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MEMORANDUM

TO: Chairman Wilkins
Commissioners
Senior Staff

FROM: Phyllis J. Newton *pin*
Staff Director

SUBJECT: Practitioners' Advisory Group Report

DATE: 25 March 1991

Attached for your information is the Practitioners' Advisory Group's report on the proposed amendments to the individual guidelines. This report more comprehensively addresses the summary provided at the March 12th Commission meeting.

Attachment

REPORT OF THE PRACTITIONERS' ADVISORY GROUP ON
PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES

INTRODUCTION

The Practitioner's Advisory Group has considered the Commission's recent proposal for amendments to the Federal Sentencing Guidelines. Representatives of the PAG met with the Commission on March 12, 1991 and presented a summary of their positions. At that time, the Commission was advised that the PAG would submit more extensive comments in writing.

These comments reflect the PAG's consideration and study of the Commission's proposed amendments. The PAG is composed of a wide spectrum of members of the Defense Bar. (A copy of the current membership list of the PAG is attached hereto.) We appreciate the opportunity to provide this information to the Commission and would be pleased to provide more in depth comments on any specific issue that the Commission remains interested in.

The PAG divided itself into six working groups to consider the proposed amendments to the guidelines and our comments will be addressed in that order. Working Group One dealt with issues relating to drug tables and miscellaneous drug related amendments. Working Group Two considered criminal history. Working Group Three studied miscellaneous violent crimes and gun offenses. Working Group Four dealt with white collar offenses, including money laundering, anti-trust and bribery. Working Group Five considered the range of issues relating to offender characteristics and Working Group Six considered proposed guideline amendments related to the plea bargaining process.

I. GROUP ONE - DRUG OFFENSES

In this proposed Amendment 11, the Commission seeks comment on the issue of whether the guidelines currently place too great a reliance on drug quantity in punishing drug offenders. It is the consensus position of the PAG that the current reliance on quantity results in disproportionately high offense levels for drug offenders, particularly less culpable offenders. While we recognize that the impact of mandatory minimum sentencing has a great deal to do with this issue, it is our belief that the Commission should independently address the appropriate level of incarceration for all drug related offenses, even if such determinations result in proposed sentences below the mandatory minimums.

The mitigating role adjustment, Section 3B1.2, has created difficulty in application to various drug related offenses. While some courts have viewed departures as a vehicle to account for roles in the offense that are inadequately dealt with in

Chapter 3B, See United States v. Crawford, 883 F.2d 963(11 Cir. 1990) other courts have found that this is not a basis for downward departure. Recently in United States v. Joyner, ____ F.2d ____ (No 90-1171, 12/4/91) the Second Circuit found that the Commission's role determinations were binding and accordingly, further reductions for minimal role were inappropriate. Taking a different tact, the Court in United States v. Redondo-Lemos, 48 Crim. Law Rept. 1409 (D.C. Arizona 1/31/91) and found that drug "mules" should be sentenced to lower sentences based upon their minimal role in the offense.

These cases indicate the discord among federal courts attempting to deal with the relationship between role in the offense and offense levels in drug cases driven by quantity. It is the position of the PAG that the current reliance on quantity creates anomalous applications. We endorse the position articulated by the NACDL that the Commission adhere to the principles of parsimony codified in Section 3553(a) of the Sentencing Reform Act which will grant broader discretion to courts to impose sentences in drug cases which are "sufficient, but not greater than necessary" and achieve the overall purposes of sentencing.

We believe that the Commission should consider a number of vehicles in addition to a re-examination of its role in the offense standard. First, we recognize the ongoing efforts to consider problems created by mandatory minimum sentencing and we urge the Commission to consider its role in this process. Second, we favor the offense level cap mechanism employed in proposed Amendment 15. We encourage the Commission to utilize similar mechanisms to deal with specific offense or offender characteristics tailored to individual categories of crime. We urge the Commission to consider during the next amendment cycle an expansion and refinement of its role in the offense provisions of Chapter 3. Finally, the Commission may wish to address more specific guidance on the appropriateness of departure in role in the offense situations.

