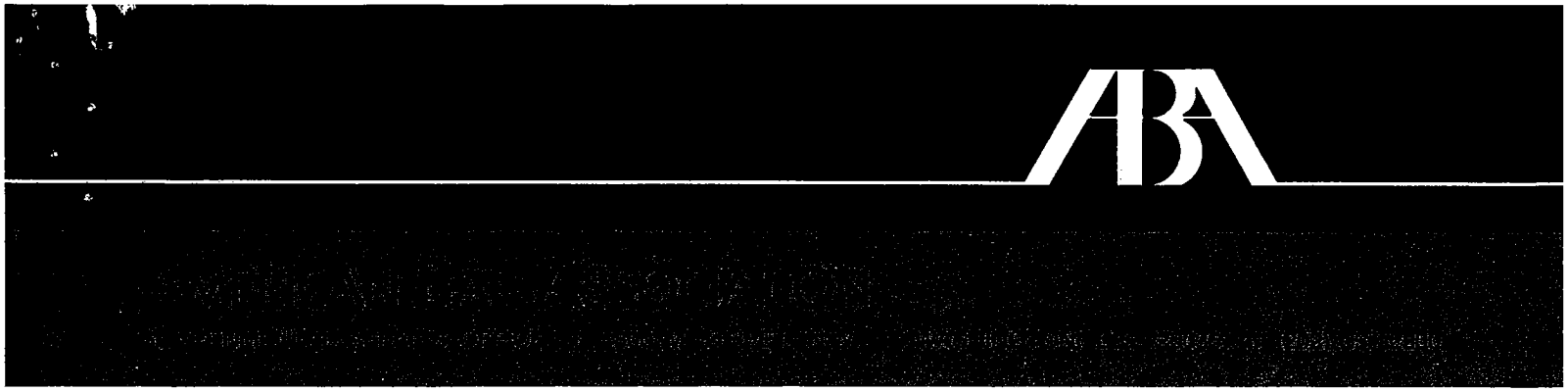
Does the commission have any other indicators of this occurring in other areas? Is the commission considering some means of regulating or capping reductions of sentence caused by 5K1.1 departures?

Sincerely,

Fred S. Tryles

Fred S. Tryles, Supervising
U. S. Probation Officer

FST:dms



STATEMENT OF

PAUL D. BORMAN, CHAIRPERSON
U.S. SENTENCING GUIDELINES COMMITTEE
CRIMINAL JUSTICE SECTION

ON BEHALF OF THE
AMERICAN BAR ASSOCIATION

BEFORE THE
U.S. SENTENCING COMMISSION

CONCERNING
PROPOSED 1991 AMENDMENTS TO THE SENTENCING GUIDELINES

WASHINGTON, D.C.
MARCH 5, 1991

Mr. Chairman and Members of the Commission:

My name is Paul D. Borman. I appear today to testify on behalf of the 350,000 members of the American Bar Association in my capacity as Chairperson of the ABA Criminal Justice Section Committee on the United States Sentencing Guidelines. Our Committee is made up of attorneys from every aspect of the criminal justice system -- prosecution, defense, judicial and academic. The Committee has had the benefit of two extended discussion of the 1991 proposals -- most recently on Thursday, February 28.

As many of you remember, our ABA Committee has testified before the Commission on numerous occasions, concerning the process by which the Commission promulgates guidelines, the substance of many guidelines, and the overall role of the Commission. Most recently, we testified about organizational sanctions. We appreciate the Commissions's willingness to both listen to and give serious consideration to our positions. We believe that the dialogue between the ABA and the Sentencing Commission has developed into a mutual respect on both sides which significantly benefits the criminal justice system.

The saga of the United States Sentencing Guidelines has been followed with great interest by the ABA both because sentencing guidelines have a critical impact on every federal court conviction, and because the ABA has developed sentencing standards by which we evaluate your Guideline proposals.

Today marks the formal beginning of yet another chapter in the epic saga of the Federal Sentencing Guidelines.

We strongly urge the Commission to spend a major part of its time and budget in setting up multiple Guideline training programs all around the country.

We urge that each and every one of you and your staff go forth and teach, and to learn from the foot soldiers in the criminal justice system. Sitting here and writing more amendments, or "clarifications", as many of them are called, is part of the problem. Venturing forth will help solve problems and avoid creating more problems. General Schwarzkoff didn't run the war sitting in the Pentagon in Washington.

We all recognize that the Guidelines by their nature cannot be kept simple. But that does not justify making the Guidelines even more complex, so that as soon as some people come close to understanding them -- **SHAZAM !** -- out comes a new set of amendments and clarifications.

This is the most important message that the organized bar can offer you this morning. And the following recent New Yorker cartoon, as amended, probably conveys the message better than my testimony so far.

Now to the 1991 amendment process:

First, we want to compliment the Commission for making better efforts in these areas:

1. Providing additional time for comments-- 45 days between publication and the public hearing, and 60 days for the entire comment period. We continue to seek the 90 day period proposed in last year's testimony.

2. Providing background reports tied to specific proposed amendments.

3. Asking, early on, for comments on matter's that are going to be on the Commission's agenda in the coming year.

4. Urging Congress to not enact additional mandatory minimum sentences.

At the same time we have searched in vain for the required comprehensive PRISON IMPACT STATEMENT -- that the Congress mandated the Commission to prepare. The Commission should not send out any additional proposals without first fulfilling this prerequisite.

Further, we want to urge the Commission to study in depth certain key aspects of the Guideline program that our experience has shown requires examination.

1. The importance and impact of offender characteristics, including prior unadjudicated crimes.

2. Mitigating Roles. This ties in with Amendment 11 and the study that Commissioner Carnes is undertaking.

With regard to the proposed 1991 amendments, we firmly believe that the Commission's credibility as an expert agency depends upon the openness of its decision making process and the extent to which the Commission's actions are grounded in empirical research, and its adherence to its enabling

would propose increased sentences in an era of dangerously overcrowded prisons without carefully weighing the impact each such proposal would have on prison populations.

At the same time, some of the most important proposals put forward by the Commission are unaccompanied by reports. For example, in amendment 9B, the Commission proposes to raise an offense level by up to eight level without providing adequate reason for the change and without providing any supporting data. Merely providing "a more appropriate sanction" does not set forth an adequate "Reason for".

Further, there are crucial structural issues underlying many of the amendments that are not addressed in the staff reports. For example, amendments 14 and 22 would entail significant shifts in the balance between real offense and charge offense sentencing, thus altering one of the bedrock policy choices of the initial guidelines. Meanwhile amendments, 1, 2 and 5 raise the question of how the Commission should respond to various expressions of congressional intent.

Yet neither the real offense issue nor the congressional intent issue is the subject of the Commission's own comprehensive staff report, despite their overarching importance. Either the Commission is proposing to act without considering the far reaching implications of its actions, or the Commission has itself considered these structural issues but proposes to act without affording the bench and bar an opportunity to comment intelligently upon them. Neither scenario is appropriate.

Carruther's proposals on Alternatives to Incarceration, Commissioner Carnes' working group on Mitigating Roles, and Commissioner Nagel's working group on Plea Bargaining. I believe that the mutuality of our interests in the federal criminal justice system will produce greater benefits as we work together early on, concerning the 1992 cycle.

At this point, I would be pleased to answer your questions.

COMMENTS ON SPECIFIC PROPOSED AMENDMENTS

Item 1. The 1990 crime bill increased the maximum offense level for certain sexual offenses. At the same time, the Congress directed the Commission to Study the sexual offense guidelines and determine if increased offense levels were appropriate. Now, before completing its mandated study, the Commission proposes to increase offense levels for these crimes.

This raises the broad question of how the Commission should respond to declarations of congressional sentencing policy. As noted in the body of our testimony, we believe that a comprehensive examination of this question is warranted.

Sometimes Congress is explicit: if it directs the Commission to set the base offense level for a crime at 22, the Commission is duty bond to comply. At other times, Congress is ambiguous: if a new law increases the maximum penalty for an offense, it may not always be necessary or wise for the Commission to increase the corresponding offense levels. Such legislation may be understood to provide greater scope for the court to depart upward from a guideline range that already provides adequate punishment for the heartland case.

Both options propose specific offense characteristics which would move the guidelines away from a modified charge offense system to a real offense system by permitting punishment for unrelated conduct that has not been proved beyond a reasonable doubt. This structural revision deserves far more consideration and analysis than it receives in the explanation accompanying this amendment.

logical for the Commission to ascertain the underlying cause of the prosecutorial disparity. One possibility is that some prosecutors find the operation of section 924 to be too harsh in individual cases. If this is so, a guideline amendment that would make the operation of the guideline uniformly harsh is plainly unwise.

The primary "Reason for" advanced is that U.S. Attorneys are not following the "Thornburgh Memorandum". The Commission should bring this matter to the attention of the Justice Department rather than act to supervise the Justice Department. The Supreme Court in Mistretta placed the Commission in the Judicial Branch, not in the Executive Branch. Further, the standard that the U.S. Attorneys must utilize in charging an offense, what is readily provable; one wonders how the Commission can arbitrarly second guess them on their decision-making.

Item 8. The explanation accompanying this amendment would make the extortion guideline equivalent to the armed robbery guideline, but does not say why this is just. Extortion typically involves the threat of future harm while robbery involves the threat of immediate harm. The explanation is also deficient in that it fails to justify the proposed offense level "floor" of 24, nor does it explain why a specific offense characteristic is needed for the few cases of product tampering.)

Item 8C proposes several specific offense characteristics that are either vague (what does the phrase "organized crime" mean?) or, as far as can be discerned form the absence of supporting data, unnecessary. Here again, the proposed amendments raise more questions than they answer. Of particular concern is the uncertain relationship between these specific offense characteristics and the "relevant conduct" and "role in the offense" guidelines.

Item 9B. This amendment proposes to double the punishment that a defendant will receive for a particular crime, but the only explanation offered for such a dramatic change is that it will "provide a more appropriate sanction" for the crime. By what criteria, did the Commission determine what constitutes an "appropriate sanction".

Item 11. The ABA appreciates the Commission's willingness to publish this request for comment, because it involves an aspect of the guidelines that we find most troubling: the unduly harsh punishment imposed on very low-level drug dealers under the structure of the current drug guidelines.

Pursuant to the Commission's request for a specific proposal, we suggest that a guideline be structured to provide an offense ceiling for the minor and minimal participants convicted of drug offenses. For example, a minimal participant

Item 19. This proposed amendment seems to respond to a very rare fact pattern, and therefore is best addressed through departure. Placing such "fixes' within the guideline, as in option one, leads to the increase bulk and complexity of the guidelines. No specific "Reason for" is set forth.

Item 21. The report accompanying this guideline suggests that majority of courts are sentencing toward the bottom of the guideline, so it is unclear why the Commission is proposing a complex revision of the guideline that would lead to higher offense levels. As in the bank robbery amendment, we commend the process by which the Commission proposes the amendment, but question whether the process has supported the outcome.

We believe that a significant in-depth study is warranted before implementation of this wholesale revision of firearms and explosives offenses. After reading the staff report, one is led to conclude that this proposal is based primarily upon the wishes to the ATF, and a single letter from a federal district judge.

Item 22. This proposed amendment would contain a series of alternative base offense levels, depending upon the court's assessment of the defendant's conduct under a preponderance of the evidence standard. This structure replaces several different guidelines, a structure which requires a defendant to be convicted of certain conduct before he is assigned to a particular guideline.

This shift to real offense sentencing may or may not be appropriate, but it appears to have been adopted without adequate consideration of the real offense issue, and is therefore objectionable for the reasons set forth in response to Item 14.

Item 23B. One part of the amendment would treat a foreign conviction as an aggravator, even if that country had failed to provide due process. This is inconsistent with § 4A1.2(h). It should be allowed only as a possible basis for departure.

In response to Item 16, we pointed out that it was difficult to offer informed comment on a proposed amendment that includes a four level range of possible offense levels. In this item, the Commission asks for such comment with respect to a fourteen level range. If the Commission has no basis for choosing an offense level between six and twenty for this conduct, it has no rational basis for this proposed amendment.

Item 25. Is there supporting data to justify raising the base level to make prison mandatory for at least part of the sentence.

Item 28. This new guideline carries a BOL of nine, higher than the BOL (8) for failure to report monetary

The Commission is not the Supreme Court of Sentencing.

We believe that the Commission should do a study of the case law in the area relating to burdens of proof and going forward, and the issue of due process.

Item 37C. This will likely result in a shut-off in any and all information provided by Defendants. Is the limitation of the protection provided the Defendant worth this result?

Item 37F. The issue of tying in of a gun not directly used in a narcotics offense with marginal, unknowing conspirators deserves study as part of Commissioner Carnes study.

TESTIMONY OF PAUL D. KAMENAR, EXECUTIVE LEGAL DIRECTOR OF THE WASHINGTON LEGAL FOUNDATION BEFORE THE UNITED STATES SENTENCING COMMISSION MARCH 5, 1991

WASHINGTON LEGAL FOUNDATION
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202-857-0240

Mr. Chairman and Members of the Commission:

My name is Paul D. Kamenar, Executive Legal Director of the Washington Legal Foundation, a non-profit public interest law and policy center that engages is litigation and the administrative process in a number of substantive areas, including criminal law and judicial reform. I have testified before and submitted comments to the Commission on several occasions on behalf of WLF regarding the formulation of the guidelines, and appreciate the opportunity to express our views before the Commission again today.

While we have been generally supportive in the past of substantial periods of incarceration for drug offenders and those convicted of violent crimes, we are also concerned that the Commission's guidelines for non-violent and non-drug regulatory offenses, particularly in the environmental area under Part 2Q, have resulted in substantial periods of incarceration that are wholly unjustified and contrary to Congressional intent that the guidelines reflect the general inappropriateness of any incarceration for first offenders who have committed such regulatory or minor offenses. See 28 U.S.C. 994(j). As I will note in my testimony, some of the proposed guidelines for this cycle graphically illustrate the gross disparities between offense levels for certain serious offenses, such as drug offenses, and the current guidelines for minor regulatory offenses.

Because the Commission, to use its own words, "emphasizes that it welcomes comment on any aspect of the sentencing guidelines, policy statements, and commentary, whether or not the subject of a proposed amendment," I intend to do just that by first making some general observations about the formulation of the guidelines, then commenting on a few of the proposed revisions, and finally, urging the Commission to revisit the environmental guidelines which are desperately in need of revision.

I. General Observations on Guideline Formulation

The Commission has stated that the basic approach it used in devising the guidelines was "the empirical approach that used as a starting point data estimating pre-guidelines sentencing practice." Section 1A3. Indeed, this approach is consistent with the wishes of Congress. 28 U.S.C. 994(m)(requiring Commission to ascertain average sentences of pre-Guideline cases). In some cases, the current guidelines and the ones proposed for this cycle, do not reflect or reveal the empirical research or study conducted by Commission. This general concern was expressed at length by Samuel J. Buffone who testified before the Commission last year on behalf of the American Bar Association, and we believe those concerns remain legitimate ones. This problem is particularly acute with respect to the development of the environmental guidelines, but others could make the same argument with respect to the proposed revisions relating to bribery (Amendment 9(A): Sec. 2C1.1,.2), extortion (Amend. 8; Sec. 2B3.2) and other areas.

