

FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF WASHINGTON

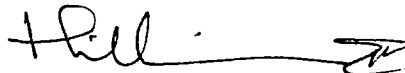
March 18, 1991

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

Dear Judge Wilkins:

This letter accompanies a supplemental statement submitted on behalf of Federal Public and Community Defenders concerning the 1991 proposed amendments to the Sentencing Guidelines. Barry Portman testified before your Commission on March 5, 1991. At that time, our initial statement was submitted. The enclosed supplemental statement addresses amendments not discussed in that initial statement. Thank you for your consideration.

Very truly yours,



Thomas W. Hillier, II
Chair, Legislative Subcommittee
Federal Public Defender,
Western District of Washington

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Statement of

Thomas W. Hillier, II
Federal Public Defender
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on behalf of

Federal Public and Community Defenders

submitted to the

United States Sentencing Commission
Washington, D.C.

March 18, 1991

Amendment 1
§ 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)
or Attempt to Commit Such Acts)

The Commission has published two options for amending the criminal sexual abuse of a minor guideline. The "Reason for Amendment" suggests that the amendment responds to an increase in the maximum penalty for violating 18 U.S.C. § 2243(a), the offense to which this guideline applies. Curiously, the "Reason for Amendment" section does not refer to a Congressional mandate specifically concerning § 2A3.2. Section 321 of the Crime Control Act of 1990 directs the Commission to "amend existing guidelines for sentences involving sexual crimes against children . . . so that more substantial penalties may be imposed if the Commission determines current penalties are inadequate."

The Commission has not assembled the data upon which to base a determination concerning the adequacy of current penalties for sexual offenses against children and therefore is not in a position to comply with the Congressional mandate. We therefore oppose both options.

Amendment 2
§ 2A4.1 (Kidnapping, Abduction, Unlawful Restraint)
§ 1B1.1 (Application Instructions)

The Commission proposes several amendments to the kidnapping guideline. The Commission proposes two new specific offense characteristics (new subsections (b)(6) and (7)) to comply with the mandate of section 401 of the Crime Control Act of 1990. In addition the Commission revises subsection (b)(5), which deals with a kidnapping committed to facilitate the commission of another

offense, and adds a cross reference to deal with the murder of a kidnapping victim.

We do not believe that the Commission's proposals complies fully with the Congressional mandate. Section 401 of the Crime Control Act of 1990 amends 18 U.S.C. § 1201 by adding a new subsection (g), captioned "Special Rule for Certain Offenses Involving Children". New subsection (g)(1) provides that new subsection (g) applies only if the victim of the offense is less than 18 years old and the offender is at least 18 years old and not closely related to, or having legal custody of, the victim. New subsection (g)(2) directs the Commission to amend § 2A4.1 "by including the following additional specific offense characteristics". New subsection (g)(2) then lists the characteristics and specifies the amount of the enhancement.

Neither proposed subsection (b)(6) or (7) contain the limitation set forth in 18 U.S.C. § 1201(g)(1). Both proposed subsections, thus, are broader than necessary to comply with the Congressional mandate. The Commission has not justified the expansion.

The Commission seeks comment about whether the enhancement of proposed subsection (b)(6) should be 3, 4 or 5 levels. Congress has mandated a 3-level enhancement for sexual exploitation, precluding the Commission from setting a greater (or a lesser) enhancement for that factor. Proposed subsection (b)(6), therefore, must require a 3-level enhancement.

Proposed subsection (b)(7) does comply with the Congressional mandate about the extent of the enhancement. Proposed subsection (b)(7) must be modified, however, in order to deal with a double counting problem. The conduct that triggers application of proposed subsection (b)(7) will also trigger proposed subsection (b)(5).

The Commission has not proposed a 2-level enhancement for a defendant who allows a child to be maltreated intentionally, to be sexually exploited, or to be placed, for consideration, in the care or custody of another person. The Commission believes that the relevant conduct guideline (§ 1B1.3) accomplishes that result. The application of § 1B1.3, however, results in an enhancement that is greater than the Congressionally-mandated 2 level enhancement. We believe that, in order to comply with the mandate, the Commission must promulgate a specific offense characteristic that overrides the relevant conduct guideline for a defendant who "allowed the child to be subjected to any of the conduct specified in this section" (i.e., section 401 of the Crime Control Act of 1990).

The Commission has rewritten subsection (b)(5).¹ The Commission indicates that the purposes of the amendment are, first, to make the enhancement always proportional to the underlying offense and, second, to clarify the application of the enhancement.

¹Proposed subsection (b)(5)(B) requires an offense level of "4 plus the offense level from the guideline applicable to that other offense" if that guideline does not take into account kidnapping, abduction, or unlawful restraint. Because this formula can result in offense levels above 43 -- for example, where the other offense is first degree murder -- proposed subsection (b)(5)(B) should be revised to provide that the offense level cannot exceed 43.