II. CRIMINAL HISTORY

In addition to the comments presented at our meeting with the Commission on criminal history, we would like to address the following additional criminal history points.

Amendment 29(A)

Amendment 29(A) provides for a 2 point addition to a defendant's criminal history score if he committed the instant offense while on "unsupervised" probation. The PAG recommends that this proposed amendment be rejected because sentences to unsupervised probation have no "supervisory component." Also, sentences to unsupervised probation are often imposed in lieu of

a fine, when a defendant is unable to immediately pay the fine. Therefore, adding 2 criminal history points to defendants placed on unsupervised probation, but not those who have been fined, clearly discriminates against indigent defendants or those otherwise unable to pay a fine and violates the equal protection clause of the Constitution. As an alternative, the PAG recommends that only one criminal history point be added if a defendant was serving a term of unsupervised probation at the time he committed the instant offense because this does not involve a breach of trust of the same magnitude as does the committing of an offense while on supervised probation.

Amendment 29(B)

Proposed Amendment 29(B) would require counting as prior convictions, convictions where the defendant had not yet been sentenced, unless the prior conviction was for conduct that was not part of the instant offense.

The PAG opposes this amendment as written for two reasons. First, use of any conviction which has not been finalized creates the possibility at some future date that the conviction will be set aside. It is unclear whether a sentence imposed using guideline computations which rely in part on a conviction later set aside can be corrected under Rule 35 as being a sentence which was imposed in violation of law or as the result of an "incorrect application" of the sentencing guidelines.

Second, this amendment will unduly complicate plea negotiations and sentencing in multi-jurisdiction cases where a defendant has been charged with conduct which although not "part of the instant offense" would be considered relevant conduct under 1B1.3. In order to prevent the use of the "prior" conviction against a defendant, plea negotiations might be stalled in one jurisdiction awaiting a plea and sentence in another.

The first problem can be addressed by the Commission recommending an amendment to the federal rules to allow for correction of a sentence imposed utilizing convictions which have later been set aside. The second problem could be addressed by changing the amendment to read:

"Where defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under §1A1.1(c), if the conduct involved in that offense would not be considered relevant conduct under §1B1.3."

Proposed Amendment 29(C)

Proposed Amendment 29(C) provides two options whereby

sentences on appeal may be counted as part of the defendant's criminal history. The PAG opposes both of the options set forth in this amendment because of the problems created if an appeal is granted after sentence has been imposed in the instant case. The federal rules do not seem to allow for correction of the sentence in such cases.

Before enacting this amendment, the PAG suggests that the Commission first seek an amendment to the federal rules to allow for correction of sentences based on guideline computations utilizing convictions later set aside on appeal. In the alternative, the PAG recommends that Option 2 be adopted.

III. MISCELLANEOUS VIOLENT CRIME OFFENSES

Proposed Amendment # 1 - Section 2A3.2 This amendment "ups the ante" for the crime of criminal sexual abuse of a minor. The basis for the proposed amendment (either option #1 or #2) is that Congress increased the maximum penalty from five to fifteen years. While the increase in the statutory maximum grants a sentencing court the power to sentence upward to a higher sentence than before the amendment not every defendant should have his sentence increased (which either option #1 or #2 would do) just because Congress increased the statutory maximum. Assuming, arguendo, that the Commission feels that some amendment must be passed, clearly option #2 should be approved with a special offense characteristic of only 2 levels. The statute is aimed at punishing statutory rape - not the age of the offender - and option #1 would provide harsher penalties for older defendants than for younger defendants. This will create a new disparity based on the age of the offender. Option #2 is the better of the two because it would add 2 points based on the fact that the victim is under fourteen years of age - an approach taken by a number of states in this area

Proposed Amendment #7 - Section 2B3.1 (robbery) The Commission's proposed amendments, all "up the ante" for persons convicted of bank robbery or the involvement of a weapon in the robbery. 7(a) should be rejected (changing the offense characteristic from 2 to 4 if the robbery is of a financial institution). This is merely "upping the ante" for almost all robberies because almost all robberies in the federal system are of banks. The Commission's study in this area is for only a short period of time (subsequent to November 1, 1989) and it was only fifteen months ago (November 1, 1989) that the robbery guidelines were amended to increase the base offense level from 18 to 20. No new increase is needed at this time. 7(B) would raise the enhancement for involvement of a weapon in a robbery from 1-4 levels. It is premised on the fact that some prosecutors are not following the Thornburgh memorandum and are pleading cases out by dropping counts charging 18 U.S.C. § 924(c) violations.

