

BLANK, ROME, COMISKY & McCAULEY

FOUR PENN CENTER PLAZA

PHILADELPHIA, PENNSYLVANIA 19103

215-569-5500

TWX 710-670-1073 • BLARCOM

FAX 215-569-5555

1400 NORTH PROVIDENCE ROAD

MEDIA, PA 19063

215-891-7800

210 LAKE DRIVE EAST

CHERRY HILL, NJ 08002

609-779-3600

1401 FORUM WAY

WEST PALM BEACH, FLORIDA 33401

407-686-8100

DIRECT DIAL NUMBER:

215-569-5646

March 11, 1991

FEDERAL EXPRESS

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

RE: **Proposal To Amend The Money
Laundering Sentencing Guidelines**

Dear Judge Wilkins:

Larry Feld, Chairman of the Civil and Criminal Tax Penalties Committee of the Tax Section of the American Bar Association and the undersigned, as the Sentencing Guidelines Subcommittee Chair, felt it important to write you directly with respect to the Money Laundering Sentencing Guidelines. It has come to our attention that prosecutors are suggesting that "routine" tax cases may be charged as money laundering offenses under 18 U.S.C. § 1956 (a)(i)(A)(ii). We believe that the money laundering guidelines should be amended to avoid the unanticipated and overly harsh sentencings which may result.

We believe it is helpful to review an example of how the tax and money laundering guidelines interplay in this regard. In a relatively routine corporate criminal tax case, the principals of a corporation will fail to report some or all of their cash receipts for tax purposes. This cash can be placed into other bank accounts or handled in various other financial transactions. We assume that over a three year period, which is the normal and usual time period for a criminal tax case, that just over \$1,000,000 was not reported. Under the Tax Guidelines, the "tax loss" as that term is defined under § 2T1.1, would be at least 28% of the gross income understatement or \$280,000. This would place the individual(s) at a Guideline Level 15 with a sentence of between eighteen and twenty-four months, absent any enhancements or reductions.

Honorable William Wilkins, Chairman
March 11, 1991 - Page 2

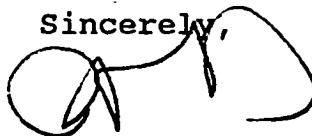
If the mails were used as part of the scheme, creating a mail fraud predicate offense, Section 1956 would permit the same conduct to be charged as a money laundering violation with an intent to evade taxes, pursuant to § 1956 (a)(1)(A)(ii). Under the money laundering guidelines, the offense level would be a base of 23 pursuant to § 2S1.1, and since more than a million dollars in funds was "involved", the guidelines would require an increase of five to a Level 28, assuming no other adjustments. Under these circumstances, the same predicate offense would require seventy-eight to ninety-seven months of incarceration.

It is our view that the § 2S1.1 Guideline should be redrafted so as to preclude this anomalous and unforeseen result. We believe that the § 2S1.1 guideline should be conformed to follow the existing RICO guidelines, which, in turn, incorporate the Guidelines applicable to the underlying predicate offense charged through the RICO count.

It is our recommendation, therefore, with respect to the § 2S1.1 money laundering guideline, that "the base offense level should be the base offense level for the guidelines offense that most closely corresponds to the underlying predicate offense involved or charged, plus one level". Through this procedure, a more significant sentence (plus 1 level) reflecting the nature of the money laundering activity would be imposed, but the Guidelines would preclude prosecutors from using § 1956 to elevate garden variety tax and other offenses in what we believe is an improper fashion.

We will be available to discuss this with you or members of the staff of the Commission in more detail.

Sincerely,

A handwritten signature in black ink, appearing to read 'IAN M. COMISKY', with a large, stylized loop at the end.

IAN M. COMISKY

IMC:smh

cc: William Purdy, Esquire
Lawrence S. Feld, Esquire
Gerald A. Feffer, Esquire

LAW OFFICES OF
PILLSBURY, MADISON & SUTRO

OTHER OFFICES

SAN FRANCISCO, CALIFORNIA
LOS ANGELES, CALIFORNIA
SAN DIEGO, CALIFORNIA
WALNUT CREEK, CALIFORNIA
WASHINGTON, D.C.

TEN ALMADEN BOULEVARD
SAN JOSE, CALIFORNIA 95113

TELEPHONE (408) 947-4000
TELECOPIER (408) 287-8341

WRITER'S DIRECT DIAL NUMBER

March 15, 1991

Proposed Amendments to Section
2R1.1 of Sentencing Guidelines

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

On January 17, 1991, the Commission published in the Federal Register a wide variety of proposed amendments to the sentencing guidelines, policy statements and commentary currently in effect ("Individual Guidelines"). Among the changes proposed are amendments to Section 2R1.1 (Bid-Rigging, Price-Fixing) (the "Antitrust Guideline") which would increase the offense levels for antitrust offenses and reduce the minimum guideline fine for convicted individuals. In response to the Commission's request for public comment, we welcome the opportunity to reiterate several points regarding the Antitrust Guideline made in our comments to the Commission's proposed organizational sentencing guidelines and to make some additional remarks. For the reasons discussed below, we urge the Commission to withdraw the proposed amendment to Section 2R1.1, to remove from Section 2R1.1 the provisions governing the sentencing of organizational antitrust offenders, and to gather the additional data necessary to determine appropriate penalty levels and the necessity for mandatory guidelines for sentencing organizations.