The Commission has changed the phrase "to facilitate the commission of another offense" to "in connection with another offense". The new phrase is more vague and could be read to produce a broader application of the enhancement, which is not what the Commission has stated to be a purpose of the amendment. We believe that the original phrase is clear and should not be changed.

Amendment 3

§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)
 § 1B1.2 (Receiving, Transporting, Transferring, Transmitting,
 or Possessing Stolen Property)

The theft guideline presently requires a one-level enhancement (or an increase to level 7 if the resulting level is less than level 7) "if a firearm, destructive device, or controlled substance was taken". The possession of stolen property guideline has a similar enhancement "if the [stolen] property included a firearm, destructive device, or controlled substance. The Commission proposes to add a cross reference to each that would apply "if the offense involved" one of those items or explosive materials.² The

²There are drafting problems with the proposed cross references. The proposed cross references provide "if the offense involved a firearm, destructive device, controlled substance, or explosive materials" (emphasis added). The equivalent phrases from the present guidelines are "if a firearm, destructive device, controlled substance was taken" (§ 2B1.1(b)(1)) (emphasis added) and "if the property included a firearm, destructive device, or controlled substance" (§ 2B1.1(b)(2)) (emphasis added).

While the proposed phrase expands the items covered to include explosive materials, it is not clear whether the Commission intends the new phrase to cover conduct beyond that covered by the present phrases. The "Reason for Amendment" does not discuss the change from "was taken" and "property included" to "offense involved", but the examples used (2 instances of possession of a stolen firearm -- conduct that is covered by the present formulation) suggest that no

purpose is to "ameliorate the potential for considerable sentencing disparity".

We do not see a need to introduce this real offense element into the guideline. The Commission cites a theoretical problem, but there is nothing to indicate that the theoretical problem is an actual problem. In the two examples cited in the "Reason for Amendment", there would disparity only if the prosecutor decides not to prosecute for the weapons offense and elects instead to prosecute for the stolen property offense. The Commission has presented no data to indicate such decisions are being made and with what frequency. The Commission also has presented no data about why prosecutors would decide not to go forward with the firearms offense. The failure to pursue a firearms charge may be due to proof problems or may reflect a belief that the punishment under the stolen property offense is adequate.³

expansion is intended. If no expansion is intended, it would seem preferable to retain the original phrases in order to avoid an inference that a change is intended.

On the other hand, if no expansion is intended, the proposed special instructions become redundant. If the proposed special instruction in § 2B1.1 applies only to theft of one of the described items, then the only "relevant guideline" that can be applied is § 2B1.1. If the proposed special instruction in § 2B1.2 applies only to possession of a stolen firearm, destructive device, controlled substance, or explosive material, then the only "relevant guideline" that can be applied is § 2B1.2.

³For example, the "prohibited person" in the Commission's first example could be someone with a dishonorable discharge from the military. A prosecutor may not consider such a prohibited person to be as dangerous as, and deserving of the same punishment as, a fugitive from justice or a drug addict, also prohibited persons.

Amendment 9(B)

**§ 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe;
Extortion Under Color of Official Right)**

§ 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity)

The Commission proposes to amend subsection (b)(2) to make the enhancements set forth in paragraphs (A) and (B) additive rather than alternative. Under the present guideline, subsection (b)(2)(A) enhances the offense level based on the value of the bribe or gratuity, using the loss table of § 2F1.1 (fraud and deceit). Subsection (b)(2)(B) enhances the offense level by 8 levels if the bribe or gratuity involved an elected official or an official holding a high level decision-making or sensitive position. An 8-level enhancement under subsection (b)(2)(A) would require a bribe of \$200,000. The purpose for the amendment is to "provide a more appropriate sanction in a case in which both characteristics are present."

The Commission has presented no data at all about sentencing practices under § 2C1.1 or § 2C1.2. We do not know how frequently cases arise in which a public official receives a bribe in excess of \$200,000 and how the courts have dealt with such cases. Absent such data, it would seem to be difficult to conclude that present levels are not adequate. We believe that the Commission should collect and analyze such data before proceeding.

Amendment 14

§ 2D1.7 (Unlawful Sale or Transportation of Drug Paraphernalia)

The Commission proposes to change present § 2D1.7 by adding a cross reference directing use of § 2D1.1 or § 2D1.2 "if the offense

involved a controlled substance" (and if an offense level higher than 12 results). In addition, the Commission proposes to add an application note suggesting consideration of a downward departure "if the offense was limited to possession or transportation of paraphernalia solely for the personal use of the defendant". The "Reason for Amendment" indicates that "the amendment reflects the expanded coverage of the statute to which this guideline applies".