The proper response by the Commission to varying prosecutorial practices should be for the Commission, if it does anything at all, to draft a letter to the Attorney General to remind him of the need for all field offices to remain consistent in charging practices and plea bargaining practices in cases dealing with a possible 18 U.S.C. 924(c) violation.

7(C) should be rejected by the Commission. It would add additional levels (from 2-5) for other robberies allegedly committed by the defendant even if he is not convicted of the other robberies, so long as the other federal robbery offenses are charged in the same indictment as a separate offense or were part of the same series as the robbery charged in the count of conviction. This proposal is unprecedented, considering that robberies are not combined for grouping purposes. Where separate offenses like robbery, murder, etc. are not grouped defendants should not be punished absent a conviction for separate offenses when the standard of proof is only "preponderance of evidence".

Proposed Amendment 7(c) is unnecessary. The defendant who has committed multiple robberies but is allowed to plea to one or two with the others being dismissed is already subject to an upward departure based on the trial court's determination that the defendant's total offense conduct is greater than that which he has pled guilty to See, e.g., United States v. Armstrong, 901 F.2d 988 (11th Cir. 1990).

Finally, we oppose 7(C) because it appears to be case where the Commission is "upping the ante" because of varying practices in the Offices of the United States Attorney around the country.

Proposed Amendments #8(A), (B) and (C) :2B3.2 (extortion)
Last year the Commission failed to pass a proposed amendment that would have increased the base offense level for extortion to 20, making it the same as the recently revised robbery base offense level. Now the Commission again seeks to increase the base offense level by 2 for extortions involving a threat of bodily injury. The offenses of robbery and extortion are not similar - robbery involves the immediate use of force, while extortion is often done by mail, phone, etc., - and extortion is often committed by persons with serious mental problems, including numerous federal inmates who threaten federal judges.

Thus, we propose no increase for extortion involving an express or implied threat of death, etc. As to proposed amendment 2(B) we propose a 2 level increase if the offense involves a threat of death or serious bodily injury to numerous persons. Under any circumstances, the term "implied" threats must be very carefully limited to avoid application of this enhancement to every extortion situation.

As to 8(B), if it is approved, the increase should be limited to 3 levels, not 5. As to 8(C) the increases proposed to Section 2B3.2(b)(6) and (7) should be 2 levels and not 4 levels. There is no empirical data justifying 4 level increases, let alone a 2 level increase.

Propose Amendment #20 - Harboring a fugitive The Commission asks for comment on whether the offense level for harboring a fugitive from arrest or harboring a person who has failed to appear for sentencing should be 1-3 levels higher than the base offense levels in 2J1.6 and 2P1.1. Under no circumstances should a person who harbors an alleged escapee or fugitive from sentencing face a higher punishment than the person who is being sought by law enforcement officials. As to the merits of the proposed amendments to 2J1.10 the top base offense under 2J1.10(a)(3) should be 15, not 18 and the other -- (B), (C) and (D) should be 12, 9 and 6 respectively. This is so because the vast majority of people that commit this crime have no idea of what the maximum penalty is for the offense committed by the person they allegedly harbored. Moreover, most persons charged with this offense under current law are relatives, boyfriends or girlfriends of the person being harbored.

Proposed Amendment #22 - prohibiting transactions re: firearms The proposal would combine current Sections 2K2.1, 2K2.2, 2K2.3 and 2K2.5 into a single guideline designated as Section 2K2.1. The proposed guideline uses a "real offense" approach. That is to say, 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 subsection.

