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March 26, 1991

MEMORANDUM:

TO: Chairman Wilkins
Commissioners
Senior Staff

FROM: Mike Courlander

SUBJECT: Comment on Proposed Amendments to Guidelines

Attached for your review are comments from the United States District Court, Eastern District of Michigan. These comments, which just arrived today, were formulated by the Pretrial and Probation Committee after receiving input from the district's Probation Office, their U.S. Attorney and Chief Federal Defender.

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.

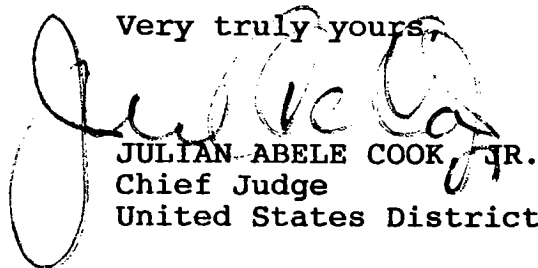
3. A guidelines should be amended only (a) if there is a demonstrated need for change and (b) to clarify and simplify as well as to eliminate clear unfairness.

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,

A handwritten signature in dark ink, appearing to read "Julian Abele Cook, Jr.", is written over the typed name and title.

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).

1 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 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.

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."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁸See *id.* at 28-32.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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:

Federal Defender Office - Detroit, Michigan

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

month terms for two embezzlements and was also released from prison three years ago. All three options result in defendant B getting more criminal history points than defendant A, who gets 3 criminal history points. If defendant B's offenses were separated by an intervening arrest, defendant B gets 6 points under all three options. If there is no intervening arrest, defendant B gets 4 or 5 points under option 1,⁴³ and 4 points under option 3. ⁴⁴

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.

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

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

⁴⁶Id. at 3.

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

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

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

and a Commission staff report concludes that "the criminal history categories used in establishing the federal sentencing guideline ranges do, in fact, predict future criminal behavior." 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(1)(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.

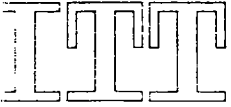
**United States Attorney's Comment on
Proposed Amendment 37(B). Stipulations.**

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.



Roger W. Langsdorf
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March 21, 1991

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

Dear Judge Wilkins:

Jim Carty has forwarded to me a copy of the staff draft of March 12. I respectfully submit the following comments with respect to this draft:

A. \$8C2.3(3) - Mandatory use of gross pecuniary loss to determine base fine amount where it is greater than the amount in the table and gross pecuniary gain.

The March 12 draft sets forth 3 alternative provisions requiring mandatory use of loss where greater than the amount in the table and gross pecuniary gain (provided that use of this method would not unduly complicate or prolong the sentencing process):

1. In all cases if management participated in the offense, etc. ("Alternative I")
2. In all cases. ("Alternative II")
3. In all cases unless the organization's liability involved other than intentional or knowing conduct and management did not participate in the offense, etc. ("Alternative III")

Alternative I is the same as that in the February 28 draft. Alternative II is the same as the October, 1990 proposal (minus Footnote 2) and Alternative 3 is brand new.

With respect to each of these alternatives:

Alternative I is certainly an improvement over Alternative II because it bars mandatory use of the loss standard where management was not implicated. However, it does not solve the many serious problems with mandatory use of the loss standard. Use of this standard should be left to the discretion of the trial judge. But if the Commission elects not to give the judge this discretion, two additional conditions should be attached to the mandatory use of the loss standard: It should be required only if (a) the offense conduct which triggered the organization's criminal liability involved intentional, knowing or reckless criminal conduct and (b) the extent of the gross pecuniary loss was not substantially greater than would have been anticipated by a reasonable person acting under the circumstances in which the individual agent or agents of the organization who committed the offense acted. Note that these two conditions were set forth as alternatives in Footnote 2 at page 9 of the October, 1990 proposal.

Alternative II is simply not a viable alternative since it could unjustifiably subject an organization to astronomical fines resulting from the conduct of a very low level employee acting on his own, contrary to organizational policies.