We believe that the proposed change is unnecessary. To begin with, the cross reference should never be applicable. Drug paraphernalia is not a controlled substance.⁴ There would be no factual basis for a plea to sale of drug paraphernalia if what was sold actually was a controlled substance.

The cross reference, moreover, does not in fact address the "expanded coverage of the statute to which this guideline applies". Before the Crime Control Act of 1990, the offense covered by § 2D1.7 proscribed (1) use of the mails or an interstate conveyance as part of a scheme to sell drug paraphernalia, (2) offering "for sale and transportation in interstate or foreign commerce drug paraphernalia", and (3) importing or exporting drug paraphernalia. The Crime Control Act of 1990 revised the offense to proscribe (1)

⁴21 U.S.C. § 802(6) defines controlled substance to be "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV or V of part B of this subchapter." Section 418(d) of the Controlled Substances Act (formerly 21 U.S.C. § 857(d)) defines the term drug paraphernalia to be "any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance".

any sale or offering for sale of drug paraphernalia, (2) use of the mails or a facility of interstate commerce to transport drug paraphernalia, and (3) importing or exporting drug paraphernalia. The old offense reached, almost exclusively, wholesale distributors (persons who distribute large quantities of drug paraphernalia). The revised offense reaches not only wholesalers, but also operators of head shops that retail drug paraphernalia along with legitimate merchandise and individuals who possess such paraphernalia for personal use. Adding a cross reference dealing with situations where a controlled substance actually is involved just does not respond to the Congressional expansion of the offense.

The defect in the guideline that the Crime Control Act of 1990 has created is that the guideline treats all three categories of offenders -- wholesalers, retailers, and personal users -- alike. We believe that the guideline must be revised to distinguish among the three categories, so that the offense level assigned reflects the seriousness of the offense. As a short-term measure, the Commission should add a proposed application note clarifying the heartland of the guideline. The proposed application note suggests that the heartland fails to distinguish between wholesalers and retailers. We suggest that the application note be expanded to recommend consideration of an upward departure for large quantities of paraphernalia indicative of wholesale operations.

Amendment 19
§ 2J1.3 (Perjury)

The Commission has asked for comments about two options for amending the perjury guideline to deal with "the situation in which a defendant is convicted of multiple counts of perjury for perjuring himself in more than one proceeding in the same case or in related cases". Option one adds a special instruction directing the court not to group together under § 3D1.2 "counts of perjury or subornation of perjury arising from testimony given, or to be given, in separate proceedings". Option two adds an application note recommending strong consideration of an upward departure.

The Commission has not indicated the extent of the problem being addressed, but a Commission staff memorandum indicates that the problem is, at best, extremely rare.⁵ As a general matter, we believe it unwise to clutter the guidelines with provisions to deal with rarely-occurring factors. Therefore, we think that a change in the guideline is not merited (option one). For the same reason, we think an application note on the matter is unnecessary (option two). If a court is ever confronted with the problem, the court will be able to depart if the court determines that a departure is warranted.

⁵See Memorandum to Chairman Wilkins et al. from Phyllis J. Newton entitled "Proposed Amendments for Perjury" (Nov. 19, 1990), at 2-3 ("In the first 43,000 cases received by the monitoring unit of post MISTRETTA sentences, there were 13 multiple count perjury cases. . . . there were no cases involving perjury in separate proceedings.").

Amendment 16(A)
New § 2D1.11 (Unlawful Distribution, Import, Export
or Possession of Listed Chemicals)

The Commission proposes a new guideline to address violations of the Chemical Diversion and Trafficking Act not directly addressed by the guidelines at present. The Commission has proposed two options. Option one, which has two alternative formulations, is based on a new quantity table. Option two relies on the quantity table of § 2D1.1.

We believe that option two is fairer than option one, and will not result in the unfairly disparate punishment that option one produces. Option one lumps all fact situations together, resulting in both overly-harsh and overly-lenient punishment. Option one, for example, assumes that the yield of a Ph.D. in chemistry who operated from a fully equipped scientific laboratory is the same as the yield of a high school dropout who worked in a shack. We believe that fairer, more uniform punishment will be meted out if sentencing courts, based upon the particular facts and circumstances of a case, determine the likely yield.

Amendment 16(B)
New § 2D1.12 (Unlawful Possession, Distribution,
or Manufacture of Prohibited Flask or Equipment;
Presenting False or Fraudulent Identification
to Obtain a Listed Chemical)

The Commission has proposed a new guideline to cover offenses set forth in 21 U.S.C. § 843(a), (4), (6), and (7). The new guideline would cover two distinct types of conduct -- (1) furnishing false information in a required report or using false

identification to receive a listed chemical (§ 843 (a)(4)); and (2) possessing "equipment specially designed or modified to manufacture a controlled substance" with intent to manufacture a controlled substance (§ 843(a)(6)) and manufacturing, distributing, or importing such equipment knowing that the equipment will be used to manufacture a controlled substance (§ 843(a)(7)).