The Antitrust Guideline is different from the other provisions of the Individual Guidelines addressing specific offenses. Contrary to most other offenses, in promulgating the guideline for antitrust offenses, the Commission deliberately set the offense and fine levels for both individuals and organizations high enough to require imposition of sanctions greater than those imposed in the past. In a recent article Mark A. Cohen and David T. Scheffman estimate that organizational fines under the

Antitrust Guideline will exceed past practice by 2500 percent and incarceration for individual offenders is virtually guaranteed. They point out, however, that there is little, if any, empirical basis for concluding that such enhanced penalties are necessary.¹ Moreover, the amendments proposed to Section 2R1.1 will further increase penalties over past practice without any additional research or data to justify the change.

The Antitrust Guideline sets the fine range for organizational offenders at twenty to fifty percent of the volume of commerce, with a minimum of \$100,000. There is even less basis for this rule-of-thumb sentencing formula than there is for the increase in penalties over past practice. No systematic study of sentencing in antitrust cases was conducted by the Commission to link offense and offender-specific characteristics to the level of sanctions levied on organizational offenders.² Instead, the formula appears to be based on assumptions which overestimate damage caused by antitrust offenses and underestimate the probability of their detection.³ Furthermore, the organizational fine formula fails to take into account marketplace penalties resulting from an organization's loss of reputation and the deterrent effect thereof.⁴ In fact, the harm to an organization's reputation and the concomitant loss of share value may well exceed the sum of all other monetary sanctions imposed.⁵

1 Cohen, Mark A. and Scheffman, David T., "The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?" 27 American Criminal L. Rev. 331 (1989) (hereinafter "Cohen and Scheffman").

2 Cohen and Scheffman, p. 337.

3 Cohen and Scheffman, pp. 343-349.

4 Cohen and Scheffman, pp. 350-351.

5 Cohen, Mark A., "Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990" (prepared for the National Conference on Sentencing of the Corporation conducted by The Law And Economics Center, George Mason University School of Law, October 25, 1990), p. 46, fn. 73. This study was attached as Exhibit B to the comments we submitted to the Commission on January 10, 1991.

The dramatic increase in fines and jail time for antitrust offenders as a result of the Antitrust Guideline creates a significant potential for "overdeterrence." This potential for overdeterrence has two components.

First, fear that legal, efficient conduct will be characterized as price-fixing or bid-rigging will cause organizations to avoid such conduct, especially since organizations know that under the guidelines sentencing judges lack the discretion necessary to curb overzealous prosecution of technical violations.⁶ Second, the dramatic increase in sanctions for antitrust offenses will cause corporations to implement overly conservative compliance programs, resulting in increased costs and inhibition of lawful, efficient conduct.⁷ Indeed, even without the increased sanctions under the Antitrust Guideline the United States Supreme Court has recognized the danger that

"salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment."⁸

As a result of the significant potential for overdeterrence engendered by the Antitrust Guideline, we urge the Commission to withdraw the proposed amendment to Section 2R1.1, and to conduct studies to determine whether the severe penalties resulting from the existing Antitrust Guideline are necessary to achieve the deterrence sought by the Commission.

The Antitrust Guideline differs from the other provisions of the Individual Guidelines addressing specific offenses in another significant way--the Antitrust Guideline prescribes fines for organizational offenders as well as for

6 Cohen and Scheffman, p. 354.

7 Cohen and Scheffman note that more than half of 188 Fortune 500 companies surveyed had "explicit antitrust compliance strategies that included avoidance of legal activities that might result in a government investigation or private litigation." Cohen and Scheffman, p. 354.

8 United States v. United States Gypsum Co., 438 U.S. 422, 441 (1978).

United States Sentencing Commission
March 15, 1991
Page 4

individual offenders. We believe that there exists no reason to segregate sentencing for antitrust offenses from other organizational sentencing practices. There is no empirical basis for concluding that deterrence of antitrust offenses requires a different approach to sentencing than the deterrence of organizational crime in general. Thus we urge the Commission to remove provisions governing the sentencing of organizational antitrust offenders from Section 2R1.1, and to include antitrust offenses in the study we have recommended regarding sentencing guidelines for organizational offenders.⁹

Thank you for your consideration of these comments on Section 2R1.1 and the Commission's proposed amendments thereto.