The proposed guideline also increases offense levels. For instance, the bar offense level for a defendant with a dishonorable discharge from the Air Force (a "prohibited person" under 18 U.S.C. 922(g)) who is convicted of the offense of shipping a .22 caliber pistol to his wife, is 12 under present Section 2K2.1(a)(2). The bar offense level for the same offense under proposed Section 2K2.1(a)(4) is [14-16]. Indeed, the bar offense level would go to 20 if the defendant had a prior conviction for a specified offense, such as possession with intent to distribute marijuana. In addition, the defendant's bar offense level would be enhanced [1-2] levels under proposed Section 2K2.1(b)(8) because of the defendant's status as a prohibited person.

The Commission, effective 11/1/89 revised Sections 2K2.1, 2K2.2 and 2K2.3 and increased bar offense levels. There has not been a sufficient number of cases involving the revised guidelines to warrant an extensive revision and an increase in bar offense levels. For instance, according to the Working Group Study Report prepared by the Commission (Dec. 7, 1990, at

appendix D, table I-A), there have only been 59 single guideline cases under the version of Section 2K2.1 that took effect 11/1/89. In these 59 cases 29 defendants were sentences below or at the bottom of the guideline range (49%), and 17 defendants were sentenced above or at the top of the guideline range (28%). This data indicates that District Court judges do not believe that the present guidelines result in inadequate sentences. Unless empirical data shows by clear and convincing evidence that judges are ignoring the guidelines in a particular area and imposing sentences regularly below the guideline range (a downward departure), or, at a minimum, judges are consistently imposing sentences at the very low end of a guideline range, there is no need for wholesale revisions and the Courts can deal with the atypical serious firearms case by departing upward from the guideline range.

Finally, the proposed guideline has double counting problems. Sections 2K2.1(a), (2), (3) and (4) provide for an increase in the bar offense level depending on the number of prior convictions in a given area. These same prior convictions would also be counted in Chapter 4 - criminal history score - double counting.

Moreover, the enhancement of proposed subsection (b)(8) is applicable only to prohibited persons.

IV. WHITE COLLAR CRIME AMENDMENTS

Proposed Amendment 9A to § 2C1.1(c) (1) (Bribery) creates "a separate cross-reference for aiding and abetting another offense that increases the offense level for such conduct by referring to § 2X2.1 (Aiding and Abetting)." As further explained in the proposal, if a bribe is made to assist a drug operation, the guidelines sentence for aiding and abetting the drug operation would apply if greater than the guideline sentence for bribery. This is so even if the defendant is neither charged nor convicted of aiding and abetting the drug operation.

The procedure of cross-referencing as a basis to require or mandate the increase of a sentence is very troublesome. It is one thing for a court to have discretion, in determining where a sentence should be within the applicable guideline range of the offense of conviction, to consider all the circumstances surrounding the offense, including whether a bribe assisted a drug offense. It is quite another to force the court to impose a sentence under a guideline range for a crime for which the defendant was not convicted and perhaps not even charged.

This may have constitutional due process infirmities. It certainly is objectionable policy-wise. Persons should generally be sentenced for what they are convicted of. True, judges can and should consider a wide range of information in determining an

appropriate sentence. Conduct not the subject of a conviction may be in a particular case an appropriate part of this spectrum of information.

But this proposed amendment in particular and cross-referencing in general are entirely different. They impose the basic equivalent of a mandatory-minimum punishment on a defendant for an offense for which the defendant has not been convicted. This is neither fair nor just. Even worse, the mandatory-minimum applies only if it is greater than the guideline sentence for the offense of conviction.

The entire concept of cross-referencing, merits reconsideration. Until that reconsideration is completed, any proposal such as 9A for Bribery should be deferred.

Amendment 26 -- § 2S1.1.