If the Commission has conducted a work study in particular areas, the Commission should explain its reasons as to why a departure from past sentencing practice is warranted. This is not only sound practice, but is suggested if not mandated by the Commission's own policy. Principles Governing the Redrafting of the Preliminary Guidelines, para. 6 (Dec. 16, 1986)("when departures. . . . are substantial, the reasons for departure will be specified").

We also wish to make two recommendations related to this empirical issue that should be relatively easy for the Commission to adopt and would be of considerable help in utilizing the guidelines. One is to list the statutory sentencing range in the applicable statute or statutes which follows each guideline in the Commentary [e.g., for Sec.2D1.8 Renting or Managing a Drug Establishment, the Commentary would read "Statutory

Provision: 21 U.S.C. 856 (0-20 yrs.)]. The Commission currently provides this information under the listing "Background," but only in certain isolated cases. The other recommendation is to list, where available, the average sentence imposed for that category of offenses, preferably both pre-Guideline and the latest post-Guideline figures, if available. For example, the Commission's 1989 Annual Report, Table VI (attached) lists the average sentence for auto theft under the guidelines to be 17 months. The Commission presumably has the figure as to what the average sentence was before the guidelines. While listing these two figures would admittedly constitute rough indicators of pre- and post-Guideline practice, we believe that they would nevertheless assist the courts, probation officers, and practitioners in utilizing the Guidelines, especially since the Commission's Annual Reports, which contain most of this valuable information, are not readily available across the country as are the guidelines themselves.

As a final observation on the promulgation of the guidelines, many have expressed concern that the guideline process is compressed on a short time schedule with insufficient opportunity for comment and deliberation, especially when numerous changes are being offered. While the Commission's organic statute is to a certain extent to blame, we believe that the Commission can alleviate this problem to some degree by parsing out various proposals within the calendar year rather than considering everything by the May 1 deadline. For example, the Commission held separate hearings on the organization sanctions in December, and need not wait until May 1 to submit any final proposal to Congress. Theoretically, the Commission can submit any of its proposals as early as January of the calendar year when Congress begins its regular session, 28 U.S.C. 994(p), and those proposals would take effect 6 months later. Thus, the Commission can now

notice in the Federal Register, or shortly after May 1, other proposals for revising the guidelines, solicit and receive comments, and hold hearings throughout the remainder of this calendar year. The Commission can then formulate and refine its final proposal and have it all ready to be sent to Congress in early January 1992 (and effective by July 1992). By spacing out the various proposals, the promulgation process would be more manageable and allow for more focused debate and comments by the public, rather than the current practice of having hearings even before written comments are all submitted. Most federal agencies require written comments to be first submitted to them which are then studied in depth by both the agency and the regulated community; the subsequent hearings are thus more productive for everyone.

Furthermore, it appears to many that the 180-day waiting period is inordinately long. To my knowledge, Congress has never modified or repealed any of the Commission's proposed changes during this period. Consequently, we urge the Commission to recommend to the Congress that the waiting period be shortened, such as 90-days, and correspondingly advance the May 1 deadline to August 1. We note, for example, that Congress required the Federal Election Commission's proposed rules be sent to Congress for only 30 legislative days for its approval, 2 U.S.C. 438(d)(2), a period of time considerably shorter than 180 calendar days and involving a regulatory subject matter of utmost concern to Members of Congress.

II. Specific Comments on Certain Proposed Amendments

There are a few proposed changes which I would like to address, particularly because they illustrate the disparity between the sentences called for in serious crimes and

those imposed for regulatory offenses under the environmental section.

Proposed Amendment 15: **2D1.8. Renting or Managing a Drug Establishment.**

The Commission proposes two options. The first option is geared toward the underlying controlled substance levels found in 2D1.1, and significantly, caps the offense level to 16 if the "defendant had no role in the underlying controlled substance offense other than renting or allowing the use of [his] premises" for drug use or trafficking. Level 16 (21 to 27 months for first offender) is the same level that is easily reached, and has been reached in several cases under Section 2Q1.3, for minor regulatory environmental offenses. Is it fair that hard-working citizens who place clean building sand or topsoil on their own property be given a level 16 under 2Q1.3 because they failed to get a permit under the Clean Water Act (United States v. Mills; United States v. Pozsgai) and incarcerated the same length of time, or more, as those who rent their property to drug manufacturers or dealers to ply their deadly trade on the rest of society.

This is a particularly egregious disparity when one considers both the underlying offenses and the statutory penalties for each of these two offenses. Congress indicated its views of the seriousness of the crime of renting or allowing property to be used by drug dealers, users, or manufacturers such as crack houses and the like by making the penalty up to 20 years and a fine of $500,000. 21 U.S.C. 856. This is a Class B Felony, the most serious category of crime next to Class A which allows for life imprisonment. And yet the Commission, concerned about the fairness of sentencing such despicable criminals is seriously considering limiting an entire category of such offenders to a level 16 just because they "had no role in the underlying controlled substance offense other than renting"

their property to the drug dealers or manufacturers? Quite frankly, I don't understand why the Commission is so overly concerned about carving out a relative safe-harbor for this offense, when the core offense conduct, or heartland case, as envisioned by the Congress is the renting of the property or allowing it to be used, regardless of the property owner's role in the underlying offense. This proposal would essentially cap the punishment for a core offense to only approximately 10 percent of the maximum punishment Congress authorized for this crime (Level 16=21-27 mos./240 mos. maximum). At the same time, Section 2Q1.3 allows individuals to be given a level 16 for essentially minor regulatory violations under the Clean Water Act that are far from the core offense of water pollution as envisioned by Congress, and where the statutory maximum is 3 years rather than 20 years. Thus, first time environmental offenders are given 75 percent of the statutory maximum for non-heartland cases (and indeed, as noted in my prior submission to the Commission regarding the application of Part 2Q, the Justice Department in many cases asks for 100 percent of the statutory maximum because the environmental guidelines dictate such absurd results).

Congress dealt severely with the crime of renting or allowing property to be used for drug dealers because of the vital link that criminal activity plays in the distribution system of illegal drugs in this country. If all the vending machines, 7-11's, and other stores in this country were prohibited from allowing their property to be used to sell Coca-Cola, it would be very difficult for the Coca-Cola Company to get its product to its customers. So too, Congress' weapon in breaking the distribution network of illegal drugs was to provide stiff punishment for those who serve as a vital link in this deadly trade. How can the Commission possibly characterize these core violators of the law as

"peripherally involved defendant[s]"? In any event, what is so "anomalous," as the Commission puts it, about a manager of a crack house getting a greater offense level than would otherwise be indicated by the small quantity of drugs confiscated in a particular drug raid, where there is substantial evidence from a stakeout or informers that the owner of the house, apartment, restaurant, or warehouse allowed his premises to be so used over a long period of time? The Commission, rather than worrying so about hypothetical "anomalous results" in this and similar areas, should instead direct its talents and energies elsewhere where real injustice actually occurs under the guidelines, such as in the environmental area.

There are numerous other proposed offenses which call for increases for certain Specific Offense Characteristics, which, when compared to offense characteristics in the environmental section, further illustrate unwarranted disparity. For example, under 2Q1.2 and 2Q1.3, a full 4 points are added on for environmental violations where there was a violation of a permit or failure to have a permit. Aside from the double counting problems universally recognized (except by the courts) in applying this offense characteristic when it is part of the underlying charge, why is 4 points added for not having a permit (for conduct which is not prohibited, but merely regulated) but only 2 points are added, for example, under Amendment 17, **Sec. 2G2.4 Possession of Material Depicting a Minor Engaged in Sexually Explicit Conduct,** where the minor is under the age of 12? Is the depiction of a 5-year old engaging in explicit sex acts with an adult worth only an additional 2 offense levels, but not having a permit for putting topsoil on your own property worth 4? Indeed, even applying the most stringent punishment this Commission has in mind for 2G2.4, namely, a base offense level of 10 rather than 6, and

two points for depicting a minor under the age of 12, the total would be 12 offense levels.

Yet Congress indicated that the maximum punishment should be 5 years for possessing 3 or more items of child pornography. Under the Commission's proposed guideline, an offender with 8 times this amount (24 magazines) depicting 5-year olds in sexually explicit conduct would receive either a level 8 (if the base offense level of 6 is adopted), or 12 (if the base level chosen is 10). A level 12 translates into 10-16 months, well below the 60 months maximum authorized by law, and more likely would result in probation or a short split sentence if the defendant pleads guilty and gets the two point reduction to reduce the level to 10. As with the managing a drug establishment offense, the conduct posed in this hypothetical is the core offense or heartland case. Again, compare this to the 21-27 month sentence for a non-heartland cases of violating the Clean Water Act where the maximum is 36 months. Does the Commission intend that the courts punish certain property owners who place topsoil and clean building sand on their own property and others for minor environmental offenses more severely than certain drug offenders and those who contribute to child pornography? It certainly seems so.

The proposed and current guidelines are replete with instances where offense characteristics are assigned 1 or 2 points that are in sharp contrast to the 4 offense levels for not having a permit under 2Q1.2 See, e.g., 2K1.1 (2 additional points for trafficking up to 75 pounds of explosives); 2K2.1(b)(2) (2 additional points for illegal trafficking of 7 firearms); 2A3.2(b)(1) (only 1 point added to rape of a minor if victim's abuser was custodian or guardian, such as a parent or teacher). See also current guidelines 2A2.2(b)(3) (2 points for bodily injury); 2A4.1(b)(4) (2 points if kidnap victim is held for more than

30 days); 2D1.1 (2 points if drug trafficker possessed firearms). In some cases, these additional offense levels appear too low; in any event, the 4 points assigned for not having a permit under 2Q1.3(b)(4)(with the potential for an adjustment up to 6 points under Application Note 7) is totally out of line with the Commission's other designation of offense characteristics which are related to the actual harm committed, and not imposed for merely because the conduct was unpermitted-- a characteristic inherent in all criminal conduct.

III. Need to Revise 2Q1.2 and 2Q1.3 of the Environmental Guidelines.

As the Commission is aware, our Foundation is particularly concerned with the clearly flawed guidelines under Part 2Q, in particular 2Q1.3 and its companion 2Q1.2 that result in the Justice Department seeking, and the courts imposing, a level 16 for first offenders who place sand, topsoil, or clean non-toxic, non-hazardous fill on their own property without a permit from the Corps of Engineers under the Clean Water Act.

Our concerns were fully addressed in our request to the Commission dated January 15, 1991, a copy of which (minus most of the exhibits) is attached hereto for your convenience. Our client, John Pozsgai, a first offender, is serving 27 months in federal prison for putting topsoil and clean fill on a few acres of his own property. Ocie and Cary Mills served 21 months for putting 19 loads of clean building sand on a quarter-acre lot on which he planned to build his retirement home. Both were assigned a level 16: 6 points for the base offense of discharging a pollutant without a permit; 6 more for discharging the pollutant over a period of time; and 4 more for not having the permit. The district courts and courts of appeals in both cases rejected arguments that this constitutes double counting. The flaws in these guidelines are widely recognized and

documented. See B. Sharp, L. Shen, The (Mis)Application of Sentencing Guidelines To Environmental Crimes, BNA Toxics Law Reporter 189 (July 11, 1990)(attached hereto). In many cases, DOJ is exploiting the flawed guidelines by seeking mandatory minimum sentences under the guidelines for first offenders that are equal to the statutory maximum.

The letter from the Chairman dated February 7, 1991 rejecting our request for the Commission to reconsider this issue is disappointing in many respects. The primary reason offered was the fact that the Commission apparently decided at its January 3, 1991 meeting not to take up the environmental section. However, the entire purpose of our January 15 request was that the Commission's action was not an informed decision because of the misleading information provided to the Commission by DOJ and EPA representatives about the operation of the guidelines. Furthermore, the letter speculates that since the only reason the judge offered for imposing such a harsh sentence on Mr. Pozsgai was his view that Mr. Pozsgai was a "stubborn violator," (the judge referred to no damage caused to the environment) that were it not for the guidelines, Mr. Pozsgai would have likely received a harsher sentence. This speculation is unwarranted for several reasons. In the first place, the maximum sentence for the worst water polluter is 3 years. If this were a pre-guideline case, the worst sentence Mr. Pozsgai would have received would have been 3 years. Under the parole guidelines then in effect, he would be eligible for parole after 1 year, and would no doubt have received it. Furthermore, "stubbornness" certainly does not seem to be a relevant offender or offense characteristic by the Commission for other crimes. Thus, it appears that the judge was able to exploit the flawed guidelines by using the high offense scores to validate his "stubbornness" reason for imposing the harsh sentence. Finally, the letter conveniently ignores altogether the similar unjust sentencing results in the

Mills case and others, and the cogent critique of the guidelines by Messrs. Sharp and Shen.

Finally, the letter concludes that the Commission is busy enough with revising other guideline provisions to take the environmental section up now. This reason is disappointing for a number of reasons.

First, the Commission has had under consideration a full revision of the environmental guidelines since at least January 30, 1989, over two years ago. See Letter to Chairman Wilkins from Thomas L. Adams, Jr. of EPA, dated February 13, 1989 (attached hereto). A third year of delay is simply intolerable, especially for the 50 or so individuals to be sentenced this year under the guidelines.

Second, the suggested revision we offered, namely eliminating or reducing the "no permit" offense characteristic, one of the two sources of the double counting problem, is relatively easy. Indeed, the Commission can still satisfy the publication requirement and meet the May 1 deadline by putting a brief notice in the Federal Register along the lines suggested in our January 15 letter by March 15, for example. Comments could be received by April 15, and the simple change sent to Congress along with the other proposals to Congress by May 1. Further refinements could then be addressed afterward if deemed necessary, but the time and effort for this revision surely is worth the time the Commission is putting in to consider whether managers of crack houses should get a break.

The February 6 letter from the Chairman is also remarkable for what it does not say. First, there is no dispute to our contention that the guidelines are inherently flawed because the Commission failed to compute the average sentences imposed for environmental offenses before the guidelines were enacted as required by Congress in order

to assess whether stiffer sentences were warranted. 28 U.S.C. 994(m). Second, there is no attempt to point to any reasons why the Congress' preference that it is generally inappropriate for the guidelines to impose incarceration for first-offenders for minor violations. It is one thing for the Commission to determine that contrary to the general rule, in appropriate circumstances, that some jail time may be warranted for minor offenses for first offenders (i.e, 2 or 3 months), but levels of 12, 14, 16 and higher are simply overkill. The 21-27 month sentence imposed on Mr. Mills and Mr. Pozsgai translate to an outrageous pre-guideline sentence of 63 to 81 months. Does the Commission really believe that such sentences are what it intended or believes is just?

Finally, the letter does not dispute our contention that the guidelines impermissibly allow for double counting. Indeed, the Chairman even acknowledged during the January 3 meeting that the environmental guidelines have the potential for impermissible double counting, but suggested that the courts can take care of the problem, Several courts, including courts of appeals, have not taken care of the double counting problem, and it behooves the Commission to revise or clarify the guidelines immediately. At a minimum, a simple policy statement can be, and should be swiftly issued to address the double counting flaw that allows judges to impose sentences (at the urging of DOJ) such as that on Mr. Pozsgai, which, according to the Commission's own data, exceeds the average sentence imposed under the guidelines for a host of serious crimes, such as auto theft, larceny, fraud, counterfeiting, and many drug offenses.