We believe that the guideline fails to distinguish appropriately between the two types of offenses involved. The guideline lumps together the first category with part of the second. Thus, the offense level is the same if the defendant (1) furnished false information in a required report or used a false identification to receive a listed chemical (a violation of § 843(a)(4)); (2) possessed a three-neck, round-bottom flask with intent to manufacture a controlled substance (a violation of § 843(a)(6)); or (3) distributed such a flask knowing that the flask would be used to manufacture a controlled substance (a violation of § 843(a)(7)). In our opinion, the first type of offense is akin to the offense covered in § 2D3.2 (manufacture of a controlled substance in excess of or unauthorized by registration quota); § 2D3.3 (illegal use of registration number to distribute or dispense a controlled substance to another registrant or authorized person); and § 2D3.4 (illegal transfer or transshipment of a controlled substance), indicating that the offense level for a violation of § 843(a)(4) should be 4.

The Commission has failed to indicate why distribution with knowledge is to be treated the same as possession with intent and

not the same as manufacturing or importing with knowledge. Thus, the offense level for distribution with knowledge is 2-levels less than the offense level for manufacture or import with knowledge. In our view, there is no reason to treat the offenses set forth in § 843(a)(6) and (7) dissimilarly. The appropriate analogy for such conduct is the conduct covered by § 2D1.7 (unlawful interstate sale and transporting of drug paraphernalia). We recommend an offense level of 12 for violations of § 843(a)(6) and (7).

Finally, we oppose the cross reference subsection. Such a provision not only assumes that prosecutors will not charge the offenses listed in the cross reference in a significant percentage of cases, it also assumes that such decisions will be inappropriate. A cross reference provision is premature and therefore unnecessary.

Amendment 16(C)
New § 2D1.13 (Structuring Chemical Transactions
or Creating a Chemical Mixture to Evade Reporting
or Recordkeeping requirements)

The Commission proposes a new guideline covering offenses under 21 U.S.C. §§ 841(d)(3) and 843 (a)(8). The "Reason for Amendment" indicates that "no existing guideline directly addresses these provisions".

The offenses that would be covered by the proposed new guideline are recordkeeping and reporting violations and should be treated as such. The offenses involved are similar to the offense covered by § 2D3.1 (illegal use of registration number to

manufacture, distribute, acquire, or dispense a controlled substance), which sets an offense level of 6. A real offense approach to setting the offense level is unnecessary and inappropriate. If the defendant's conduct amounts to aiding and abetting, then defendant is liable as a principal. If defendant's conduct does not amount to aiding and abetting, then setting the offense level as if defendant had aided and abetted is inappropriate.⁶

Amendment 16(D)
New § 2D3.5 (Violation of Recordkeeping
or Reporting Requirements)

The Commission proposes a new guideline to deal with recordkeeping and reporting offenses in the chemical Diversion and Trafficking Act. The offense level would be [4-8].

We believe that an offense level other than 4 would not be consistent with the Commission's approach to recordkeeping and reporting offenses of the kind covered by the proposed new guideline and would result in unfairly disparate punishment. At present, the offenses covered by the proposed new guideline, violations of 21 U.S.C. § 842(a)(9) and (10), are similar to those covered by the illegal transfer or transshipment of a controlled

⁶The term "with . . . reasonable cause to believe" in proposed subsection (a)(1) sets a civil negligence standard, which we believe is inappropriate in any circumstance because it results in unfairly disparate treatment. Under that standard, an unsophisticated defendant, who is ignorant of the use to which the chemicals will be put, is treated the same as a defendant who intends that the chemicals be used to manufacture a controlled substance.

substance guideline (§ 2D3.4). That guideline sets an offense level of 4. An offense level of 4 is presently required for the offenses that the proposed guideline would cover.⁷

Amendment 20
New § 2J1.10 (Harboring a Fugitive)

The Commission proposes a new guideline to dealing with harboring offenses. The "Reason for Amendment" indicates that determining an offense level under § 2X3.1 (accessory after the fact), the guideline currently applicable to harboring, "is frequently difficult to calculated . . . because it [the offense level] hinges on the defendant's knowledge of the specifics of the fugitive's offense." The new guideline is based upon the escape and failure to appear guidelines (§ 2P1.1 and § 2J1.6), and has a residual provision that bases the offense level on the offense for which the fugitive is wanted. The Commission seeks comment about whether the offense level should be equivalent to, or 1-3 levels higher than, the offense level from § 2P1.1 and § 2J1.6.