Alternative III, as presently worded, is a significant weakening of the limited protection offered in Alternative I since it would require use of the loss method if the offense involved knowing or intentional conduct, even if management was not involved. This Alternative would be greatly improved if it were phrased in the disjunctive rather than the conjunctive (i.e. if "or" were used instead of "and"), but this still would not deal with the situation in which losses not reasonably foreseeable occurred. I would suggest that the second proviso to §8C2.3 be amended to read as follows:

"Provided, further, that subsection (a)(3) shall not be used for determination of the base fine if (a) the offense that resulted in the organization's criminal liability involved other than intentional or knowing conduct, (b) management neither participated in, condoned nor was willfully ignorant of the offense, or (c) the extent of the gross pecuniary loss was substantially greater than would have been anticipated by a reasonable person acting under the circumstances in which the individual agent or agents of the organization who committed the offense acted."

The Honorable William W. Wilkins
March 21, 1991
Page Three

B. Requirements for a Compliance Program

For the reasons set forth in my letter of March 11 the last sentence of the first paragraph in definition (h) on page 3 should be amended to read more or less as follows:

"Due diligence ordinarily [generally, usually] requires that the organization has taken the following seven general types of steps to assure compliance with the law:"

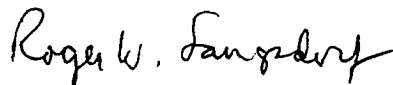
C. \$8C2.4(f) - Credit for Lack of Supervisory Involvement

Two points are awarded:

"If the offense was exclusively committed by a person or persons who did not hold a supervisory position in the organization, management neither condoned nor was willfully ignorant of the offense, and the offense was committed contrary to the established policies of the organization."

Absent a limiting definition this provision would hardly ever apply. What is a supervisory position? It could be read as including every single employee to whom another employee (or perhaps even outside contractor) reports. This would leave a relatively small handful of employees to whom no one happens to report. What was wrong with the February 28 draft which included "any person or persons not within management" in the category of persons whose actions in defiance of management involvement or company policy entitle an organization to credit?

Sincerely,



Roger W. Langsdorf

cc: Members of the Commission

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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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April 9, 1990

MEMORANDUM:

TO: Chairman Wilkins
Commissioners
Staff Director
Senior Staff, Legal & Drafting Staffs

FROM: Paul K. Martin *PKM*

SUBJECT: Public Comment

Appended for your review are additional comments from probation officers in Fresno, CA, and Kansas City, KS, regarding the Commission's proposed amendments. Delivery of the letters to the Monitoring Unit resulted in a delay in circulation.

Attachments

UNITED STATES DISTRICT COURT
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PROBATION OFFICE

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March 29, 1990

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Dear Sir:

The following comments will reflect the ideas of U.S. Probation Officer John J. Cahill and U.S. Probation Officer William H. Martin from the District of Kansas. The comments made by the two writers will undoubtedly reflect a philosophy developed from their positions as presentence writers.

Page 6, No. 4(a), Real Offense vs. Charge Offense Sentencing. The writers believe that a serious problem exists in that U.S. Attorneys are able to dismiss numerous counts of an Indictment in exchange for a plea of guilty to one count of the Indictment, and the presentence writers are thus left to determine all of the relevant conduct which usually results in a significantly higher offense level than had the presentence writer merely determined an offense level based upon the count of conviction. The fact that the U.S. Attorney can reduce the actual elements of the real offense to a charge offense puts the Probation Officer in the position of being an investigative agent, jury, and ultimately judge of the defendant's actual conduct.

Page 8, No. 4(b), Departures. The writers believe that the Sentencing Commission should enlarge the number of reasons for a Court to depart from the guidelines. Several factors that were considered important in pre-Guideline presentence reports (age, lack of any criminal record, and the defendant's attitude and motive for the offense) are subjected to parameters in the Guidelines that are inflexible and oftentimes incapable of truly reflecting the subtleties of each offense. The writers also believe that re-writing the Guidelines will create numerous problems unforeseen at this time in the presentence writers applying Guidelines which have been amended. We ask for clear and complete instructions on the specific implementation of the amendments. The overall effect of these continuing amendments will result in defendants receiving longer or shorter sentences based merely on the date of the commission of the offense. The writers would recommend that the Sentencing Commission allow itself greater time to study all of the problems surrounding the Guidelines and attempt to resolve these problems at one time rather than constantly amending and updating the Guidelines. The writers wish to note that changes are certainly neces-

sary but often confusing and difficult for defense counsels, U.S. Attorneys, and presentence writers at the implementation stage.