Thank you for the opportunity to present these views. I will be happy to answer any questions you may have.

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January 15, 1991

HAND-DELIVER

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

Re: Modification of Part 2Q of the Guidelines

Dear Judge Wilkins:

On Thursday, January 3, 1991, the Commission met to discuss what substantive areas of the sentencing guidelines it would consider for possible review. One of the categories briefly discussed was the environmental section, Part 2Q. Commissioner Paul Maloney from the Justice Department referred to a December 24, 1990 letter to the Commission from DOJ signed by Assistant Attorney General Richard B. Stewart and James M. Strock, Assistant Administrator for Enforcement for EPA suggesting that the Commission should defer consideration of revising Part 2Q, allegedly because there had not been enough case history (approximately 24 cases) to evaluate its implementation. This point was reiterated by Mr. Barry Hartman, Mr. Stewart's deputy, who suggested at the meeting that the Commission should "not shoot in the dark and make changes," noting that approximately 50 sentences would be meted out in calendar year 1991 that would provide the Commission with more information, and that only one circuit court had reviewed a Part 2Q case, a Sixth Circuit case which he argued, and was recently decided.[1]

During the brief discussion which ensued, you and perhaps another Commissioner acknowledged that Part 2Q guidelines impermissibly allow for double counting, but suggested that the courts can handle that problem. Judge MacKinnon also queried Mr. Hartman about the ratio of civil to criminal prosecutions in the environmental area (approximately 10 to 1) and the relevance of that practice to evaluating the guidelines. The Commission, apparently relying on DOJ's representations, nevertheless did not take up the issue of revising Part 2Q or any section thereunder.

While I was in attendance during that part of the meeting, I did not believe it was appropriate at that time to address the Commission, especially since I had not seen the

[1] Actually, at least three circuits had then reviewed sentences under Part 2Q: the Sixth Circuit (United States v. Bogas), Third Circuit (United States v. Pozsgai), and Eleventh Circuit (United States v. Mills). On January 4, 1991, the day after the Commission's meeting, the First Circuit issued an opinion involving 2Q1.2 in United States v. Wells, bringing the total number of circuits to four. These and other Part 2Q cases will be discussed, infra.

December 24 letter from DOJ.[2] Indeed, it appeared that perhaps none of the Commissioners had seen the letter since the Commission's Staff Director noted at the meeting that it had just arrived that morning. Having now secured and examined a copy of that letter (Attachment 1), I submit that the reasons proffered by DOJ and EPA to delay modification of Part 2Q or any sections thereunder are totally disingenuous as explained below and in the documents attached.

Accordingly, the Washington Legal Foundation urgently requests the Commission to reconsider this vital issue so that it can make a fully informed decision in this matter. In that regard, I am willing to address the Commission at the earliest opportunity possible for 5 minutes or more if necessary to elaborate further on the points discussed herein and to answer any questions or comment on any written or oral statements that might be made by DOJ or EPA officials at that same meeting. It is my understanding that the Commission has scheduled a meeting for January 22, 1991. While I believe that this issue is of such importance that the Commission should revisit this issue before then, the Commission may find the January 22 date to be a more convenient time to address the issue and, if convinced that Part 2Q needs modification, to do so with this cycle of amendments (since only 19 days would have then elapsed since the Commission's January 3 meeting).

Draconian Sentences Urged by DOJ and Imposed Under Part 2Q

As you know, our Foundation represents John Pozsgai, a 58-year old Hungarian immigrant and self-employed truck mechanic, who received the longest prison sentence in the history of the United States for any environmental offense: 27 months under U.S.S.G. 2Q1.3, for simply placing topsoil and clean (non-toxic, non-hazardous) fill on a couple acres of his own property, an old junk yard that he actually cleaned up. Not a single fish, bird, or sea lion was killed, harmed, or even threatened. Indeed, the government does not dispute the fact that a tiny stream adjacent to Mr. Pozsgai's property actually runs clearer today than it did before he purchased the property due to his clean-up efforts. Yet, since the EPA and U.S. Army Corps of Engineers determined that part of the property (which is zoned light industrial) technically constituted a marginal "wetland," a permit was allegedly needed under the Clean Water Act to place topsoil (a "pollutant") and other clean fill on the property.

The sentencing judge agreed with both the Probation Officer and U.S. Attorney's suggested application of Section 2Q1.3 of the guidelines: 6 points for the base offense of discharging a non-toxic, non-hazardous pollutant without a permit in violation of 33 U.S.C. 1311, 6 more for discharging the pollutant (under 2Q1.3(b)(1)(A)), and 4 more for not having the permit (under 2Q1.3(b)(4)). This double, indeed triple counting, quickly added up to a level 16 which, for a first time offender like Mr. Pozsgai, dictated a 21- to 27-

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[2] I learned of the Commission meeting by happenstance only the evening before, and did not know what would be on the agenda until the meeting was underway. No notice of the meeting was published in the Federal Register or any trade journal that I am aware of, nor was the agenda made available to the handful of persons who signed in at the desk outside the meeting room. If these are indeed public meetings of the Commission, we believe it is in the public interest for the Commission to notice all of its meetings, as is the practice of other agencies and commissions, indicate which ones are open to the public, summarize the agenda, and indicate whether or not members of the public are allowed to comment at the meeting. This practice would also be consistent with the Commission's otherwise open and helpful communications office.

month prison sentence. The court rejected the double counting arguments, refused requests for downward adjustments within the specific offense characteristics, and refused to depart. Although there was little if any environmental harm, the judge imposed the maximum at the urging of the prosecutor who wanted to use Mr. Pozsgai to send a message to all "private land owners," and because the court felt that Mr. Pozsgai was "stubborn." The 27-month sentence is equivalent to a staggering pre-guideline sentence of 81 months (approximately 7 years) since parole was available (and invariably granted) after serving one-third of the sentence.[3]

Before the guidelines were issued, no one was ever imprisoned for discharging a non-toxic, non-hazardous substance, let alone for such a long period of incarceration. Three months imprisonment for such infractions may be more than necessary to meet the ends of justice; 6 months seems particularly harsh; 12 months is clearly excessive; and anything over 18 months is simply unconscionable. Yet the guidelines as written and as interpreted by DOJ, probation officers, and the courts, mandate at least a level 14, if not a 16, resulting in sentences of up to 27 months for first time offenders such as Mr. Pozsgai whose conduct is far from the core offense or "heartland" case of water pollution.[4]

The Pozsgai case is not an aberration. Ocie Mills and his son Carey were sentenced shortly before Mr. Pozsgai in early 1989 to 21 months in prison under 2Q1.3 for placing 19 loads of clean building sand (technically a "pollutant") on a quarter acre plot on which he had planned to build a retirement home in Florida because part of the property was deemed by EPA to be a wetland (although Florida officials told the Mills' otherwise). United States v. Mills (PCR 88-03100, N.D. Fla.). As in the Pozsgai case, the district court agreed with the prosecutor and probation office that a level 16 was the proper score, mandating a minimum 21-month sentence.

On appeal to the Third Circuit in the Pozsgai case, we argued, inter alia, that the sentencing court misapplied the guidelines by double counting and wrongly applied offense

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[3] Indeed, since some of the filling activity took place before the November 1987 effective date of the guidelines, the judge sentenced Mr. Pozsgai under both the guidelines and the Clean Water Act. The court imposed the maximum sentence under the Clean Water Act of three years for the pre-Guideline counts, a sentence which was essentially ordained given the results suggested by the guidelines. For in order to have some semblance of symmetry between the pre- and post-guideline sentence for essentially the same conduct, the Pozsgai Court could not adopt the Probation Officer's recommendation of a one-year sentence for the pre-Guideline violations (who also determined that this was not a serious offense). Rather, by imposing the maximum three-year sentence (a sentence which one would normally think should be reserved for the worst water polluter rather than for one who caused little if any harm) with parole technically available after one year, the court was able to approximate the guideline sentence of 27 months. Indeed, to be truly symmetrical, the court would need to have imposed at least two consecutive maximum three-year sentences for the pre-guideline counts just to match the guideline sentence.

[4] The 27-month period of incarceration permitted and imposed under a level 16 for a minor regulatory offense is greatly disproportionate to the average sentence meted out under the Guidelines for a first offender (even excluding those cases where no prison sentence was imposed, i.e., probation) for a serious offense such as Burglary/B&E (24 mos.), and for other serious crimes, even counting those offenses committed by criminals with extensive prior criminal history: Larceny (20 mos.), Embezzlement (10 mos.), Fraud (13 mos.), Drug Offenses-Possession (8 mos.); Drug Offenses-Use of Communication Facility (26 mos.); Auto Theft (17 mos.); Forgery/Counterfeiting (16 mos.); Bribery (17 mos.); and Escape (22 mos.). See Table VI, U.S. Sentencing Commission Annual Report 1989 (Attachment 2).

characteristic 2Q1.3(b)(1) governing discharge of a pollutant since comment n.4 indicates that it applies only if there is "actual environmental contamination," hardly the case involving topsoil, sand, and clean fill. Alternatively, we argued that Section 2Q1.3 itself was unlawfully promulgated because the Commission did not undertake the requisite analysis of pre-guideline sentences in this area as required by 28 U.S.C. 994(m); that the environmental guidelines were inconsistent with Congress's intent that the guidelines "reflect the 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 offens"; and that they violated Congress' overall intent of reducing sentencing disparities and promoting fairness by causing just the opposite. Without any oral argument, the Third Circuit affirmed both the conviction and the sentence without opinion. 897 F.2d 524 (3d Cir. 1990). Rehearing en banc was summarily denied, and the U.S. Supreme Court denied the petition for writ of certiorari. 111 S.Ct. 48 (1990). Mr. Pozsgai began serving his 27-month sentence on November 23, 1990 at Allenwood Prison (which according to DOJ is over capacity). Attached are copies of the briefs in the case filed in the Supreme Court (Attachment 3). The court of appeals briefs, which treat these arguments in greater detail, can be supplied to the Commission if necessary.

The appeal by Ocie Mills and his son who received a 21-month sentence for placing sand on their property fared no better. The Eleventh Circuit affirmed the conviction and sentence in July 1990 without opinion despite strenuous arguments that the guidelines permit double counting. 904 F.2d 713 (11th Cir. 1990). Unfortunately, the Mills' were denied bail pending appeal and consequently, they have just completed serving their unjust sentences (although they remain on supervised release).[5]

Other environmental cases cited in our Supreme Court brief further illustrate the flaws in the environmental guidelines and their application. For example, federal prosecutors and probation officers are requesting the court to impose a statutory maximum penalty of one year for negligent violations of the Clean Water Act, even though the defendant is a first offender, because the guidelines dictate a minimum over one year. See, e.g., United States v. Fisher, CR 89-234 (D. Ore. Feb. 12, 1990).[6] This structural problem with Part 2Q that causes minimum guideline sentences to exceed statutory maximums has been thoroughly analyzed and discussed in an article entitled "The (Mis)Application of Sentencing Guidelines To Environmental Crimes," by Benjamin S. Sharp and Leonard H. Shen of Perkins Coie in Washington, D.C., reprinted in BNA Toxics Law Reporter, July 11, 1990 at 189 (Attachment 5).

In another case, a judge who is regarded as environmentally sensitive and who, during her confirmation hearings in 1979, told the Senate Judiciary Committee that she

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[5] Both the Pozsgai and Mills cases have received considerable nationwide media attention, a sampling of which is provided (Attachment 4). We can supply the Commission with a videotape of news coverage of these cases, including NBC's Good Morning America, Cable News Network, and CBS Evening News.

[6] As Commissioner Gelacak rhetorically questioned Assistant Attorney General Stewart in a related context during the recent hearings on organizational sentencing concerning DOJ's proposal for large fines for environmental offenses, "how on earth do we [the Sentencing Commission] maintain any credibility if we establish a guideline sentencing proposal that exceeds present statutory maximums...?" December 13, 1990 Hearings at 120, lines 12-14.

would not hesitate to put white collar criminals in jail, found it particularly difficult to grant the Justice Department's request to send a first offender to jail for over 51 to 63 months for improperly storing toluene (paint thinner), and instead managed to interpret 2Q1.2 in such a way as to impose 6 months of home detention. United States v. Bogas, 731 F. Supp. 242 (N.D. Ohio 1990). The Justice Department appealed to the Sixth Circuit, and at the urging of Mr. Hartman, the sentence was recently overturned. 1990 WESTLAW 188792 (6th Cir. Dec. 3, 1990). The Sixth Circuit, apparently sympathizing with the possible harsh result on resentencing, noted that the district court might try departing from the guidelines. Something is fundamentally wrong with the guidelines and the way that the Justice Department urges their application, where, in order to achieve rational sentencing in this area, departure must be the rule rather than the exception. In any event, uniformity of sentencing in this area is bound to suffer by relying on the vagaries of departure.

DOJ/EPA December 24, 1990 Letter

In their joint letter to the Commission dated December 24, 1990, Messrs. Strock and Stewart posited three reasons why the Commission should avoid addressing Part 2Q.

> "First, the existing guidelines received a good deal of very close attention from you and other Commissioners when they were initially developed in 1986. The result was a set of provisions which were fundamentally sound. Certainly our work with the guidelines so far have revealed no glaring errors or provisions badly in need of revision."

It is my understanding from discussions with current and former Commission officials, and from examining Commission hearings and records, that the environmental guidelines in fact received very little attention by the Commission. Indeed, the Commission did not, as required by law, carefully examine past sentencing practice to determine the average sentences imposed, nor did the Commission articulate any reasons why a radical departure from past sentencing practice was warranted in this area. The result was certainly not a set of provisions which were "fundamentally sound," but rather one which overzealous EPA and DOJ officials and prosecutors can exploit by seeking a way to impose draconian sentences for essentially minor regulatory offenses for first time offenders, and thereby undermining Congress' and the Commission's goals of uniformity and proportionality in sentencing. It is no accident that at public seminars on environmental enforcement, DOJ officials have promised the regulated community a "reign of terror." Naturally, one cannot expect such officials to acknowledge that the unprecedented sentences sought by DOJ and meted out to Mr. Pozsgai, the Mills', and others are the product of "glaring errors."

The second reason given by DOJ/EPA to postpone review of Part 2Q is that they "have not had sufficient experience" with the application of the guidelines to offer modifications because less than 24 cases have been disposed of under the guidelines, and that they expect, according to Mr. Hartman at the meeting, approximately 50 sentences to be imposed this year. Thus, the letter continues, "[b]y waiting another year, we will likely have more than twice as many guidelines cases as we now have [for a total of approximately 75] on which to base any possible changes."

We submit that the current experience with the guidelines is more than sufficient for the Commission to detect and correct the flaws with the guidelines. It is not necessary nor is it in the public interest to wait to have potentially 50 more Pozsgai-type prison sentences to realize that something is seriously awry with these guidelines and/or their application, although DOJ and EPA would no doubt prefer the Commission to believe the contrary.[7] Indeed, this is a perfect opportunity to make whatever changes the Commission believes is warranted, and then fine tune any of those changes, if necessary, after experiencing another wave of sentences imposed under the modified guidelines.