We question whether a separate guideline is necessary. Someone who harbors a fugitive is an accessory after the fact.⁸

⁷U.S.S.G. § 2D3.2, comment (stat. prov. n), and U.S.S.G. § 2D3.3, comment (stat. prov. n), indicate that those guidelines apply to violations of 21 U.S.C. § 842. Both guidelines call for an offense level of 4. The Statutory Index, U.S.S.G. App. A, indicates that U.S.S.G. § 2D3.1 also applies to violations of 21 U.S.C. § 842(a), but that guideline covers conduct resulting in the manufacture, distribution, acquisition, or dispensing of a controlled substance. The offense level under that guideline is 6.

⁸See W. LaFave & A. Scott, Substantive Criminal Law § 6.9(a) (1986).

The Commission has advanced no policy reason to treat harborers differently from other accessories after the fact. The Commission's justification is one of convenience.

The Commission has overstated the proof problem. The scienter requirement is not onerous: The defendant must know, or "reasonably should have known" about the required factor. Moreover, the proof problem is the same for all accessories after the fact. In a bank robbery, the accessory after the fact's offense level turns upon whether the defendant knew, or reasonably should have known, such things as the amount taken, whether a firearm was present and how it was used, and the nature of any physical injury caused. It is no less difficult to establish knowledge of such factors than it is to establish that the defendant knew or reasonably should have known that the person harbored was a law enforcement officer, for example.

The "Reason for Amendment" indicates that "the guideline range derived from § 2X3.1 is often higher than the statutory maximum for harboring a fugitive." This problem will arise when the person harbored is a fugitive, rather than an escapee or someone who has failed to appear. We suggest dealing with the problem by amending § 2X3.1 to cap the offense level when the conduct is harboring a fugitive.

Amendment 23(A)

§ 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien)

The Commission proposes to add a base offense level of [12-20]

if the defendant is convicted of an offense involving an unlawful alien who has been convicted of an "aggravated felony". The "Reason for Amendment" indicates that the change "is in response to statutory changes made by" the Immigration Act of 1990. That Act raised the maximum prison term for a violation of 8 U.S.C. § 1327 from 5 years to 10 years.

Congressional action increasing a maximum for an offense does not necessarily require a general increase in the offense levels of the guideline applicable to that offense. A statutory maximum sets an appropriately severe punishment for the most aggravated form of the offense. An increase in the maximum penalty means that Congress believes that the most aggravated form of the offense should be treated more severely, but does not necessarily mean that Congress believes that the heartland form of the offense should be treated more severely. Unless Congress has given directions about the heartland form of the offense, there is no mandate to the Commission to increase the offense level for the heartland form.

Nothing in the Immigration Act of 1990, or its legislative history, indicates that Congress intended to do more than increase the maximum punishment that could be imposed for the most aggravated form of the offense. We therefore believe that this amendment is unnecessary.⁹

⁹We also believe that the proposed amendment takes a rigid approach that will result in unfairly disparate punishment. The term "aggravated felony", as defined in 8 U.S.C. § 1101(a)(43), includes a wide range of offenses and would cover someone who has been convicted of murder, who has been convicted for a second time of possessing small amounts of marijuana, and who has been convicted of selling a hunting rifle to a person with a

Amendment 23(B)**§ 2L1.2 (Unlawfully Entering or Remaining in the United States)**

The Commission proposes to add a new specific offense characteristic calling for an increase of [6-20] levels "if the defendant was deported after sustaining a conviction for an aggravated felony". The "Reason for Amendment" indicates that the change is being made because of the maximum prison term for unlawful reentry after deportation following conviction of an aggravated felony. The commentary to the present guideline suggests a departure "in the case of a defendant previously deported after sustaining a conviction for an aggravated felony . . . or for any other violent felony".¹⁰

The Commission has not presented any data suggesting that the sentences that have been imposed under the present guideline are inadequate. Absent any data indicating a problem, we see no need to amend the guideline.

Amendment 24(A)**§ 2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Serious Injury)**

The Commission proposes a series of revisions in the tampering

dishonorable discharge from a branch of the military. A single offense level does not distinguish among the various types of offenses that fall under the definition of aggravated felony.

We suggest that the Commission gather data about how the courts are sentencing in cases involving an aggravated felony. Such data might provide a basis for crafting an amendment that would draw appropriate distinctions among the kinds of offenses that fall within the definition of aggravated felony.

¹⁰U.S.S.G. § 2L1.2, comment (n.3).

with consumer products guideline. The "Reason for Amendment" describes the changes but does not set forth a reason for the changes.