Page 9, No. 4(c), Plea Agreements. Paragraph 3 of this section reflects that the Guidelines are expected to create a clear, definite expectation in respect to the sentence that a Court will impose if a trial takes place and that a prosecutor and defense attorney should seek to agree about a likely sentence or range of sentences and no longer will be working in the dark. The writers feel that, three years after implementation of the Guidelines, the U.S. Attorneys and defense attorneys continue to enter into plea agreements which are meaningless in light of the offense conduct and appropriate Guideline calculations. The writers feel that this problem is escalating and we are often put in a position where we must, based upon the facts of the offense, which are known to both attorneys, determine a guideline range that is significantly higher than that reflected in the plea agreement.

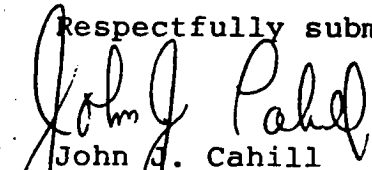
Page 11, No. 4(g), Sentencing Ranges. The presentence writers feel that the sentencing ranges pertaining to first-time offenders with no prior record require much lengthier sentences than those imposed prior to the Guidelines. Based upon the experience of the writers, the average sentences imposed under the Guidelines are not reflective of the average sentence imposed prior to implementation of the Guidelines. The writers note that two-level enhancements at the upper range of the Sentencing Table often punish a defendant more for behavior as an offense characteristic than if the defendant had been convicted of a separate crime, based upon the same behavior.

Page 74, Chapter Seven, No. 69. The writers feel that Option 2 would require probation officers to complete an entirely new presentence investigation based upon investigative materials and prosecutorial judgments made in city, county and state courts. The probation officer would be put in an untenable position with respect to making judgments that could be wholly inappropriate. For instance, an individual could be convicted of possession of 20 grams of cocaine base in a state court and receive a sentence of 1 - 5 years imprisonment. After proper investigation, and determining the relevant conduct pertaining to that offense, the probation officer could be put in a position of determining that there was actually over 500 grams of cocaine base that could be directly attributed to the defendant, and a combination of specific offense characteristics and other adjustments might result in the probation officer interpreting the guidelines to reflect that a defendant should be sentenced to life imprisonment. While the writers are aware that the Court would probably be restricted by the statutory maximum of the original sentence, there is nothing in No. 69 that would so indicate. ~~*~~In any event, the writers feel that Option 2 is wholly unworkable and would most often result in a defendant being sentenced at the statutory maximum authorized by his original offense. The writers strongly feel that the current procedure pertaining to violations of probation and supervised release allowing the Court to

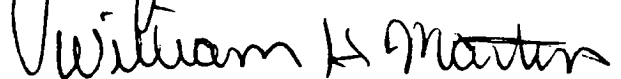
U.S. Sentencing Commission
March 29, 1990
Page 3

impose any sentence authorized by statute is markedly superior to the proposed amendment.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "John J. Cahill".

John J. Cahill
U.S. Probation Officer

A handwritten signature in cursive script, appearing to read "William H. Martin".

William H. Martin
U.S. Probation Officer

JJC/WHM/dms

CHARLIE E. VARNON
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REPLY TO Fresno

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
PROBATION OFFICE

March 20, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue NW
Suite 1400
Washington, DC 20004

attention: Communications Director

RE: COMMENT ON PROPOSED AMENDMENTS
WAB:sj

Dear Sir/Madam:

After reviewing the proposed amendments, I agree with the direction the Commission is taking and I appreciate the clarifying language. As a practitioner who deals with the guidelines on a daily basis, I wish I had time to comment on each of the many changes. Instead, I intend to comment on the three or four issues which seem most significant.