You have repeatedly and publicly stated that the Commission's duty is to review and revise the guidelines in order to achieve the best possible guidelines. The first signs that something was fundamentally wrong with the environmental guidelines or their application came at least by mid-1989 when I brought to the Commission's attention the unduly harsh and unprecedented sentences meted out in the Pozsgai and Mills cases under 2Q1.3. Some perhaps thought then that the double counting problems experienced in those cases would surely be corrected by the appeals courts (which turned out not to be the case). In any event, the 1989-90 cycle was a good opportunity to correct the problem. By not reviewing Part 2Q then, nor during this 1990-91 cycle, and waiting, as DOJ suggests until the 1991-1992 cycle, the Commission further and unnecessarily postpones correcting obvious problems for three years.

While it is always nice for statisticians to work from ever larger data bases, the Commission should not forget that these guidelines profoundly affect the lives, liberty and livelihood of individuals and their families. If the small number of criminal environmental cases before 1986 was a sufficient data base upon which to devise the guidelines in the first place (according to the EPA, there were only 16 criminal cases in 1985), then surely there are enough post-guideline cases to make an intelligent assessment of the guideline's operation today.

It would be cruel solace indeed for those who have served, are serving, and will likely serve two or more years of hard prison time for minor regulatory offenses to discover much later that the Commission did not intend such harsh results after all, and that had they been properly sentenced, they would have received probation or much shorter prison terms.[8]

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[7] The Justice Department should provide this Commission, and can easily do so, with the Sentencing Memoranda submitted to the court by the prosecutors in these two dozen cases, any defense memoranda, and the actual sentence imposed and the reasons therefor stated by the court. In addition, as for the 50 sentences which DOJ indicates would be imposed this calendar year, DOJ should also provide the Commission a copy of the indictments or information in those cases and indicate whether the defendants have pled guilty or were convicted after trial. See 28 U.S.C. 995(8), (14), (15), (16).

[8] In that regard, we note that Congress mandated that the Commission "periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section." 28 U.S.C. 994(o). Congress envisioned that guidelines might be reduced, and instructed the Commission to "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced" to conform to a guideline revised downward. 28 U.S.C. 994(u). If the Commission decides not to review this matter sua sponte, we are prepared to invoke

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The third and final reason for delaying revisions proffered by DOJ/EPA, "even assuming that we had sufficient evidence to undertake a revision," is the alleged shortage of time, particularly because everyone's attention "is focused chiefly upon organizational sentencing guidelines. [DOJ/EPA] believe that the public and the criminal justice system would not be well served by our trying to develop Part 2Q amendments on a compressed schedule." The suggestion that the Commission cannot chew gum and pat its head at the same time insults the Commission and its staff and undermines its duties and responsibilities. Indeed, the fact that the proposed organizational guidelines are being further considered for yet a second year is an argument to initiate public review now rather than uncovering problems a year later that could have been earlier resolved. While organizational sanctions, primarily fines, are a serious issue, it is nonetheless not as a compelling an issue as one that involves substantial deprivation of an individual's liberty and freedom. Furthermore, to the extent that organizational sanctions for environmental offenses are tied into the individual sentencing guidelines in Part 2Q, the issues are intertwined. Additionally, the Commission and DOJ/EPA staff apparently already have done extensive work on revising Part 2Q guidelines.

In any event, there are several suggestions which we are prepared to recommend that would be very easy for the Commission to propose that clarifies the Commission's original intent in promulgating Part 2Q. For example, the double counting problem (which you acknowledged at the January 3 meeting) needs to be addressed because it is not being corrected by the courts. In the Pozsgai and Mills cases alone, approximately 15 district court and court of appeals judges were squarely presented with the issue and saw no problem with it. Thus, 2Q1.3(b)(5) currently states:

> (5) If the offense involved a discharge without a permit or in violation of a permit, increase by 4 levels.

This provision can be revised to prevent double counting by simply inserting at the end the following phrase: "but not if the underlying offense charged is a failure to have a permit or is a violation of a permit." A better suggestion would be to eliminate the permit section altogether (or if retained, to reduce the additional points assessed to a more reasonable level such as 1, or at most 2) since most environmental crimes constitute discharges without a permit or are in violation of a permit's conditions.[9] All crimes, for

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[8](...continued)
28 U.S.C. 994(s) on behalf of Mr. Pozsgai which allows a prisoner to formally petition the Commission to modify the guidelines. Regardless of what mechanism the Commission uses to revise the guidelines, even if they were to be promulgated this cycle, because of the 180-day delay period for its implementation, Mr. Pozsgai by then would have already served almost one year in prison for his offense, a period of time greater than that which would be dictated, we would hope, by any revised guideline. In addition, such revision could be applied or used to adjust, if warranted, many of the 50 sentences that DOJ indicates will be imposed this calendar year, presumably most of them in the earlier part of this year.

[9] Even when the offense does not, strictly speaking, involve a violation of a permit, wildly disparate results obtain. In United States v. Wells, 1991 U.S. App. LEXIS 56 (1st Cir. Jan. 4, 1991), the defendant was tried and convicted of repeatedly discharging zinc from his small business above the effluent limits set by the EPA despite repeated warnings to stop. Section 2Q1.2, the applicable guideline which deals with
(continued...)

that matter, are "unpermitted" by the state. No one is permitted to rob a bank, for example, yet no aggravating points are added to such malum in se crimes because the offender really and truly intended to violate the law and commit the crime without society's permission. With respect to these traditional crimes, the basic rationale for the Commission's additional points is based chiefly on the levels of harm caused by the conduct. On the other hand, Mr. Pozsgai and others can obtain (and indeed he is currently pursuing administratively an after-the-fact permit) "permits" to place fill on one's property or discharge "pollutants." And as even Mr. Stewart himself candidly recognized, "we aren't talking about bankrobbers here, we are talking about [companies engaged in] productive economic activity." Wall Street Journal, Dec. 26, 1990, at 12, col.1.

Similarly, 2Q1.3(b)(1) -- allowing for 4 to 6 additional points for the discharge of pollutants depending upon whether it was continuous or not -- can be easily revised to prevent double counting. Under the current provision, a repetitive discharge of a gallon of oil a day over three months into a river causes an increase of 6 points, yet a one-time spill of 1,000 gallons (or even millions of gallons as in the Exxon Valdez case) adds only 4 points, a difference in points which are crucial in determining whether a first offender is eligible for probation (offense level 10 or less), or even a split sentence (offense levels 11 and 12, where at least 4 to 5 months must be served in prison), or is required to serve a minimum of 12 months, once a level 13 is reached, (see U.S.S.G. 5C1.1), a level quickly attained for even the most minor of environmental infractions.

The current offense characteristics also impermissibly allow the court to consider multiple counts of the same violation as constituting a repetitive discharge to cause 6 points to be added to the base offense level. Multiple fraud counts, for example, are not punished in that manner. See U.S.S.G. 2F1.1. If a criminal defrauded 40 individuals of $1,000 each as part of a continuous scheme, the total harm of $40,000 is used to determine the additional level to add, not some arbitrary number because the fraud, however small, was a continuous or repetitive one. Confusion is further added when the Commission in its comment n.4 to 2Q1.3 assumes that "actual environmental contamination" took place when all that is involved is the discharge of clean fill or some other "pollutant" that is easily dissipated or easily cleaned up.

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[9](...continued)
hazardous and toxic pollutants, begins with a base level of 8, two points higher than 2Q1.3 dealing with non-toxic pollutants under which Mr. Mills and Mr. Pozsgai were sentenced. Thus, under a rational and proportional system, one would think that polluters of toxic and hazardous substances would be punished more severely than non-toxic polluters. Yet Mr. Wells' sentence of 15 months (an excessive punishment in its own right for a first offender) is well below the 27 months and 21 months given to Mr. Pozsgai and Mr. Mills (whose respective sentences are approximately 100 and 50 percent greater than Mr. Wells' sentence) due primarily to the fact that the 4 additional points for a permit violation (2Q1.2 (b)(4)) was not included in the Wells case. This was so not because the Court refused to double count, but because Mr. Wells did not violate his permit; rather, he knowingly exceeded an effluent limit set by the EPA and promulgated in the Code of Federal Regulations. Yet if his permit had simply contained the same effluent limit as a condition of the permit, he would have been subject to the additional four points.

Furthermore, the base level of 8 for 2Q1.2 or 6 for 2Q1.3, assumes an underlying violation of some reporting or recordkeeping requirement. U.S.S.G. 1A4(f), p.s. Yet no such requirements were violated in the Mills, Pozsgai, Wells, and many other cases, either because there were no such reporting/record-keeping requirements, or, as in the Wells case and similar cases, the company was reporting accurate, albeit unlawfully high, levels of discharges.

A better suggestion would be eliminate 2Q1.2(b)(1) or 2Q1.3(b)(1) altogether or to substitute them with a provision that simply allows the court to impose from 0 to 4 additional points depending upon the harm to the environment (as currently determined in comment 4.).

The collateral issue raised by Judge MacKinnon at the January 3 meeting regarding the availability of civil and administrative sanctions is indeed a very important one. Many regulatory offenses are disposed of by civil and administrative enforcement actions. For the most part, the level of intent needed to trigger a civil violation is sufficient to convict criminally. The discretion by the government as to how to proceed is truly an awesome power that is often abused. In the Pozsgai case, the civil case had just begun when the case was criminalized. In the Mills, Wells, and other cases, the federal authorities did not even bother with civil remedies, perhaps in keeping with a 1987 DOJ directive (Attachment 6) that DOJ attorneys are encouraged to bring criminal cases first to obtain collateral estoppel for later filed civil cases. As Assistant Attorney General Stewart admitted, DOJ prosecutors "don't have coherent guidelines on how to draw the line between criminal and civil" enforcement. Wall Street Journal, supra.

Yet in many cases, infinitely more harmful conduct is handled civilly than criminally, even where the violator was repeatedly warned by EPA of the offending conduct.[10] The point of all of this to demonstrate that unlike bank robbery, arson, and other crimes, there are no civil remedies available to the government to prevent the harmful conduct. The fact that civil remedies are available for regulatory offenses, namely injunctive relief and civil fines, and are used according to DOJ in 10 out of 11 environmental cases, shows that society has decided to use criminal sanctions and incarceration sparingly for these kind of violations. Thus, a more complete data base to use in gauging what the offense levels (and fine levels) should be is not simply culled from the criminal cases for environmental offenses, but from the civil cases as well.

For all of the above reasons, we urge the Commission to reconsider its position on this matter at or before its January 22 meeting.[11] At the very least, it behooves the

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[10] For example, in United States v. BP Oil Corp., (E.D. Pa.), the same U.S. Attorney's Office that prosecuted Mr. Pozsgai found it sufficient to invoke only civil remedies to address an ongoing and knowing water pollution violation far more serious than that committed by Mr. Pozsgai and others. See Oct. 23, 1990 DOJ Press Release (Attachment 7). BP Oil had knowingly violated its permit hundreds of times from 1984 to August, 1990. Similarly, in United States v. Great Lakes Carbon Corp. (E.D. Tex., filed Oct. 12, 1990), DOJ is seeking only civil relief against a polluter "for numerous violations" of the company's permit under the Clean Water Act, including knowing violation of a formal administrative order to stop the pollution. And in United States v. Rhone-Poulenc (S.D. W.Va.-filed Oct. 31, 1990), the civil complaint had to be amended to include violations that occurred after the original complaint was filed.

[11] The Commission need not decide now what, if any, revisions it should make. The public notice requirements of 5 U.S.C. 553(b) as required by 28 U.S.C. 994(x) can be satisfied by providing in the Federal Register "either the terms or substance of the proposed rule or a description of the subject and issues involved." 5 U.S.C. 553(b)(3)(emphasis added). Thus, a general notice along the lines that the Commission proposes to revise downward 2Q1.2 and 2Q1.3 by reducing the double counting problems and the high offense levels that result from minor offenses would be sufficient notice to elicit comments. See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976)(notice need not contain precise proporal agency may ultimately

(continued...)

Commission to issue a policy statement under 28 U.S.C. 994(a)(2) in the interim to express its view that double counting should not occur in applying Sections 2Q1.2 and 2Q1.3. We are prepared to assist the Commission in any way possible to facilitate its resolution of this issue, including working with Commission staff and DOJ/EPA officials.

Respectfully submitted,

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Executive Legal Director

cc: All Commissioners
John R. Steer, General Counsel
Richard B. Stewart, Asst. Attorney General, DOJ
James M. Strock, Asst. Administrator, EPA

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[11](...continued)
adopt); Forester v. CPSC, 559 F.2d 774 (D.C. Cir. 1977). If the Commission staff already has proposed revision, that would clearly suffice. The point is that while the Commission is not required to make any changes, the advantages of publishing a general notice are clear: while the Commission is satisfying the notice requirement to elicit comments, the Commission and staff can continue its independent review of Part 2Q. If after receiving comment and further study the Commission decides that no changes are warranted at this time, so be it. But the Commission should not precipitously cast aside its option to review this important issue during this cycle when it is relatively easy to keep that option open.

Table VI

AVERAGE LENGTH OF IMPRISONMENT FOR PRIMARY OFFENSE CATEGORIES; AVERAGE LENTH OF IMPRISONMENT BY PRIOR ADULT CRIMINAL CONVICTIONS* (January 19, 1989 through December 31, 1989)

Comparison of 27 mos. sentence for first-offender of minor infraction of Clean Water Act with other crimes/offenders

PRIMARY OFFENSE	AVERAGE LENGTH OF IMPRISONMENT**									
	TOTAL		PRIOR ADULT CRIMINAL CONVICTIONS							
			0 Convictions		1 - 2 Convictions		3 - 4 Convictions		5 or More Convictions	
	Average Months	Number of Cases	Average Months	Number of Cases	Average Months	Number of Cases	Average Months	Number of Cases	Average Months	Number of Cases
TOTAL	**57**	**15,315**	**51**	**6,853**	**56**	**4,259**	**65**	**1,977**	**73**	**2,226**
Homicide***	123	78	103	35	122	25	101	7	205	11
Kidnapping	191	35	146	8	219	10	225	7	177	10
Robbery	92	816	49	157	65	209	102	171	131	279
Assault	39	151	36	49	37	41	36	26	51	35
Burglary B&E	44	87	24	20	40	25	47	17	62	25
Larceny	20	561	19	159	16	158	17	97	29	147
Embezzlement	10	211	10	156	7	33	16	12	12	10
Tax Offenses	48	24	43	19	14	3	149	2	--	0
Fraud	15	922	13	443	16	241	17	90	23	148
Drug Offenses										
--Importation & Distribution	77	8,441	67	4,375	77	2,482	94	900	111	684
--Simple Possession****	8	253	8	114	7	71	6	36	13	32
--Communication Facility	26	142	24	82	23	40	18	7	46	13
Auto Theft	17	95	16	26	14	33	20	19	20	17
Forgery Counterfeiting	16	452	12	139	12	130	22	81	21	102
Sex Offenses	68	98	56	45	53	26	82	10	114	17
Bribery	17	48	19	38	9	8	12	2	--	0
Escape	22	319	18	37	19	88	21	69	27	125
Firearms	43	945	30	161	27	255	39	203	64	326
Immigration	10	989	7	455	9	219	14	141	16	174
Extortion/Racketeering	58	171	45	93	54	41	82	20	112	17
Gambling/Lottery	11	35	8	12	10	11	12	5	19	7
Other	26	442	23	230	24	110	32	55	34	47

* Of the 21,190 guideline cases, 254 cases involving mixed law counts (both guideline and pre-guideline) were excluded. In addition, 1,804 cases were excluded due to one or more of the following conditions: missing FPSSIS primary offense category (1,565), missing information on prior adult criminal convictions (1,565), or missing sentencing information (299).