The effect of the amendments is to change the heartland of the offense from serious bodily injury to bodily injury. This has the effect of increasing the offense level for the less aggravated forms of the offense. The Commission has supplied no data suggesting the need for such a change.

There are drafting problems with the proposed amendments. Thus, proposed subsection (b)(1) directs a 2-level increase in the offense level "if the offense involves extortion", and proposed subsection (c)(3) (formerly subsection (b)(1)) directs application of § 2B3.2 "if the offense involved extortion (and if the resulting offense level is greater than the offense level determined under the product tampering guideline). Amendment 24(A) does not amend the commentary to explain how proposed subsection (b)(1) and proposed subsection (c)(3) relate to each other. If both provisions are to apply when an offense involves extortion, there is double counting.

Amendment 24(B)
§ 2N1.2 (Providing False Information or Threatening
to Tamper with Consumer Products)

The Commission requests comments about whether it should amend § 2N1.2 in a parallel fashion. We do not believe that § 2N1.1 or § 2N1.2 should be amended unless it has been established that there is a problem with them.

Amendment 29(A)
§ 4A1.1 (Criminal History Category)

The Commission proposes to amend the commentary to the criminal history category guideline to define the term "criminal justice sentence" to include unsupervised probation. The "Reason for Amendment" indicates that the purpose of the amendment is to clarify the meaning of that term.¹¹

We oppose promulgation of this amendment because the amendment produces unfairly disparate results. Thus, the proposed commentary states that a sentence to pay a fine is not a "criminal justice sentence", so § 4A1.1(d) would not apply to an offense committed while defendant was under a sentence to pay a fine. If, however, the court imposing the fine puts the defendant on unsupervised probation until the fine is paid, § 4A1.1(d) is applicable. There is no good justification for the disparate treatment.

The purpose of the criminal history score is to predict the likelihood of future criminal behavior. There is no data indicating that adding criminal history points for offenses committed on unsupervised probation improves the predictive power

¹¹There appears to be a drafting problem with the amendment. As revised by amendment 19(A), the term "criminal justice sentence" would mean "a sentence countable under § 4A1.2 . . . having a custodial or supervisory component, whether active or inactive." The application note would then go on to state that "a term of unsupervised probation would be included" in the definition.

It would seem, however, that by definition unsupervised probation does not have "a custodial or supervisory component, whether active or inactive." A better way to execute the Commission's policy may be to insert "(supervised or unsupervised)" after "probation" in § 4A1.1(d).

of the criminal history score. The only purpose served by the change seems to be to increase the criminal history score.

Amendment 34(A)
Chapter 5, Part H (Specific Offender Characteristics)

The Commission proposes to amend §§ 5H1.1 - 5H1.6 to remove inconsistencies and ambiguities and to limit those policy statements to addressing departures. Although we believe that the Commission should seek to increase the offender characteristics that a sentencing court can consider, we do not oppose amendment 34(A). The changes made by amendment 34(A) merely make §§ 5H1.1 - 5H1.6 consistent with each other. We recommend, however, that the Commission reconsider the policies embodied in those policy statements.

Amendment 34(B)
**§ 5H1.4 (Physical Condition, Including Drug Dependence
 and Alcohol Abuse (Policy Statement))**

Amendment 34(B) revises the first sentence of § 5H1.4 to provide that "physical condition or appearance, including physique, is not ordinarily relevant" to a departure determination, and adds a second sentence, stating "Specifically, physical appearance or condition, including physique, is not a relevant factor in determining whether to impose sentence below the applicable guideline range." We question the need for such a provision, and we disagree with the view that a defendant's vulnerability to rape in

prison should be ignored by the court in deciding whether to depart.

Although the "Reason for Amendment" states that courts have departed "in several cases" because of the defendant's vulnerability to rape in prison, there is only one reported case to that effect.¹² The Commission has not presented data indicating that there are other such cases. The one reported case, moreover, was not inappropriately decided -- the defendant had already been sexually assaulted while incarcerated. Absent evidence of inappropriate departures, we see no need for an amendment.

The proposed amendment not only is unnecessary, it is insensitive to the physical and emotional consequences of prison rape¹³ and contrary to the statutory command to insure that punishment not be disparate. A defendant who serves a four year term during which he is raped, in continual fear of rape, or in solitary confinement to avoid rape, has received much harsher punishment than an inmate serving the same term who is not a target for rape.

The Commission's proposal is poorly drafted. If amendment 34(B) is promulgated, the first sentence of the policy statement would provide that physique "is not ordinarily relevant" in determining whether to depart, and the second sentence would state

¹²See United States v. Lara, 905 F.2d 599, 603 (2d Cir. 1990).