The Anti-Drug Abuse Act of 1988 added section (a) (3) to 18 U.S.C. § 1956, providing a maximum sentence of twenty years for conducting or attempting to conduct a financial transaction, with intent to promote a specified unlawful activity, to conceal proceeds of such activity, or to avoid a reporting requirement, involving property "represented by a law enforcement officer" to be proceeds of such activity or property used to conduct or facilitate such activity. 18 U.S.C. § 1956(a) (3). Similarly, the Crime Control Act of 1990 amended the knowledge requirement of 18 U.S.C. § 1956(a) (2), which provides a maximum of twenty years for transporting, transmitting, or transferring, in or out of the United States, or attempting to do so, a monetary instrument or funds in order to conceal proceeds or to avoid a reporting requirement, "knowing" that the instrument or funds represent proceeds of unlawful activity. Under the amendment to § 1956 (a) (2), "the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified ... as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true." P.L. 101-647, Sec. 108 (1990).

The proposed Guideline amendments attempt to effectuate the statutory changes by amending § 2S1.1(b) (1), to provide a three level increase if the defendant "knew or believed" that the funds were the proceeds of drug trafficking. The reference to the defendant's "belief" is designed to account for money laundering offenses committed during a "sting" operation. However, the proposed Guideline amendment is deficient because of the impact of § 2S1.1(b)(2), which increases the offense level (from a base level of 20-23) by up to 13 levels depending on the "value of the funds" in excess of \$100,000. This provision would allow undercover agents in a "sting" to set arbitrarily at a very high figure the "value of the funds" to be laundered. In order to avoid the possibility that mere undercover conversations will arbitrarily increase offense levels, the court should exclude

from the guideline determination the value of the funds represented in the "sting" operation, which the defendant did not intend to launder or which he was not reasonably capable of laundering. (See § 2D1.4, Application Note 1, for a similar provision for negotiation of drug quantities in an uncompleted distribution).

Amendment 27 -- § 2S1.3.

This amendment clarifies the specific offense characteristics for failure to report monetary transactions and structuring transactions to evade reporting requirements. Under the proposed amendment, there is an increase of 4 levels, or to level 13 if the resulting offense level is less than 13, "if the defendant knew or believed that the funds were criminally derived property." Such "belief" presumably can stem from a "sting" operation. Moreover, § 2S1.3(b)(2) provides that if the "value of the funds" exceeded \$100,000, the level is increased as specified in § 2S1.1(b)(2). The proposed amendment therefore does not protect against the possibility of an artificially increased offense level resulting from undercover conversations during the "sting." To avoid the possibility that mere undercover conversations will arbitrarily increase offense levels, we recommend that the amendment authorize the court to exclude from the guideline determination the value of the funds represented in the "sting" operation which the defendant reasonably did not believe were criminally derived property or reasonably believed were not intended to be used to promote criminal activity, or which he did not intend to structure to evade reporting requirements or was not reasonably capable of so structuring.

Amendment 28 -- 2S1.4

This amendment would create a separate guideline for offenses involving Currency and Monetary Instrument Reports. While we agree that CMIR violations should be treated less severely than other currency transaction reporting violations, the proposed base offense level of 9 is too high when the defendant is not aware that the funds were criminally derived property or were intended to be used to promote criminal activity. We recommend that the base offense level be set no higher than level 6.

Also, as with the other money laundering guidelines, there is the possibility of an artificial increase in levels based on a "belief" derived from a "sting" operation. § 2S12.4(b)(1) provides for a 4 level increase if the defendant "knew or believed" that the funds were criminally derived property, and § 2S1.4(b)(2) provides for a 4 level increase if the defendant "knew or believed" that the funds were intended to be used to promote criminal activity. Further, if the "value of the funds"

exceeded \$100,000, the offense levels are increased as specified in § 2S1.1(b)(2). To avoid the possibility that mere undercover conversations will arbitrarily increase offense levels, we therefore recommend that the amendment authorize the court to exclude from the guideline determination the value of the funds represented in the "sting" operation which the defendant reasonably did not believe were criminally derived property or reasonably believed were not intended to be used to promote criminal activity, or which he did not intend to transport or receive or which he was not reasonably capable of transporting or receiving.