** The calculation for average prison sentence excludes cases that did not receive a sentence to prison (3,736) and cases that did receive a sentence to prison but the length of the sentence was indeterminable (81). Life sentences were included in the computation of the average (the 38 life sentences were coded as 360 months).

*** The "Homicide" category includes 1st degree murder, 2nd degree murder, and manslaughter cases.

**** Because of enhancements in statutory penalties for simple possession, all offenses sentenced under 21 U.S.C. § 844(a) are not restricted to the previous 12 month statutory maximum. Substantially longer penalties are reflected in the averages provided here.

SOURCE: U.S. Sentencing Commission, 1989 Data File, MON1289



[Ed. note: During the month of July, articles in the Analysis and Perspective section of Toxics Law Reporter *examine the subject of environmental crimes. In this week's issue, Benjamin S. Sharp and Leonard H. Shen analyze sentencing guidelines for environmental crimes. In the last two weeks of the month, Steven L. Humphreys writes on prosecuting the corporate polluter. Last week's article, by Paul G. Nittoly, discussed current trends in the prosecution of environmental offenses (5 TXLR 161).]*

THE (MIS)APPLICATION OF SENTENCING GUIDELINES TO ENVIRONMENTAL CRIMES

By Benjamin S. Sharp and Leonard H. Shen *

When Congress enacted the Comprehensive Crime Control Act in 1984, few environmental lawyers even noticed the event. But years later, as the U.S. Sentencing Commission established by that statute has generated sentencing guidelines and the courts have begun to apply them to actual cases, it is becoming clear that applying the guidelines will result in sanctions far more severe than those reflected in the policy choices made by Congress for many of the underlying environmental offenses. In addition to inconsistencies between the guidelines and the substantive environmental laws, there are many instances in which the guidelines violate legislative directives to the commission in the enabling statute, the Comprehensive Crime Control Act.

A large part of this problem is attributable to the fact that the sentencing guidelines have crammed a complex environmental regulatory system into a Procrustean bed composed of essentially two core guidelines—neither of which reflects fully the policies of the underlying statutes. The misshapen product of this exercise has been the shifting or even reversal of congressional determinations of the relative seriousness of particular environmental crimes, an emphasis on a few key violation circumstances that bear little relation to the environmental statutes, the conversion of the statutory maximum to a mandatory minimum in a host of situations that would not appear to have been contemplated when the underlying statutes were enacted, and several other discrepancies or even plain legal errors.

While not purporting to review comprehensively the application of the sentencing guidelines in the environmental area, this article concludes that the commission seriously needs to reexamine the guidelines that govern environmental violations and makes several suggestions for revision. The article also offers lines of reasoning by which defendants may challenge application of the guidelines to specific cases as inconsistent with environmental statutes and the enabling legislation.

Beginning in the 1970s, Congress considered several pieces of legislation designed to improve federal sentencing practices. See generally C. Ogletree, Jr., "The Death of Discretion? Reflections on the Federal Sentencing Guidelines," 101 *Harv. L. Rev.* 1938, 1944 & n.34 (1988). The most frequent criticism of the existing sentencing practice was that it gave broad discretion to sentencing judges, leading to disparate treatment for similarly situated individuals.

In 1984, Congress enacted the Comprehensive Crime Control Act, which established the U.S. Sentencing Commission as "an independent commission in the judicial branch." 28 U.S.C. §991(a). The commission was tasked to draft sentencing guidelines that would narrow the disparity in sentences imposed on similarly situated offenders for comparable criminal conduct. 28 U.S.C. §991(b)(1)(B). However, the commission was expected to leave federal judges with sufficient flexibility to impose individualized sentences warranted by mitigating or aggravating factors not taken into consideration in the general sentencing guidelines. 18 U.S.C. §3553(b).[1]

Following its creation, the sentencing commission conducted extensive public hearings and a research program analyzing approximately 100,000 federal criminal cases. After receiving considerable public comment on a preliminary draft of the guidelines issued in September 1986, a revised draft was submitted for public comment in January 1987 and became final Nov. 1, 1987.

Because relatively few environmental crimes had reached the sentencing stage before the final guidelines

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[1] Case law has construed this provision very narrowly, as limited solely to circumstances that the commission did not consider or mention. See, e.g., *U.S. v. Lira-Barraza*, ___ F.2d ___, 1990 WL 17296 (9th Cir. Feb. 28, 1990); see also *U.S. v. Uca*, 867 F.2d 783, 787 ("departures are to be the exception, not the rule"); see generally §5K2.0.

were released in 1987, the environmental guidelines did not have an experience baseline as did all other guidelines. As a consequence, the commission appears to have filled the experience void with its own policy choices. Yet as is discussed below, the policy decisions ultimately made by the commission seem unconstrained by congressional directives and at odds with policy choices made by Congress when it enacted the underlying environmental statutes.

The Environmental Guidelines

Seven guidelines deal specifically with the environment. U.S. Sentencing Commission, Guidelines Manual, §§2Q1.1-2Q2.1 (November 1989). Two of these deal with tampering, attempted tampering, or threatened tampering with a public water system; one deals with hazardous or injurious devices on federal lands; one deals with specially protected fish, wildlife and plants; and one deals with knowing endangerment resulting from mishandling hazardous or toxic substances, pesticides or other pollutants. This article does not address these guidelines, which apply to relatively esoteric environmental provisions that are only rarely used.

The vast majority of environmental crimes under the principal statutes are subsumed under §2Q1.2—"Mishandling of hazardous or toxic substances or pesticides; recordkeeping, tampering, and falsification"—and §2Q1.3—"Mishandling of other environmental pollutants; recordkeeping, tampering, and falsification." See Attachment A for these guidelines. Most of the underlying environmental crimes are misdemeanors. See Attachment B for a summary of covered offenses.

As with all types of crime covered by the guidelines, each environmental guideline establishes a numerical "base offense level" for a particular criminal offense and adjusts this level in light of a host of "specific offense characteristics" recited by each guideline.

The resulting number is further adjusted by factors such as whether the victim was known to be particularly vulnerable or was an official, or was physically restrained in the course of the offense, see §3A.1; whether the defendant played an organizing role or was a minimal participant and whether the defendant abused a position of trust or used a special skill that significantly facilitated the offense, see §3B.1; and whether the defendant has clearly demonstrated an acceptance of responsibility, see §3E.1.

The resulting offense level is plotted on a matrix or "Sentencing Table" published by the commission, against a "Criminal History" axis which is derived from the defendant's past criminal record or criminal livelihood. The final sentence is selected by a judge from a range corresponding to the appropriate offense level and criminal history category set forth in that matrix. Absent specified circumstances, courts are not free to depart from the range, and departures are reviewable on appeal by the government. 18 U.S.C. §3742(b).

Guidelines' Excessive Sentences

One of the most glaring problems with the environmental guidelines is that they result in sentences in many cases that exceed the maximum allowed by the underlying environmental statute. This not only alters or reverses the congressional determination of the seriousness of the category of offense, but impermissibly reduces the range of sentences required by the Comprehensive Crime Control Act to a single term of imprisonment—the statutory maximum. Furthermore, the guidelines fail to contemplate sentences other than imprisonment for first offenders of the environmental laws. The guidelines thus both violate the sentencing commission's enabling statute and conflict with the underlying environmental laws.

Several categories of environmental crimes are misdemeanors. All Toxic Substances Control Act (TSCA) criminal violations are misdemeanors, with a maximum imprisonment term of one year and a maximum fine of $25,000 per day of violation. 15 U.S.C. §2615(b). Most Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) violations are similarly punishable by up to one year imprisonment, although a private applicator may be imprisoned only for a maximum of 30 days. 7 U.S.C. §1361(b). Clean Water Act negligent violations also trigger a one-year imprisonment maximum. 33 U.S.C. §1319(c)(1).

No Distinction Between Felony, Misdemeanor

Yet because the guidelines fail to distinguish between misdemeanors and felonies, these statutory maximum terms may often be exceeded by a sentence calculated under the guidelines. For example, the shortest guideline sentence available for a base level offense violation of FIFRA by a private pesticide applicator (base level 8 = 2-8 months) is twice the statutory maximum. See §2Q1.2.[2]

Of particular note, a violation of the Clean Water Act has been transformed by application of the guidelines into a much more serious transgression than the statute itself would suggest. The CWA sets a statutory maximum of three years imprisonment for knowing crimes (one year for negligence) that do not rise to the level of a "knowing endangerment." 33 U.S.C. §1319(c)(2).

Despite this statutory maximum, the guidelines' choice of specific offense characteristics will in virtually all cases assure a minimum offense level of 14-18 for any CWA violation, even those involving a nonhazardous pollutant such as fill dirt. This would result in a sentence just within the statutory maximum range for a felony and well over the maximum for a misdemeanor for a defendant with no prior criminal history, and a sentence above the statutory maximum for defendants with any prior history. See Attachment C.

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[2] The Application Notes accompanying §2Q1.2 (Note 4) and §2Q1.3 (Note 3) indicate that downward departures may be appropriate for negligent violations. No guidance is provided suggesting how great a departure may be warranted or whether wholesale abandonment of the guidelines for misdemeanors is appropriate. Some courts have likened the notes to legislative history that cannot override the guideline or be resorted to unless there is facial ambiguity in the guideline. See, e.g., *U.S. v. Anderson*, No. 89-10059 (9th Cir. Feb. 8, 1990).

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Four-Level Increase For Permit Violations

For example, specific offense characteristic (b)(4) requires a four-level increase for discharges without a permit or in violation of a permit (in the case of non-hazardous water pollutants) or for disposal without a permit or in violation of a permit (in the case of hazardous water pollutants). Since virtually all violations of the CWA involve discharge in violation of or without a permit, they will automatically result in an effective base level of 6+4 = 10.

Next, characteristic (b)(1) requires a four-level increase for any discharge of a pollutant, which by definition will always be the case whenever there has been a discharge in violation of a permit.[3] (If the discharge is ongoing, continuous, or repetitive—again the likely scenario for CWA violations—there will be a six-level increase.) Finally, many discharges into publicly owned treatment works (POTWs) would qualify as "disruption of a public utility," requiring an additional four points.

The total offense level for virtually any CWA violation is thus at least 14, and under a substantial proportion of CWA cases, closer to 18 or 20—right at the statutory maximum level. Thus, for example, the court in *U.S. v. Mills*, (N.D. Fla. April 17, 1989), appeal pending, (11th Cir.), sentenced two defendants each to 21 months in prison for filling with dirt a 75' X 300' wetlands, invoking the "ongoing or repetitive release" characteristic of §2Q1.3(b)(1) and the discharge without a permit characteristic of §2Q1.3(b)(4).

Statutory Maximum Controls

It is true that the guidelines provide that where the guidelines sentence would exceed the statutory maximum, the statutory maximum controls. See 18 U.S.C. §3559(b); §5G1.1 (statutory maximum governs as to an imprisonment term); see also §5E1.2(c)(4) (statutory fine if based on a per day violation will govern instead of the guidelines fine). It is, of course, clear that an independent agency cannot lawfully pre-empt Congress' judgment in the original substantive statute by prescribing a regulatory sentence more severe than the appropriate maximum sentence for particular environmental violations.

But the guidelines effect an analogous result of questionable validity. The sentencing commission has compressed the range of sentences available, turning the penalty into a mandatory minimum (and maximum) for many types of crimes. Although there may be no per se constitutional defect in mandatory minimum sentencing, see, e.g., *McMillan v. Pennsylvania*, 477 U.S. 79, 92 (1986), by establishing what amounts to a flat sentence, the guidelines violate the Comprehensive Crime Control Act itself, which requires that the commission establish a sentencing range for each category of offense. See 28 U.S.C. §994(b)(1); see also *Mistretta v. U.S.*, ____ U.S. ____, 109 S. Ct. 647, 656 (1989). Furthermore, for sentences involving imprisonment, Congress mandated that "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months." 28 U.S.C. §994(b)(2). Where the guidelines result in a minimum sentence of one year for misdemeanors or a sentencing range for felonies where the minimum is less than 25% below the maximum, it is clear that the guidelines are inconsistent with their enabling legislation.

Sentencing First Offenders

This result also violates Congress' mandate that "the commission shall insure that the guidelines reflect the general inappropriateness of imposing a sentence to a term of 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." 28 U.S.C. §994(j). Because very few of the misdemeanor violations of TSCA or FIFRA, or a negligent violation of the CWA, can be considered a "crime of violence or an otherwise serious offense," the imposition of not only a sentence of imprisonment, but the maximum available sentence, violates the leniency Congress required for a first offender. Id.

Finally, as a policy matter, it is troubling that whole categories of environmental crimes have suddenly been transformed into mandatory minimum violations by a commission that was not charged by Congress to rewrite priorities in environmental enforcement. Apart from tending to transform a statutory maximum into a sentencing minimum, the fact that these specific offense characteristics are virtually always triggered in, for example, the CWA context means that a CWA violation per se will be treated much more seriously than another environmental violation—even if Congress assigned a lower statutory maximum to the CWA than, for example, many RCRA permit violations. Compare 33 U.S.C. §1319(c) with 42 U.S.C. §6928(d). Indeed, this uniform aggravation of sentencing for CWA violations disrupts the carefully crafted hierarchy of criminal penalties (with different prison terms for negligent, knowing, and knowing endangerment crimes) established by Congress' 1987 CWA amendments.[4]

Specific Offense Characteristics

Most guidelines in areas other than the environmental area cover specific crimes (e.g. perjury) and use the

[3] Although the guidelines do not define pollutant, the CWA does. A pollutant includes "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. §1362(6).

[4] Another example of a shift in or even reversal of Congressional priorities can be found when the guidelines are applied to FIFRA. Violations of FIFRA's proprietary information confidentiality requirements are punishable by three years, 7 U.S.C. §1361(b)(1)(C), by comparison to the one year maximum for most other FIFRA violations. See 7 U.S.C. §1361(b)(1)(A). Yet the guidelines would turn on its head Congress' determination of the relative severity of these offenses, in part because the guidelines fail to provide any enhancement for illegal disclosure of confidential information. Thus, the proprietary information violation would merit only an 8 (the base level under §2Q1.2), whereas most pesticide releases would be base level 8 plus either 4 (for a single release) or 6 (for a continuous release). See Appendix C.

offense characteristics to differentiate common circumstances surrounding a crime (e.g., causing physical injury to a person or resulting in substantial interference with the administration of justice) as aggravating or mitigating factors. See §2J1.3. By contrast, the environmental guidelines attempt to encompass a dazzling range of offenses under two guidelines that cannot reasonably be tailored to the diversity of crimes to which they apply. The offense characteristics and their Application Notes cannot apply the myriad factual circumstances that may aggravate or mitigate so many offenses. As a consequence, neither the base levels nor the offense characteristics are common to the bulk of the offenses covered. Moreover, the specific offense characteristics used as adjustment factors fail to follow the logic of the underlying environmental statutes. We briefly discuss each characteristic below.