Guideline 2B3.1

The need to include unconvicted robberies in the guideline range is overdue considering the current state of plea bargaining. However, why limit the consideration of the defendant's real criminal conduct in this fashion to robberies only? Why not burglaries and many other non-fungible offenses where the defendant is being allowed to plead guilty to only one or two of several counts? Further, I don't think you will be able to define a common scheme or plan or same course of conduct in such a way as to avoid interminable arguments.

I suggest you either modify Guideline 1B1.4 or create a new policy statement to establish a presumption the court should depart in such cases. I realize the guidelines already allow for such departures but the district and appellate courts seem reluctant to consider conduct outside the count of conviction where the harms are non-fungible.

Guideline 2D1.4

In California at least, we have numerous cases involving the manufacture or attempted manufacture of illegal drugs. Where there is no specific quantity on which to base the offense level, we spend countless hours debating with all parties the defendant's intent. In case after case, the defendant has enough of one chemical to manufacture 50 pounds but only enough of another chemical to manufacture 10 pounds. We need a

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guideline for cases involving the manufacture of illegal drugs where no specific quantity has been seized or cannot easily be determined. In my view, a new guideline to deal with this problem is the single most important amendment you could propose to alleviate problems in the field.

I also believe the two-level enhancement for possession of a firearm during the commission of an offense is both unclear and too limited. This specific offense characteristic does not define what constitutes possession or what constitutes "during." There should be an additional enhancement if the defendant or his co-conspirators possess multiple weapons, particularly of the automatic type. I believe the mere presence of a weapon during the course of a drug offense is a serious matter.

Guideline 3E1.1

I do not agree with the suggestion that the two-level reduction not be available unless the defendant accepts responsibility before adjudication of guilt. Some defendants forthrightly acknowledge their responsibility after adjudication of guilt. They go to trial in some instances on the advice of their attorney for reasons not related to their willingness to admit guilt or not. However, I would like to see greater flexibility in the offense level reduction possible under this guideline. At the present time, to obtain the reduction the defendant must clearly accept personal responsibility. By itself, a guilty plea is not sufficient. The guideline is essentially black and white with really no room for shading. As a practical matter, many defendants plead guilty and are willing to discuss the matter with the court or probation officer but do not do so because of their attorney's advice. Other defendants accept partial responsibility, for example for the counts of conviction, but not for other aspects of their criminal conduct. Some defendants submit letters accepting personal responsibility but do not discuss their criminal behavior verbally. I suggest the Commission consider a reduction of between one and three levels depending on the nature of the acceptance of responsibility. A defendant who pleads guilty but refuses to discuss the offense on advice of counsel might receive a one-level reduction. A defendant who accepts full personal responsibility verbally but who can't remember where the fruits of the crime disappeared might receive a two-level reduction. A defendant who accepts full responsibility verbally and who assists in the recovery of the fruits of the crime or who assists in some way in making the victim whole might receive a three-level reduction.

Guideline for Drunk Driving

We have several felony drunk driving cases pending in our district at this time. This is such a common offense and a matter of such national interest that I believe it justifies a separate guideline.

Guideline 5E1.2

Based on my own observation and discussions with others, the guideline range for fines seems somewhat unrealistic for most of our clients. According to the fine table, for an offense level as low as eight, the

mimum fine is \$1,000. When one includes the costs of supervision, confinement or incarceration, the minimum is substantially higher. While I realize we can recommend only a portion of these fines according to ability to pay, I think officers frequently recommend no fine at all rather than justify why they are not recommending according to the fine table. For many of our clients, a fine of a few hundred dollars is substantial punishment. While I am not in a position to suggest what appropriate fines might be, I do suggest you lower the minimum amounts, narrow the ranges throughout, and clarify the relationship between a fine from the fine table with a fine imposed as costs of supervision or confinement.

Thank you for your consideration of these suggestions. I think you are doing a great job and the guidelines are achieving their intended purpose. Of the suggestions made, far and away the most important is our need to more easily determine the base offense level for drug laboratories when no actual quantity is known.

Sincerely,



WILLIAM A. BARRETT

Deputy Chief U.S. Probation Officer

WAB:sj