Proposed Amendment 9(B) would cumulate the eight level increase for a bribe of an elected or high level official and the increase from a bribe in excess of \$2,000. The Proposed Amendment would make the same change for a gratuity. The present guidelines provide that when both a high level official and more than \$2,000 are involved, the computation is the greater of the eight level increase for the former or the increase for the monetary amount. There is no cumulation. No. 2C. 1(b)(2); 2 Cl. 2(b)(2).

This proposed amendment should be rejected for two principal reasons: the present eight level increase for bribery of an elected or other high official is objectionable for the reasons set forth below and the present amendment would compound its objectionable features and also produce an excessively draconian result.

1. The present eight level increase for a bribe or gratuity to "an elected official or an official holding a high level decision-making or sensitive position." 2 Cl. 1(b)(2)(B); 2 C. 2(b)(2)(B).

This provision increases the guideline range from 6-12 months (base level 10) to 27-33 months (base level 18). It is excessive, particularly given the enormous breadth of the definition of "public official" under 18 U.S. Code 201 and the vagueness of the provision in question and the resulting uncertainty of what officials do or do not come within its scope.

The United States Supreme Court has given the definition of public official in 18 U.S. Code 201, ("any person acting by or in behalf of the United States") a sweeping expanse. The official need only "possess some degree of federal responsibility for carrying out a federal program or policy." Dixon v. United States, 104 S.Ct. 1172, 1181 (1984). In Dixon, the Supreme Court upheld application of § 201 to a housing coordinator of a private non-profit corporation which was a subgrantee of a city receiving a federal block grant.

Under Dixon, the application of the eight level increase to

"elected officials" is not limited to the President, Vice President and Members of Congress. Many state and local officials would fall within § 201. Even if one were to agree that an increase for bribery of the President, Vice-President or Member of Congress is an aggravating factor, an automatic eight level increase for some lowly local elected official involved with a federal block grant does not justify this enormous automatic increase.

In determining who is an "official holding a high level decision making or sensitive position," the Application Note is not especially helpful. It merely states that the provision includes, "for example, prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility." Does a gratuity to a police sergeant (a "supervisory law enforcement official") warrant an eight level increase? Plainly not. The Application Note gives very little effective guidance. Would it apply to the executive director of the non-profit corporation in Dixon whom the Supreme Court held to be a public official under § 201? It might well given the vagueness of the provision in question.

In short, the eight level increase is not by its terms restricted to a very small, clearly-defined group. Even if it were possible to do so, the eight level automatic increase or non-increase only because a defendant is on one side or the other of a very fuzzy line (if it is a line at all) is neither fair nor in keeping with the goal of the guidelines to reduce unwarranted disparity in sentencing.

The position of the public official is certainly a factor a court can consider in determining where within the guidelines range a sentence should fall. The eight level increase provision, at least as presently drafted, should be deleted.

2. Cumulating the eight level increase with the increase from bribes involving more than \$2,000.

For reasons stated above, the proposed amendment would result in seriously inequitable and excessively draconian sentences. The proposed amendment contains no rationale for adding the eight level increase to the increase resulting from bribes involving more than \$2,000.

Bribery, of course, is a very serious offense. The base level offense of 10 reflects this. To increase the offense level for the amount of the bribe is not unreasonable. But to add on enormous eight level increase for the high level official will result in sentences that have no substantial precedent and which are too harsh. This is particularly so if the "benefit received" as a factor in determining the amount involved is a corporate

benefit and not for the individual defendant.

The excessive nature is more than obvious when applied to gratuity. The maximum statutory sentence is two years. Under the proposed amendment, a gratuity of more than \$5,000 to a "high level official" puts the minimum guideline sentence at the statutory maximum -- 7 (base level) + 8 + 2 = 17. This hardly seems consistent with the intent of Congress in limiting the offense to a maximum term of two years.

To cumulate the excess monetary amount and the automatic eight level increase for high level officials is to compound and aggravate the defects of the eight level increase and the uncertainties and vagueness of the application of corporate benefits to individuals.