• Single release v. repetitive release

Both §2Q1.2 and §2Q1.3 provide for increasing the base offense level by six levels "[i]f the offense resulted in an ongoing, continuous, or repetitive discharge . . . of a pollutant into the environment," while the base offense level may be increased by only four levels "if the offense otherwise involved a discharge, release, or emission of a pollutant." §2Q1.2(b)(1); §2Q1.3(b)(1).

It certainly makes good policy sense to impose a greater sentence where a continuous or repetitive environmental discharge is occurring. But this guideline ignores the fact that the environmental statutes already provide for separate counts for such discharges, and the criminal fine provisions of both the statutes and the guidelines, see §5E1.2(c), allow per-day fines. Cf. *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 791 F.2d 304, 316 (4th Cir. 1986) (assessing protracted CWA civil violations at approximately $5,000 per day), rev'd on other grounds, 108 S. Ct. 376 (1987); U.S. v. T & S Brass and Bronze Works Inc., 681 F. Supp. 314, 322 (D.S.C. 1988) (imposing $1,000 per day for RCRA civil violation) 3 TXLR 1027; *U.S. v. SCM Corp.*, 667 F. Supp. 1110, 1128 (D. Md. 1987) (assessing sequential Clean Air Act violations at $10,000 per day).

The underlying statutes are thus already finely tuned to increase the ultimate penalty in accordance with the continuous or repetitive nature of a discharge. But the guidelines now double-count a multiple-discharge violation by increasing the offense level for each individual violation as well as allowing sentencing for multiple counts. See §5G1.2. Because many CAA and CWA discharge violations involve dozens or even hundreds of days of effluent or air emission releases, increasing the penalty will be called for in most circumstances under the guidelines—despite the fact that Congress, when it established the availability of per-day violation fines in the environmental laws, already determined the appropriate degree of enhancement to be charged for repetitive violations.

• Likelihood of death or serious injury

§2Q1.2 and §2Q1.3 provide for an increase of nine and 11 levels, respectively, where the offense "resulted in a substantial likelihood of death or serious bodily injury." At the outset it should be noted that few environmental violations, even criminal ones, rise to the level of creating a substantial likelihood of death or serious bodily injury. For example, in the 13-year history of TSCA Section 8(e), 15 U.S.C. §2607(e), which requires reporting of information which reasonably supports the conclusion that a substantial risk of injury to health or the environment is posed by a chemical, no criminal charges have ever been brought by the Environmental Protection Agency under this provision. Nonetheless, it makes good policy sense to punish with particular severity environmental violations that create the greatest health and safety threat—even it means reserving one of five specific offense characteristics for one of the least likely circumstances of an environmental crime.

The problem lies in the fact that different offense increases are provided for hazardous (increase of nine) when compared to nonhazardous pollutant violations (increase of 11) which result in a likelihood of such serious injury. The net result is that the same total offense level (17) is available for a violation that results in serious injury, regardless of whether the violation involved a hazardous or a nonhazardous pollutant. The commission apparently contemplated that the harm would be the same regardless of the hazardous nature of its source, and hence the same sentence would be appropriate.

This also may be a reasonable policy decision. If it is, the question arises why it is not applied uniformly to violations that fall short of a likelihood of death or serious bodily injury. Why should the same environmental injury which happens to fall short of creating death or serious bodily injury not trigger the same penalty, regardless of whether it is caused by a hazardous or a nonhazardous pollutant? Why make a policy distinction between hazardous and nonhazardous and apply it only to a few isolated cases, and not apply it to the bulk of environmental crimes?

The guidelines' failure to address this issue at best raises questions about how seriously the commission takes its own distinction between hazardous and nonhazardous materials—and at worst creates an unwarranted inequity in treatment between those who cause lesser environmental harm as a result of a "hazardous" substance discharge and those who have mishandled "nonhazardous" pollutants but with substantial harmful result.

• Disruption of public utilities, community evacuation or substantial cleanup expenditures

Both §2Q1.2(b)(3) and §2Q1.3(b)(3) require an increase of 4 levels if an offense "resulted in disruption of public utilities or evacuation of a community, or if

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cleanup required a substantial expenditure." But the wholesale equating of a widespread community evacuation with a "substantial" cleanup makes little sense when the environmental harm or threat present in a widespread evacuation is compared to even a minimal hazardous waste site cleanup. Even the initial investigation of a non-National Priorities List site may often cost several hundred thousand dollars. If such an expenditure is considered "substantial"—a reasonable construction given the guidelines' complete absence of explanation of the term—even a minor problem of surface soil contamination would be comparable to situations requiring a public evacuation.

Furthermore, it is ambiguous whether a cleanup funded by a defendant triggers this element; if so, there is a strong incentive for a defendant not to undertake mitigation efforts, since the prison term will be the same regardless of whether it is the defendant or the government who performs cleanup. It is true that, for a few environmental crimes not subject to a "per day" fine calculation, a defendant's cleanup efforts will likely reduce the "pecuniary gain" from the crime and hence reduce the fine imposed. See §5E1.2(c)(4). But few defendants would choose to expend cleanup monies in the hope of reducing their fines, if the certain price is an increase of 4 offense levels—which translates into several months or more of extra imprisonment.[5]

• Disposal without or in violation of a permit

Section 2Q1.2(b)(4) provides for an increase of 4 levels if the offense "involved transportation, treatment, storage, or disposal without a permit or in violation of a permit." Section 2Q1.3(b)(4) provides for the same increase if the offense involved "a discharge without a permit or in violation of a permit."

The language and the statutory citations accompanying these provisions suggest that §2Q1.2 was intended to govern RCRA permit violations, and §2Q1.3 was intended to govern CWA permit violations that do not involve hazardous pollutants.[6] But while it may make sense to create an aggravating offense characteristic based on failure to obtain or comply with a permit where RCRA statutory penalties are relatively stringent (two year and five year offenses, 42 U.S.C. §6928(d)), there is no reason to apply this uniformly to CWA offenses. The CWA statutory penalties (one year v. three year offenses, 33 U.S.C. §1319(c)) are differentiated based solely on intent. Yet no offense characteristic addresses that factor; instead, both CWA misdemeanors and CWA felonies, which virtually always involve a permit violation, are uniformly treated with the (b)(4) aggravating factor.

[5] Again there is a discrepancy between the guideline and the Application Note which, unlike the guideline, suggests that only "public" cleanup expenses are covered. At least one prosecutor has asserted that private cleanup costs trigger this provision.

[6] The conclusion is not stated in the guidelines; it is deduced from the fact that §2Q1.2(b)(4) refers to "treatment, storage, or disposal"—key RCRA terms—and cites to RCRA, 42 U.S.C. §6928(d), whereas §2Q1.3(b)(4) refers to "discharge" without a permit—the key CWA term—and cites to the CWA, 33 U.S.C. §1319(c).

In sum, there is no apparent correlation between the widely ranging statutory provisions of the CWA and RCRA and the sentences that result from application of the guidelines. Nor does the guidelines' distinction between RCRA and CWA nonhazardous violations have any basis in the underlying statutes, apart from the general fact that some RCRA permit violations (those not involving used oil) have greater sentences than some CWA permit violations (those that do not involve a knowing violation).

To some degree, the Application Notes to these guidelines provide additional discretion for "departures" from the guidelines that can reduce the inequities produced or match the sentences more closely to those suggested by the substantive statutes. But why create a system whose basic components require constant tinkering in order to correct their inherent inconsistencies with environmental laws? Furthermore, is it appropriate to give certain circumstances the prima facie applicable status of a specific offense characteristic, while giving other circumstances—including the important factor of whether conduct was negligent rather than knowing—the status of "departures" which a court must justify and which are not subject to specific numerical boundaries? See, e.g., §2Q1.2, Application Note 4 ("In cases involving negligent conduct, a downward departure may be warranted"); §2Q1.3, Application Note 8 (where defendant has violated an administrative order, "an upward departure may be warranted").

Distinction Unsound

The guidelines' inconsistency with the environmental statutes lies not just in the specific offense characteristics, but even in their fundamental, overarching framework. As already noted, the guidelines create a general distinction between hazardous and nonhazardous pollutants, with a greater offense level for hazardous pollutants. See "Background" note to §2Q1.3 ("The section parallels §2Q1.2 but applies to offenses involving substances which are not pesticides and are not designated as hazardous or toxic.")

To some degree, this distinction tracks that of the environmental statutes themselves, some of which—the Comprehensive Environmental Response, Compensation, and Liability Act and RCRA are examples—limit their reach to listed or readily identifiable "hazardous" wastes or substances.[7] The sentencing commission appar-

[7] While this distinction is the clear intent of the two guideline provisions, §2Q1.2 fails to cite the correct CERCLA provision in identifying the statutory list of hazardous substances. See Commentary to §2Q1.2, "Statutory Provisions" (citing 42 U.S.C. §9603(b), (c), (d)). The correct citation should be 42 U.S.C. §9602. Although Application Note 3 does mention the CERCLA hazardous substances list, the failure to cite §9602 in the "Statutory provisions" section at least creates an ambiguity whether a hazardous substance which is not hazardous under any of the other cited statutes would be governed by §2Q1.2 rather than §2Q1.3.

A further example of unnecessary ambiguity arises from the guidelines' inconsistent and incomplete citation of the environmental statutory provisions. For example, §2Q1.2 cites to both the "prohibited acts" sections of TSCA and FIFRA, and those statutes' generic penalty provisions, but cites only to the generic penalty provisions of

ently assumed that Congress, by enacting laws which dealt specifically and only with hazardous substances, was making a policy determination that such substances were a greater threat to society than nonhazardous substances, and therefore any violation involving such substances would per se be worthy of a greater penalty.

The problem with applying this distinction in the sentencing context is that Congress has gone one step beyond the gross distinction between hazardous and nonhazardous pollutants, and actually enacted laws governing certain nonhazardous substances and assigned specific criminal penalty ranges for violations of those laws. Parts of RCRA, the CWA, and the CAA, for example, clearly govern nonhazardous substances.

Therefore, if the sentencing commission is seeking to embody policy decisions about the seriousness of an offense, it should look to the specific penalties provided in the environmental statutes themselves, not to the precursor, blunderbuss distinction between "hazardous" and "nonhazardous" pollutants that may have governed when Congress was simply trying to determine what types of substances would be covered by an emerging statute. It is that statutory penalty attributable to a specific nonhazardous pollutant offense which should govern, not a generic distinction between hazardous and nonhazardous substances.

Congress' Policy On Penalty Ranges

Looking, then, to the specific penalty ranges dictated by Congress for nonhazardous pollutants, we discover that Congress intended to make the same penalty available for nonhazardous violations as for hazardous substance violations. The same penalty provisions with the same penalty ranges apply to both hazardous and nonhazardous substances in these statutes. See, e.g., 33 U.S.C. §1319(c); 42 U.S.C. §6928(d); 42 U.S.C. §7413. It is clear that Congress did not differentiate between, for example, a discharge of soil into waters in excess of Total Suspended Solids limits in an effluent permit, and a discharge of benzene in violation of a similar provision in the same permit. The hazardous/nonhazardous distinction between §2Q1.2 and §2Q1.3 is unsupported by the statutes.

Furthermore, by making a hazardous/nonhazardous distinction which is not apparent in the underlying statutes, the guidelines tend to level out sentences among different types of statutes. For example, TSCA and FIFRA violations with a maximum prison term of one year, CAA violations with a maximum term of three years, and RCRA violations with a maximum term of five years are all governed by §2Q1.2 and the same base offense level.

The leveling effect is only slightly mitigated by the specific offense characteristics, since only two of those characteristics—the one providing for a 4-level increase for permit violations, see §2Q1.2(b)(4), and the one providing for a 2-level decrease for "simple recordkeeping or reporting violations only," see §2Q1.2(b)(6)—tend to apply differentially and in the right direction among the different environmental statutes.[1]

Conclusion

The structural and specific problems only briefly discussed in this article are certain to generate real-life horror stories as the growing number of criminal cases in the pipeline reach the point of sentencing under the guidelines. Indeed, problems such as the "mandatory minimum" effect of the guidelines may support sound judicial challenges to such sentences, as violations of the Comprehensive Crime Control Act's mandates of a sentencing range or of leniency for first-time offenders. In any event, the sentencing commission should act quickly to review the guidelines with closer attention to the diversity of offenses and the policy choices reflected in statutory maximum sentences provided by the underlying environmental statutes.

At least three general reforms of the environmental guidelines are suggested by our discussion. The first should be to create a base offense level and specific offense characteristics which will only rarely, if ever, range above the statutory maximum provided by the underlying statutes—and to provide for the leniency Congress intended to give first offenders. It is reasonable to assume that when Congress allowed "up to" X years imprisonment for a particular type of violation, it intended the range of sentences from zero months to the maximum to be employed, depending on a review of all the circumstances of the particular case. A similar intent to establish a range of penalties is unequivocally expressed by the Comprehensive Crime Control Act itself. Any guideline which results in top-loading the sentences at or near the statutory maximum does violence to the intent of both statutes.

The second reform should be to base the specific offense characteristics on policy concerns reflected by the environmental statutes, not the few crude concerns identified in the guidelines. Some preliminary guidance can perhaps be gleaned from EPA's civil penalty settlement policy documents, both the generic Civil Penalty Settlement Policy and the statute-specific (or even the program-specific) settlement policies issued by EPA. These guidance documents identify some of the factors that the agency will look to in setting the civil penalty for a particular environmental violation. The policies attention to the violator's prior compliance history and

the CWA, CAA, and Safe Drinking Water Act. Similarly, §2Q1.3 cites to both the substantive provisions and the generic penalty provisions for unlawful obstruction of a navigable waterway, but cites only to the generic penalty provisions of the CWA and CAA. The commission should amend the statutory citations for both guidelines either to include substantive provisions and their penalty provisions for all relevant statutes, or to include only the generic penalty provisions of these statutes.

[1] §2Q1.2(b)(4) tends to increase the sentence for RCRA permit violations above the sentence equally applicable to TSCA and FIFRA violations, and thus brings the sentence closer to the five-year maximum allowed by RCRA. §2Q1.2(b)(6) tends to decrease the sentence for TSCA and FIFRA violations, many of which will fall into the "simple recordkeeping or reporting" category, and thus brings the sentence closer to the one-year maximum allowed by those statutes.

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degree of willfulness, for example, find little counterpart in the sentencing guidelines, which look rather narrowly only to the defendant's actual criminal history.