¹³The great majority of the victims of prison rape are young and heterosexual. See T. Cahill, "Prison Rape", in Men and Intimacy 31-32 (F. Abbott ed. 1990); "Rape Behind Bars", The Progressive (Nov. 1985 ("Prison rapists typically victimize young, heterosexual first offenders")).

that "physique is not a relevant factor" in determining whether to depart below the applicable guideline range. The two sentences would be inconsistent.¹⁴

Prison rape is a real problem that no conscientious judge should ignore. Amendment 34(B) represents an unjustified restriction on a sentencing judge's ability to depart in those rare instances when a guideline sentence would pose a real danger to the defendant's physical safety.

Amendment 36
§ 6A1.3 (Resolution of Disputed Factors)

The Commission proposes to amend the commentary to § 6A1.3 to state that the preponderance standard "is appropriate to meet due process requirements and policy concerns" and to express the view that the burden "appropriately rests with the government if the guideline adjustment would enhance the sentence (aggravating factors) and with the defendant if the adjustment would reduce the sentence (mitigating factors)." We oppose the amendment as an unnecessary Commission intrusion into questions of law to be resolved by the courts.

¹⁴It might be argued that because the second sentence specifically refers to a downward departure, the first sentence should be read as applicable to an upward departure, giving rise to two standards: Physique ordinarily is not relevant to an upward departure, and never is relevant to a downward departure. Such a reading would be inconsistent with the statement in the "Reason for Amendment" that "the Commission's position [is] that such grounds [youthful appearance and slender physique] are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."

Amendment 37(X)
Chapter 5, Part K, Subpart 2 (Other Grounds for Departure)

The Commission proposes two new policy statements. Proposed § 5K2.16 indicates that a downward departure may be warranted "if the defendant made full restitution for the offense prior to its discovery". Proposed § 5K2.17 indicates that a downward departure may be warranted "if the defendant voluntarily disclosed the existence of, and his responsibility for, the offense to authorities prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise".

We support the promulgation of both proposed policy statements, although we believe that proposed § 5K2.16 should be modified. Limiting § 5K2.16 to the making of full restitution before discovery of the offense unfairly discriminates against defendants of modest means. We suggest that the introductory phrase of proposed § 5K2.16 be changed to read: "If, before discovery of the offense, the defendant has made restitution for the offense to the extent of the defendant's financial ability to do so,".

FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF WASHINGTON

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January 3, 1991

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

Dear Judge Wilkins:

I am writing on behalf of the Legislative Subcommittee of the Federal Public and Community Defenders. We are advised that the Sentencing Commission is soliciting recommendations for amendments to the Federal Sentencing Guidelines Manual for consideration during the next amendment cycle. In this letter, we recommend four changes that we believe will better enable the guidelines and policy statements to achieve the purposes of sentencing. The recommendations set forth below address problems that recur frequently under the guidelines and policy statements presently in effect. We urge your favorable consideration of our suggested changes.

I. Minimal and minor participants in drug cases. Because § 2D1.1 is quantity-based, the offense level for a minimal or minor participant is often so high that the adjustments authorized by § 3B1.2 do not adequately reduce the offense level to reflect a defendant's lesser role. Making a minimal or minor participant's offense level dependent upon quantity serves no significant purpose once a drug offense reaches a certain scale. As a former Assistant United States 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." Young, "Rethinking the Commission's Drug Guidelines: Courier Cases Where Quantity Overstates Culpability," 3 Fed. Sent. R. 63 (1990).

We recommend that the Commission address this matter directly by, first, adding the following new paragraphs to § 2D1.1(b):

- (3) If the defendant was a minimal participant in the criminal activity upon which the offense of

conviction is based, and the offense of conviction involved --

- (A) marijuana, hashish, hashish oil, a Schedule I or II Depressant, or a Schedule II, IV, or V substance, reduce by 4 levels, but in no event shall the offense level be greater than level 16; or
 - (B) any other controlled substance, reduce by 4 levels, but in no event shall the offense level be greater than level 20.
- (4) If the defendant was a minor participant in the criminal activity upon which the offense of conviction is based, and the offense of conviction involved --
- (A) marijuana, hashish, hashish oil, a Schedule I or II Depressant, or a Schedule III, IV, or V substance, reduce by 2 levels, but in no event shall the offense level be greater than level 22; or
 - (B) any other controlled substance, reduce by 2 levels, but in no event shall the offense level be greater than level 26.

In addition, we recommend that the following new subsection be added to § 2D1.1:

(c) Special Instructions

- (1) If subsection (b)(3) or (b)(4) applies, do not apply § 3B1.2.