1. Anti-Trust Amendments

Proposed Amendment 25 regards bid-rigging, price-fixing, or market-allocation agreements among competitors, Section 2R1.1. The stated rationale for the proposed amendment, to increase the offense level for anti-trust violations to bring them more in line with the offense levels for fraud and to enhance the general deterrent effect of anti-trust offenses, does not support the Commission's proposed amendment. First, there is no apparent correlation between fraud and anti-trust offenses. Fraud is a specific intent crime while anti-trust is generally a general intent crime. Similarly there is no indication of need for additional deterrence of the magnitude which would be created by the proposed amendment.

V. OFFENDER CHARACTERISTICS

With respect to Part H- Specific Offender Characteristics, we recommend that the Commission defer making any changes in this area until next year's cycle.

The Commission's only reason for the proposed change is that the current guidelines "contain numerous inconsistencies and ambiguities." The Commission does not articulate, however, any reasons as to why particular offender characteristics are generally inappropriate for consideration. Only 994(3) states that some of these characteristics are generally inappropriate to consider (education, vocational skills, employment, family and community ties), but not age, physical condition, civic and public service work. Yet there is no articulated reason as to why all these characteristics should be lumped together as being generally irrelevant to the sentencing decision. Further, for those which Congress designated as generally inappropriate, the Commission should provide some guidance as to what kind of rare cases make it appropriate to consider these factors.

There should be more study, data, etc. and greater opportunity to address this issue more comprehensively.

With respect to 5K1.1, we suggest that the current section be amended so that motions to depart from the Guidelines for substantial assistance to authorities for the investigation or prosecution of another person can be made by either the government or the defendant.

Under 28 U.S.C. 994(n), substantial assistance by the defendant for prosecution of other persons is a basis for departure, regardless of who makes the motion. Yet current guidelines speak only to such motions by the government, and the Commission indicated that it wishes to reinforce U.S. v. Chotas, 913 F.2d 897 (11th Cir. 1990) which ruled that the government must make the motion under 5K1.1 before the court can depart. If indeed, the Commission (and Congress) believes that a judge may consider departure for defendant's providing of information about other persons, as a matter of policy, it should be irrelevant how the decisionmaker receives that information, whether it be from the government or the defendant. To be sure, the government can respond to the defendant's motion as to the worth of such information, and the court can evaluate it. But as the guidelines are formulated now, the defendant may provide valuable information about other federal crimes, or even about state crimes committed by another person which the U.S. Attorney may choose to pass on to state authorities, but for which the U.S. Attorney may not be inclined to make a motion. Congress did not see fit to limit the benefits in 994(n) only on motion of the government; Congress did so only with respect to going below mandatory minimums under 3553(e).

The Commission in the proposed Application Note 1 inappropriately deletes any reference to 28 U.S.C. 994(n) from the original application note, and cites only 18 U.S.C. 3553(e) which allows for reduction below the statutory minimum but only if the government makes the requisite motion. To the extent that the Commission is allowing departures to be made below statutory minimum if the government breaches in bad faith its agreement to make the requisite motion, we would of course support it, as even some case law now allows.

As a technical correction, the proposed commentary does say that "This section implements 28 U.S.C. 994(m) and 18 U.S.C. 3553(e)" when it should read 994(n).

VI. PLEA BARGAINING

Proposed Amendment 37B would amend Guideline 1B1.8, uses of certain information. The proposed Amendment would add two application notes. The PAG favors Application Note 5 and opposes Application Note 6. This Application Note would further the

overall purpose of this guideline section to permit the longstanding practice between government attorneys and defense counsel whereby a cooperating defendant is assured that his truthful disclosures will not be detrimentally used against him in the future. Our sole criticism of proposed Application Note 5 is the inclusion of the words "other persons" modifying disclosures of unlawful activities. This potentially would eliminate the reach of this section to a situation in which a sole perpetrator of potentially large offenses such as fraud and swindles would have no incentive to provide the government information regarding additional victims. This section might also have applicability to solo offenses where the government has a law enforcement need for information about how the crime was committed in order to detect and deter similar offenses in the future.

It is for these reasons that we oppose Application Note 6. There are valid law enforcement reasons why cooperative information provided by offenders that does not directly lead to unlawful activities of others should be within the reach of the guideline.

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