Third, the commission should seriously consider increasing the number of guidelines that deal specifically with environmental crimes. Perhaps the fundamental problem with the guidelines is that they attempt to squeeze the enormously complex regime of multi-media environmental laws into essentially two narrow guidelines. Important distinctions between the various statutes must be addressed through the clumsy use of specific offense characteristics and Application Notes which provide either too little or too much discretion to vary the final sentence according to a limited few parameters. But no matter how well-chosen the base offense level or the specific offense characteristics, it is unlikely that any two guidelines and their satellite corollaries can do justice to the infinite permutation of violations possible under the many environmental laws. The creation of one guideline for each substantive statute, or for each medium polluted, or some demarcation other than a simple hazardous/nonhazardous distinction, may bring a court closer to the mark set by Congress.

Ultimately, the lodestar of any reform should be to track faithfully the policies and structures of the environmental laws. Unless a fundamental consistency with the underlying statutes is assured, the commission will continue to invite courts faced with flagrantly inequitable results to depart as a matter of course from the guidelines' factors; to disregard the guidelines entirely; or worse, to twist the often ambiguous and skeletal language of the guidelines in a way never intended by the commission so as to reach a court's desired result. By forcing courts to choose between perpetrating injustice and creating such twisted law, the guidelines may encourage judges to seize back and abuse the very discretion intended to be taken from them.

APPENDIX A.
SENTENCING GUIDELINES

PART Q. OFFENSES INVOLVING THE ENVIRONMENT

§2Q1.1. Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants

(a) Base Offense Level: 24

Commentary

Statutory Provisions: 33 U.S.C. §1319(c)(3); 42 U.S.C. §6928(e).

Application Note:

1. If death or serious bodily injury resulted, an upward departure may be warranted. See Chapter Five, Park K (Departures).

Background: This section applies to offenses committed with knowledge that the violation placed another person in imminent danger of death or serious bodily injury.

Historical Note: Effective November 1, 1987.

§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification

(a) Base Offense level: 8

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by 6 levels; or

(B) if the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 9 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

(6) If the offense involved a simple recordkeeping or reporting violation only, decrease by 2 levels.

Commentary

Statutory Provisions: 7 U.S.C. §§136j-136l; 15 U.S.C. §§2614 and 2615; 33 U.S.C. §§1319(c)(l), (2), 1517(b), 1321(b)(5); 42 U.S.C. §§300h-2, 6928(d), 7413, 9603(b), (c), (d); 43 U.S.C. §§1350, 1816(a), 1822(b).

Application Notes:

1. "Recordkeeping offense" includes both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false

information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.

2. "Simple recordkeeping or reporting violation" means a recordkeeping or reporting offense in a situation where the defendant neither knew nor had reason to believe that the recordkeeping offense would significantly increase the likelihood of any substantive environmental harm.

3. This section applies to offenses involving pesticides or substances designated toxic or hazardous at the time of the offense by statute or regulation. A listing of hazardous and toxic substances in the guidelines would be impractical. Several federal statutes (or regulations promulgated thereunder) list toxics, hazardous wastes and substances, and pesticides. These lists, such as those of toxic pollutants for which effluent standards are published under the Federal Water Pollution Control Act (e.g., 33 U.S.C. §1317) as well as the designation of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (e.g., 42 U.S.C. §9601(14)), are revised from time to time. "Toxic" and "hazardous" are defined differently in various statutes, but the common dictionary meanings of the words are not significantly different.

4. Except when the adjustment in subsection (b)(6) for simple recordkeeping offenses applies, this section assumes knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.

5. Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from the offense levels prescribed in these specific offense characteristics may be appropriate.

6. Subsection (b)(2) applies to offense where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. See Chapter Five, Part K (Departures).

7. Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels either upward or downward could be warranted.

8. Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels either upward or downward may be warranted.

9. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).

Background: This section applies both to substantive violations of the statute governing the handling of pesticides and toxic and hazardous substances and to recordkeeping offenses. The first four specific offense characteristics provide enhancements when the offense involved a substantive violation. The last two specific offense characteristics apply to recordkeeping offenses. Although other sections of the guidelines generally prescribe a base offense level of 6 for regulatory violations, §2Q1.2 prescribes a base offense level of 8 because of the inherently dangerous nature of hazardous and toxic substances and pesticides. A decrease of 2 levels is provided, however, for "simple recordkeeping or reporting violations" under §2Q1.2(b)(6).

Historical Note: Effective November 1, 1987.

§2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment, increase by 6 levels; or

(B) If the offense otherwise involved a discharge, release, or emission of a pollutant, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 11 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved a discharge without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

Commentary

Statutory Provisions: 33 U.S.C. §§403, 406, 407, 411, 1319(c)(1), (c)(2), 1415(b), 1907, 1908; 42 U.S.C. §7413.

Application Notes:

1. "Recordkeeping offense" includes both recordkeeping and reporting offenses. The term is to be broadly

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construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.

2. If the offense involved mishandling of nuclear material, apply §2M6.2 (Violation of Other Federal Atomic Energy Statutes, Rules, and Regulations) rather than this guideline.

3. The specific offense characteristics in this section assume knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.

4. Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation a departure of up to two levels in either direction from that prescribed in these specific offense characteristics may be appropriate.

5. Subsection (b)(2) applies to offenses where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. See Chapter Five, Part K (Departures).

6. Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels in either direction could be warranted.

7. Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels in either direction may be warranted.

8. Where a Defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).

Background: This section parallels §2Q1.2 but applies to offenses involving substances which are not pesticides and are not designated as hazardous or toxic.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 205).

CHAPTER FIVE — DETERMINING THE SENTENCE

Introductory Commentary

For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. §3553(a).

Historical Note: Effective November 1, 1987.

PART A — SENTENCING TABLE

Commentary

Application Notes:

1. The Offense Level (1-43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I-VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "Life" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24-30 months of imprisonment.

2. In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

3. The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A. The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 270).

The Sentencing Table used to determine the guideline range follows:

APPENDIX B.
ENVIRONMENTAL CRIMES
SUBJECT TO SENTENCING GUIDELINES SECTIONS 2Q1.2 and 2Q1.3

VIOLATIONS SUBJECT TO SECTION 2Q1.2:

Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §1361.

- Registrant, applicant, or producer who knowingly violates FIFRA may receive up to $50,000 fine and/or one year imprisonment.
- Commercial applicator of a registered pesticide or any person not described above who knowingly violates FIFRA may receive up to $25,000 fine and/or one year imprisonment.
- Private applicator who knowingly violates FIFRA may receive up to $1,000 fine and/or 30 days imprisonment.
- Any person who, with intent to defraud, uses or reveals confidential formula information acquired under FIFRA may receive up to $10,000 fine and/or three years imprisonment.

Toxic Substances Control Act, 15 U.S.C. §2615.

- Any person who knowingly or willfully violates TSCA may receive up to $25,000 fine per day of violation and/or one year imprisonment.

Clean Water Act, 33 U.S.C. §1319(c)(1), (2).

- Any person who negligently violates CWA or negligently introduces into a sewer system or publicly owned treatment system (POTW) any pollutant which such person knew or reasonably should have known could cause personal injury or property damage, and which causes such POTW to violate any effluent limitation or permit condition, shall receive a fine of not less than $2,500 nor more than $25,000 per day of violation, and/or imprisonment for up to one year. A second or further violation of this provision may result in a fine of up to $50,000 per day of violation, and/or imprisonment of up to two years.
- Any person who knowingly violates the CWA or knowingly introduces into a sewer system or POTW a pollutant under the terms described above shall be fined not less than $5,000 nor more than $50,000 per day of violation, and/or be imprisoned for up to three years. A second or further violation of this provision may result in a fine of up to $100,000 per day of violation and/or imprisonment of up to 6 years.
- Any person in charge of a vessel or of an onshore facility who fails to notify the United States of a discharge of oil or a hazardous substance from such vessel or facility may be fined up to $10,000 and/or imprisoned for up to one year.

Deepwater Port Act, 33 U.S.C. §1517(b).

- Any person in charge of a vessel or a deepwater port who fails to notify the Secretary of Transportation as soon as he has knowledge of a discharge of oil may receive up to $10,000 in fines and/or up to one year imprisonment.

Safe Drinking Water Act, 42 U.S.C. §300h-2.

- Any person who willfully violates the underground injection control laws promulgated pursuant to the SDWA may be imprisoned for up to three years, and/or fined in accordance with Title 18 of the U.S. Code.

Resource Conservation and Recovery Act, 42 U.S.C. §6928(e).

- Any person who knowingly violates RCRA by transporting or causing to be transported any hazardous waste without a permit, or by knowingly treating, storing, or disposing of any hazardous waste without a permit or in knowing violation of a permit, may receive a fine of up to $50,000 per day of violation and/or up to five years imprisonment.
- Any person who knowingly violates any other provision of RCRA may receive a fine of up to $50,000 per day of violation and/or up to two years imprisonment.
- A second or further violation of RCRA may result in a fine and/or imprisonment term up to double the maximum appropriate for a first violation.

Clean Air Act, 42 U.S.C. §7413.

- Any person who knowingly makes any false statement, representation, or certification in any document filed or required to be maintained by the CAA or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device required to be maintained by the CAA may be fined up to $10,000 and/or imprisoned up to six months.
- Any person who commits any other knowing violation of the CAA may be fined up to $25,000 per day of violation and/or imprisoned up to one year. A second or further conviction under this provision may result in a fine and/or term of imprisonment up to double the maximum appropriate for a first violation.

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SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6
2	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6	1 - 7
3	0 - 6	0 - 6	0 - 6	0 - 6	2 - 8	3 - 9
4	0 - 6	0 - 6	0 - 6	2 - 8	4 - 10	6 - 12
5	0 - 6	0 - 6	1 - 7	4 - 10	6 - 12	9 - 15
6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15	12 - 18
7	1 - 7	2 - 8	4 - 10	8 - 14	12 - 18	15 - 21
8	2 - 8	4 - 10	6 - 12	10 - 16	15 - 21	18 - 24
9	4 - 10	6 - 12	8 - 14	12 - 18	18 - 24	21 - 27
10	6 - 12	8 - 14	10 - 16	15 - 21	21 - 27	24 - 30
11	8 - 14	10 - 16	12 - 18	18 - 24	24 - 30	27 - 33
12	10 - 16	12 - 18	15 - 21	21 - 27	27 - 33	30 - 37
13	12 - 18	15 - 21	18 - 24	24 - 30	30 - 37	33 - 41
14	15 - 21	18 - 24	21 - 27	27 - 33	33 - 41	37 - 46
15	18 - 24	21 - 27	24 - 30	30 - 37	37 - 46	41 - 51
16	21 - 27	24 - 30	27 - 33	33 - 41	41 - 51	46 - 57
17	24 - 30	27 - 33	30 - 37	37 - 46	46 - 57	51 - 63
18	27 - 33	30 - 37	33 - 41	41 - 51	51 - 63	57 - 71
19	30 - 37	33 - 41	37 - 46	46 - 57	57 - 71	63 - 78
20	33 - 41	37 - 46	41 - 51	51 - 63	63 - 78	70 - 87
21	37 - 46	41 - 51	46 - 57	57 - 71	70 - 87	77 - 96
22	41 - 51	46 - 57	51 - 63	63 - 78	77 - 96	84 - 105
23	46 - 57	51 - 63	57 - 71	70 - 87	84 - 105	92 - 115
24	51 - 63	57 - 71	63 - 78	77 - 96	92 - 115	100 - 125
25	57 - 71	63 - 78	70 - 87	84 - 105	100 - 125	110 - 137
26	63 - 78	70 - 87	78 - 97	92 - 115	110 - 137	120 - 150
27	70 - 87	78 - 97	87 - 108	100 - 125	120 - 150	130 - 162
28	78 - 97	87 - 108	97 - 121	110 - 137	130 - 162	140 - 175
29	87 - 108	97 - 121	108 - 135	121 - 151	140 - 175	151 - 188
30	97 - 121	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210
31	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235
32	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262
33	135 - 168	151 - 188	168 - 210	188 - 265	210 - 262	235 - 293
34	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327
35	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365
36	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405
37	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405	360 - life
38	235 - 293	262 - 327	292 - 365	324 - 405	360 - life	360 - life
39	262 - 327	292 - 365	324 - 405	360 - life	360 - life	360 - life
40	292 - 365	324 - 405	360 - life	360 - life	360 - life	360 - life
41	324 - 405	360 - life	360 - life	360 - life	360 - life	360 - life
42	360 - life	360 - life	360 - life	360 - life	360 - life	360 - life
43	life	life	life	life	life	life

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Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9603(b).

• Any person in charge of a vessel or facility from which a hazardous substance is released (other than a federally permitted release) under certain circumstances and who fails to notify the United States of such release shall be fined in accordance with Title 18, U.S. Code, and/or imprisoned for up to three years. The term of imprisonment may range up to five years for a second or subsequent conviction.

• Any facility owner/operator or transporter of hazardous substances to a facility who knowingly fails to notify the United States of the existence of such facility, the amount and type of hazardous substances found there, and any known, suspected or likely releases from such facility, shall be fined up to $10,000 and/or imprisoned for up to one year.

• Any person who knowingly destroys, mutilates, erases, conceals, or otherwise renders unavailable or falsifies any records with respect to hazardous substances at a facility shall be fined in accordance with Title 18, U.S. Code, and/or imprisoned for up to three years (or up to five years for a second or subsequent violation).

Outer Continental Shelf Lands Act, 43 U.S.C. §1350, §1822(b).

• Any person who knowingly and willfully violates the OCSLA, any lease or regulation issued under the OCSLA, makes any false statement in any document filed or required to be maintained, falsifies or tampers with any monitoring device, or reveals any confidential data under the OCSLA may be fined up to $100,000 per day of violation and/or imprisoned up to ten years.

• Any person in charge of a vessel or offshore facility which is involved in an oil pollution incident and who knowingly fails to notify the United States may be fined up to $10,000 and/or imprisoned up to one year.

VIOLATIONS SUBJECT TO SECTION 201.3:

Rivers and Harbors Act, 33 U.S.C. §406, §411.

• Any person who wrongfully constructs bridges, piers, or otherwise obstructs a navigable waterway shall receive a fine not less than $500 and not more than $2,500, and/or be imprisoned up to one year.

• Any person who deposits refuse in a navigable waterway, takes possession of or uses or injures any harbor or river improvements, or obstructs a navigable waterway with a vessel, loose timber, or craft shall receive a fine not less than $500 and not more than $2,500, and/or be imprisoned not less than thirty days nor more than one year.

Clean Water Act, 33 U.S.C. §1319(c), and Clean Air Act, 42 U.S.C. §7413

• For violations involving a nonhazardous or nontoxic pollutant: same maximum fines and imprisonment terms noted supra under, §2Q1.2.

Ocean Dumping Act, 33 U.S.C. §1415(b).

• Any person who knowingly violates the Ocean Dumping Act may be fined up to $50,000 and/or imprisoned for up to one year.

Act to Prevent Pollution from Ships, 33 U.S.C. §1908.

• Any person who knowingly violates the Act or the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (the "MARPOL Protocol") may be fined up to $50,000 and/or imprisoned up to five years.