Finally, we recommend that Application Note 2 to the Commentary for § 3B1.2 be changed by eliminating the last phrase in the last sentence. Specifically, deletion of the phrase "involving a small amount of drugs". Input from Federal Public Defenders in the field indicates that that language operates to deprive deserving defendants of the § 3B1.2 adjustment in cases involving large amounts of drugs despite the fact that the defendant's role is minimal or minor. Our suggested change would be in keeping with the rationale that minimal participants in drug transactions frequently have no knowledge of or stake in the amount of drugs involved in a transaction and that, therefore, their sentences should not be determined solely on the basis of the amount of drugs.

II. Acceptance of responsibility. The present adjustment for acceptance of responsibility is inadequate and does not insure a real reduction in sentence (because of the overlapping ranges in offense levels). A greater adjustment for acceptance of responsibility will not only insure a certain, though small, reduction in sentence, but will also reduce pressure to reach plea agreements that hide facts or are otherwise of a kind that the Commission would like to discourage. We recommend that the Commission amend § 3E1.1(a) by striking "2 levels" and inserting "3 levels".

III. Career offenders. The Commission is required by 28 U.S.C. § 994(h) to assure that certain career offenders receive a sentence "at or near the maximum term authorized". The Commission has interpreted the phrase "maximum term authorized" to mean the maximum term prescribed by statute. A recent Eighth Circuit case, however, suggests that such an interpretation may not be correct. See United States v. R.L.C., 915 F.2d 320 (8th Cir. 1990). The case involved an interpretation of the phrase "maximum term that would be authorized if the juvenile had been tried and convicted as an adult" in 18 U.S.C. § 5037(c)(1)(B). The Eighth Circuit rejected the government's argument that the phrase refers to the maximum prescribed by statute for the offense committed, holding instead that the phrase means the maximum term that the juvenile could have received under the guideline had the juvenile been sentenced as an adult.

We recommend that the Commission adopt amendment option one, published by the Commission on March 3, 1989, see 54 Fed. Reg. 9160-62.

IV. Substantial assistance to authorities. The sentencing court is required by 18 U.S.C. § 3553(a) to consider the defendant's "history and characteristics". Section 5K1.1, however, purports to limit the sentencing court's consideration of one aspect of the defendant's history and characteristics -- whether the defendant assisted authorities -- by requiring a motion by the government. While 18 U.S.C. § 3553(e) requires a government motion before the court can impose a sentence below a minimum term required by statute, 28 U.S.C. § 994(n) does not mandate such a requirement when the departure is below the guideline range but not below a statutory minimum. Indeed, as Judge Clark recently pointed out,

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

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

The requirement of a government motion risks unfairness. If there is a dispute between the government and the defendant as to the nature and extent of the defendant's cooperation, the government can foreclose resolution of that dispute by a neutral third party -- the court -- if the government fails to make a § 5K1.1 motion. Section 5K1.1 is a policy statement and therefore not binding upon the sentencing court, but for the most part courts have chosen to follow the Commission's recommendation. They have attempted to ameliorate the chance of unfairness by indicating that a government motion may not be necessary if the prosecutor acts in bad faith. See United States v. LaGuardia, 902 F.2d 1010, 1017 (1st Cir. 1990); United States v. Justice, 877 F.2d 664, 668-69 (8th Cir. 1989); United States v. White, 869 F.2d 822, 828-29 (5th Cir. 1989).

A more direct way to deal with the concern for fairness is simply to recommend a departure if the defendant has assisted authorities. Section 5K1.1 presently speaks of substantial assistance, but if the goal is to encourage defendants to cooperate with authorities, that goal would be better served if § 5K1.1 covered any assistance. The substantiality of the assistance is better accounted for in determining the extent of a departure. After hearing from the government and the defendant, the court can determine whether the defendant did assist authorities and, if so, assess the nature and extent of that assistance. The sentencing court can be expected to give careful consideration to the government's evaluation of the nature and extent of the defendant's assistance. The approach we recommend avoids needless litigation about whether the government is acting in bad faith and will focus the attention of the parties upon the true issues -- did the defendant assist authorities and, if so, how significant was the assistance.

We recommend that the Commission amend the first sentence in § 5K1.1 to read as follows: "The court may depart from the guidelines upon a finding that the defendant has assisted in the investigation or prosecution of another person."

As always, we appreciate the opportunity to provide the Sentencing Commission with our input. As you know, our attorneys represent thousands of individuals in the United States courts each year. We work with the Sentencing Guidelines on a daily

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basis and we emphatically believe that the recommendations set forth above will improve the guideline system that you have worked so hard to implement. Thank you for your consideration of our recommended changes.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Hillier", followed by a horizontal line and a stylized flourish or arrow pointing to the right.

Thomas W. Hillier, II
Chair, Legislative Subcommittee
Federal Public Defender, Western District
of Washington

TWH:ifh/wilkltr

cc: Legislative Subcommittee Members