APPENDIX C.
EXAMPLES OF ENVIRONMENTAL SENTENCING INEQUITIES

Statutory Provision	Statutory Penalty	Sentencing Guideline Provision for Typical Offense		Guideline Penalty	Inequitable Result
1. FIFRA 7 U.S.C. §1361(b)(2) (private pesticide applicator)	Up to 30 days	2Q1.2(a) base offense	8	2 - 8 months	Guidelines always impose statutory maximum.
2. CWA 33 U.S.C. §1319(c)(1) (negligent discharge of pollutant)	Up to 1 year	2Q1.3(a) base offense	6		Guidelines always impose statutory maximum.
		2Q1.3(b)(1)(B) discharge	4		
		2Q1.3(b)4 permit	4		
			14	15 - 21 months	

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3. CWA 33 U.S.C. §1319(c)(2) (negligent discharge of pollutant)	Up to 3 years	2Q1.3(a) base offense	6		Guidelines typically impose statutory maximum.
		2Q1.3(b)(1)(B) continuous discharge	6		
		2Q1.3(b)(3) disruption of facility	4		
		2Q1.3(b)(4) permit	4		
			20	33 - 41 months	
4. Violation of MARPOL Protocol 33 U.S.C. §1908 (discharge of pollution from ship)	Up to 5 years	2Q1.2(a) base offense	8		Guidelines typically impose less for this felony
		2Q1.2(b)(1)(B) discharge	4		
			12	10 - 16 months	
5. FIFRA 7 U.S.C. §1361(b)(3) (disclosure of confidential pesticide information)	Up to 3 years	2Q1.2(a) base offense	8		Guidelines typically impose less for this felony violation than sentence for FIFRA misdemeanor.
		2Q1.2(b)(6) simple record-keeping	−2		
			6	0 - 6 months	

SUMMARY OF DEVELOPMENTS

ENVIRONMENTAL EXPOSURE

Agent Orange

GOVERNMENT, INDUSTRY MANIPULATED RESULTS OF HERBICIDE STUDIES, FORMER OFFICIAL SAYS

A former top U.S. Navy official who ordered extensive spraying of the defoliant Agent Orange during the Vietnam War told a House subcommittee June 26 that the government and the chemical industry manipulated the results of scientific studies and suppressed evidence of adverse health effects of the dioxin-containing herbicide.

Retired Admiral Elmo R. Zumwalt Jr., who completed his own review of the scientific literature on Agent Orange in May as a special assistant to Veterans Affairs Secretary Edward J. Derwinski, asserted in his testimony that there is "credible evidence" linking certain cancers and other illnesses with the defoliant.

However, Zumwalt said, "government and industry officials credited with examining such linkage intentionally manipulated or withheld compelling information on the adverse health effects associated with exposure to the toxic contaminants contained in Agent Orange."

Efforts "to distort the record" on the herbicide "were so appallingly egregious that they continue to needlessly muddle the debate on the human health effects of toxic dioxins," Zumwalt said in prepared testimony before the House Government Operations Subcommittee on Human Resources and Intergovernmental Operations.

Determining the relationship between Agent Orange exposure and health effects such as cancer and other disorders is critical because of demands from veterans from the Vietnam War for compensation for a host of diseases which veterans' groups say are caused by Agent Orange.

At the hearing, Zumwalt presented the results of a review of studies on Agent Orange and other dioxin-containing herbicides which he conducted along with a panel of scientific experts assembled specifically for that purpose. According to Zumwalt's report, 28 health problems, including a number of cancers, neurological defects, and immune system disorders, are related to Agent Orange exposure.

In part because of Zumwalt's review, the Department of Veterans Affairs has ruled that it will consider as service-related and therefore eligible for compensation two cancers for Vietnam veterans: non-Hodgkin's lymphoma and soft-tissue sarcoma.

In making that decision, Derwinski, the Veterans Affairs secretary, indicated that it was "as least as likely as not" that Agent Orange exposure was related to the illnesses, although the department has still not said there was a causal relationship between the defoliant and the cancers.

Conventional Propaganda

In testimony before the subcommittee that was highly critical of both government and industry studies that for years were used to deny compensation to veterans, Zumwalt recalled that he had suspected that the Hodgkin's disease and non-Hodgkin's lymphoma from which his son suffered and later died was related to his exposure to Agent Orange in Vietnam.

Yet, at the time, "the conventional propaganda" of the government held that there was insufficient evidence to support a linkage, he said. Zumwalt noted, however, that there is now "a clear consensus" among epidemiologists, toxicologists, and immunologists that substances found in Agent Orange, including the dioxin 2,3,7,8-TCDD, "are extremely toxic to animals" and, by extrapolation, to humans.

Among the studies Zumwalt reviewed were two conducted by the federal Centers for Disease Control. The first, called the Agent Orange Validation Study, began

THE WALL STREET JOURNAL.

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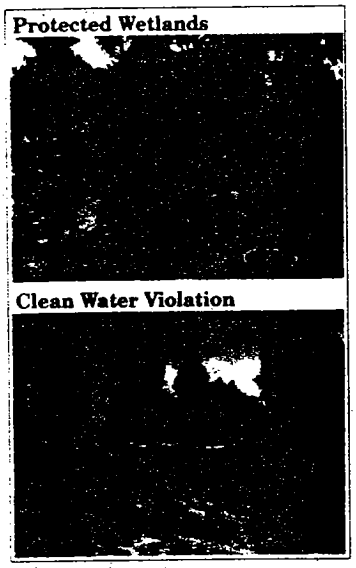
REVIEW & OUTLOOK

Property Busters

Fans of "Ghostbusters" will recall that the movie featured a pompous bully from the Environmental Protection Agency. Well, life is imitating art in Morrisville, Pa., where a flabbergasted truck mechanic is discovering how little regard the EPA has for property rights. Somehow only Bill Murray could muster the bemused astonishment needed for this role.

John Pozsgai is a 57-year-old self-employed mechanic who bought and tried to improve what amounted to an illegal dump next to his home. For his trouble, he's earned a criminal sentence of three years in prison and a $202,000 fine for fouling U.S. "wetlands." If his experience is the shape of environmental law enforcement to come, Mr. Pozsgai can be forgiven for wondering why he ever fled Communist Hungary in 1956.

Mr. Pozsgai set off on his crime spree when he bought a nearby lot to expand his back-yard truck-repair business. The 14-acre lot would remind no one of the Everglades. It's bordered by a tire shop, lumberyard and four-lane expressway, and for 20 years was used by neighbors as an unofficial dump site. Its only endangered species were 7,000 old tires, rusting cars and assorted junk. Mr. Pozsgai proceeded to clear the mess and spread a layer of clean landfill



eagerly deposited by area contractors, as the nearby photos attest.

Somehow his enterprise offended the EPA's enforcers, apparently energized by George Bush's "no net loss of wetlands" campaign pledge. Most Americans probably figure that means protecting Cape Cod or the great blue heron. And indeed the Pozsgai parcel was not even listed on the U.S. National Wetland Inventory Map. But the EPA judged that Mr. Pozsgai's vacant lot contained a stream – dry for most of the year – that somehow crossed the expressway and ran into a glorified ditch known as the Pennsylvania Canal. The EPA also cited as evidence the presence of skunk cabbage, a common weed, and sweet gum, a common tree. By this definition of "wetlands," just about any large American rain puddle will qualify as protected.

The Feds began to harass Mr. Pozsgai to get a permit for his property improvement, though Mr. Pozsgai claims state officials told him he could go ahead without one. The doughty Feds even staked out the property with a video camera to tape trucks dumping dirt. After the Feds got a restraining order, Mr. Pozsgai obliged by putting up barricades, but a few uninformed truck drivers still dumped their unhazardous dirt – providing more evidence against the evil emigre.

The Justice Department then charged him with 40 violations of the Clean Water Act, though the act never even uses the word "wetlands." The act merely bans the polluting of "navigable waters" of the U.S. The bar against polluting "wetlands" is a bureaucrat's interpretation of this typically ambiguous congressional law. The jury that convicted Mr. Pozsgai can be forgiven if it was as confused as the prosecutors.

At the sentencing, U.S. Attorney Seth Weber invoked President Bush's campaign pledge and claimed, "A message must be sent to the private landowners, the corporations and developers of this country." Presumably that message is that property owners who offend the government's environmental zealots will end up as indicted felons. Drug dealers can plea bargain, but "landowners" go directly to jail. In a similar case in Pensacola, Fla., a man and his son have been convicted for cleaning out a drainage ditch. Mr. Pozsgai would be in the slammer already if his case hadn't been appealed by the Washington Legal Foundation, a public-interest group. An appellate ruling may come as soon as Friday.

We've thought for some time that environmentalism and property rights are on a collision course. A free society should have room for both, but that's impossible so long as EPA Administrator William Reilly and his crusaders think individual rights have to be sacrificed to their view of the public good. John Pozsgai knows what that means.

Forbes JANUARY 22, 1990

Dangerous criminal nabbed!

Who is the most notorious environmental criminal in the U.S.? Would you believe a Hungarian immigrant named John Pozsgai? Pozsgai, who owns a small truck-repair shop, was convicted in late 1988 of violating the Clean Water Act. His sentence: three years in the slammer and a $202,000 fine, the stiffest penalty ever for an environmental violation. His crime? Filling in 5 acres of a 14-acre parcel he owns in Morrisville, Pa., near Trenton, without a permit.

Pozsgai, 58, came to the U.S. in the aftermath of the 1956 Hungarian uprising. In 1987 he bought the 14-acre tract so he could expand his business. The property had been used as a dump for years, so Pozsgai began cleaning it up, hauling away more than 7,000 used tires and other debris. He also began filling in the land with clean fill and topsoil.

Unfortunately, Pozsgai's property had been classified as federal wetlands because of a small stream that runs along its edge in wet weather. And he got repeated warnings from local and federal environmental authorities that he could not fill in his land without the proper permits. Pozsgai contends that a series of engineers he hired could not figure out how to file the necessary forms.

The sentence was the maximum allowed, unheard of in a case that involved no hazardous chemicals and no prior convictions, according to the Washington Legal Foundation, which has taken up Pozsgai's case. Pozsgai knowingly and repeatedly violated the law, say the feds, and now must pay the price.

The wetland outlaw's appeal is scheduled to be heard this month.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 13 1989

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

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

Dear Judge Wilkins:

Among the federal regulatory agencies, few have assigned more resources and importance in working closely with the U.S. Sentencing Commission in the development of sentencing guidelines, first for individual defendants, and then with regard to organizational defendants, than the Environmental Protection Agency. Former Administrator Lee Thomas not only personally followed the Agency's efforts in this regard, but last October also conveyed to the Commission, through correspondence, his personal comments on the draft organizational guidelines. In addition, the Deputy Assistant Administrator for Criminal Enforcement, Paul R. Thomson, Jr., testified to the full Commission in December 1988. The Office of Criminal Enforcement Counsel has also recently chaired several meetings and provided extensive data for research personnel of the Commission who are examining how business entities have been penalized for environmental violations.

It is in light of this record of positive support and cooperation between the Commission and the Agency that I convey our concern about the manner by which the Commission has undertaken to enact the proposed revision of Part Q, Offenses Involving the Environment, of the Sentencing Guidelines.

Our concern is that the Sentencing Commission did not inform my office nor consult with my staff on a matter of such obvious interest to the Agency as a revision of the sentencing guidelines for environmental offenses. In October 1988, the Office of Criminal Enforcement Counsel understood, apparently mistakenly, as result of communications with the Commission staff that the Commission for the foreseeable future had abandoned its pursuit of any substantial revision of Part Q. It was with considerable surprise that we learned on January 30, 1989 that a full revision of Part Q was under active consideration and had

been developed to the point of being presented to the full Commission within two weeks for possible publication in the Federal Register. This information and a copy of the draft revision was not provided to the EPA by the Sentencing Commission, but through the Environmental Crimes Section of the Land and Natural Resources Division of the Department of Justice. It was indeed perplexing that the Commission (as indicated by the enclosed Commission letter of January 3, 1989) provided a draft of the revision to the Department of Justice for its review and comment in early December, but the Agency did not receive the draft revision until January 30, 1989. In the legislation creating the U.S. Sentencing Commission, Congress specifically directed that in "fulfilling its duties and exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system", 28 U.S.C. § 994(o).

To avoid a reoccurrence of this situation and to foster a continuing close working relationship, we would request that the Agency be consulted at the earliest possible date in the formulation process of any Guideline revisions that would impact on environmental criminal enforcement.

Sincerely,

Thomas L. Adams, Jr.
Assistant Administrator

Enclosure

cc: Commissioner Nagel

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(918) 582-1993
FAX (918) 582-1991

March 5, 1991

United States Sentencing Commission
Attention: Communications Director
1331 Pennsylvania Avenue N.W., Suite 1400
Washington D.C. 24004

Dear Communications Director:

Please accept this letter as a comment on the guidelines reliance on drug quantities in punishing drug offenders, particularly for less culpable aiders and abettors and/or minimal participants. See 3B1.2.

As a practitioner in the 10th Circuit, my familiarity with that court's opinions regarding upward departures based on uncharged quantities has become more the rule than the exception. Even though the court has commented in numerous cases that the guidelines recognize that upward departure should only be rarely be dealt out, my study of that court's opinions in the last 90 days finds upward departures to be almost regularly applied by the trial court and affirmed by the appellate court. To me there can be no greater injustice in the sentencing guidelines than for a defendant to be sentenced upon a plea of guilty to a quantity of drugs not alleged or proven in the information or indictment. The concept of relevant conduct can encompass and/or incorporate the overall quantity of a alleged conspiracy even though the defendant himself may have only been involved in one minor transaction. Because of the existing state of the law in this area, the trial courts are consistently applying guideline sentences based on the over all quantities alleged to have been distributed or potentially manufactured by a drug conspiracy.

It has been my experience, having regularly defended drug cases in the federal courts, that prosecutors may have a fairly decent case involving minimal quantity and achieve a conviction. Then at the time of the sentencing, the court can rely on third party hearsay and other evidence not subject to the rules regarding admissibility to produce quantity increases far beyond the scope of the charge for which the defendant stood accused and/or was convicted and/or pled guilty to. The concept of proof beyond a reasonable doubt at those proceedings has been rejected by the courts. This process in turn allows the government to avoid its more difficult burden of proof beyond a reasonable doubt at trial and in essence convict and increase sentences based on a mere preponderance of the evidence and evidence not guarded by the strict rules of admissability.

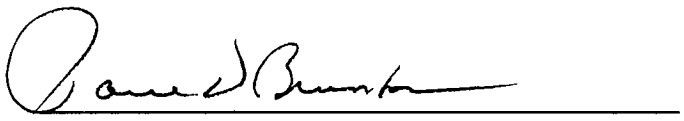
The reality of all of this procedure is creating a system which cannot cope with the numbers of individuals being sentenced, particularly for such long periods of time.

As an old state warden told me in the early 1970s, "Prisoners who have no hope of parole or early release become incorrigible and incredibly difficult to deal with". They have nothing to loose!

Where is the equality or justice in the guidelines when some poor schmuck who may have dealt only a minute quantity of drugs is sentenced based on the overall drug quantity alleged to have been attributed to a large international conspiracy?

Your consideration in reassessing the guideline sentences and quantities attributed to those individuals subject to its strictures is greatly appreciated.

Yours in Justice,



Paul D. Brunton
Attorney at Law

PDB: se