Very truly yours,

PILLSBURY, MADISON & SUTRO

9 See "Comments Regarding 1990 Draft Guidelines for Sentencing Organizations" submitted by Pillsbury, Madison & Sutro, January 10, 1991 and "Comments Regarding Proposed Guidelines for Sentencing Organizations" submitted by Pillsbury, Madison & Sutro, February 15, 1990.

750 THIRD AVENUE
NEW YORK, N.Y. 10017
(212) 826-2400

7788 LEEBURG PIKE
FALLS CHURCH, VIRGINIA 22043
(703) 848-2890

WASHINGTON, PERITO & DUBUC

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

1120 CONNECTICUT AVENUE, N. W.

WASHINGTON, D. C. 20036

(202) 857-4000

TELEX: 892415-904000
TELECOPIER: (202) 857-4410

2882 WORLD TRADE CENTER
401 EAST PRATT STREET
BALTIMORE, MARYLAND 21202
(301) 952-0212

PAUL D. LAXALT
SENIOR COUNSEL

March 19, 1991

By Telecopier

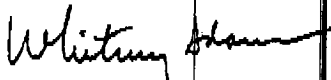
Paul K. Martin
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Re: Fed. Reg. 1846 (Section 2S1.1)

Dear Mr. Martin:

I write to personally support the comment submitted by James M. Becker dated March 18, 1991 and also to point out a particular anomaly in Guideline 2S1.1(a)(1) that ought to be corrected. The current guideline provides for a level 23 "if convicted under 18 U.S.C. § 1956(a)(1)(A) or (a)(2)(A)." Since adoption of this Guideline, Section 1956(a)(1)(A) was amended in 1988 to add a tax code scienter (18 U.S.C. § 1956(a)(1)(A)(ii)). The Commission's level 23 guideline is premised on the greater culpability of those who encouraged or facilitated a crime specified in Section 1956(b)(7) but the tax violations are not one of those more serious offenses. The combined effect of the Commission's current guideline, promulgated before the statutory change, and the 1988 amendment adding Subsection 1956(a)(1)(A)(ii) is to escalate most tax offenses automatically to level 23 (but see Guidelines 2T1.1-2T4.1). I believe this is an inadvertent oversight and that the Commission's intent would be to treat Section 1956(a)(1)(A)(ii) offenses no more seriously than a level 20. This could be accomplished by amending Guideline 2S1.1(a)(1) to read as follows: "23 if convicted under 18 U.S.C. § 1956(a)(1)(A)(i) or (a)(2)(A)."

Very truly yours,



Whitney Adams, Esq.

COYLE & HENRY, P.C.

LAWYERS

ROBINSON RENAISSANCE

119 NORTH ROBINSON, SUITE 320

OKLAHOMA CITY, OKLAHOMA 73102

J. W. COYLE III
DAVID P. HENRY
JOHN E. VITALI
DAVID T. MCKENZIE

TELEPHONE
(405) 232-1988
TELECOPIER
(405) 272-9859

March 15, 1991

United States Sentencing Commission
Attn: Communication Director
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 24004

Re: Federal Sentencing Guidelines Commentary - Drug
Quantities for Less Culpable Aiders and Abettors

Dear Communication Director:

I actively practice Federal criminal defense law. My involvement with the Guidelines on behalf of my clients has convinced me of the unfairness of relying on drug quantities to arrive at an appropriate guideline range. My involvement in these cases, and the unfair sentences that I have seen in this District, and all of the Districts from the Criminal Law Reporter, the Guidelines Grapevine, and other information that I receive, confirms my feelings.

In the February 13, 1991, edition of the Criminal Law Reporter alone, there was a decision where the 2nd Circuit rejected disparity among co-defendants' sentences as a cause for downward departure, and in a District Court case from Arizona, it was reported that the disparity in drug sentences prompted a Judge to go under a mandatory minimum sentence. (48 Cr1 1407, 1409)

In my opinion the most logical position is to attack the problem of quantity-based sentencing. Clearly, the effects of relevant conduct under 1B1.3 which extend drug quantities often well beyond the scope of the individual defendant is responsible for creating the anomalies. "Relevant conduct" should be more stringently analyzed, and certain specific criteria assigned to hopefully avoid the problems.

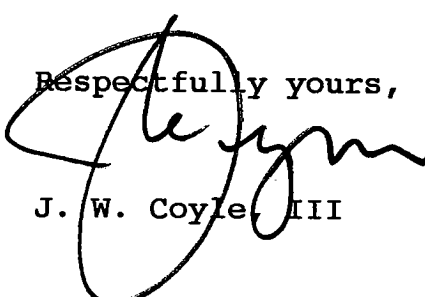
An additional solution is to change the role in the offense application so as to provide further adjustment for minor and minimal participates.

There are numerous other problems I have with the Guidelines, including the fact that they give the government much more power

Page 2
Re: Guidelines
3/15/91

than they ever had before the Guidelines were in effect. However, I will complain about those problems in separate correspondence, as I sincerely believe this is the most unfair situation that I have seen in seventeen years of criminal defense practice. I urge the Commission to change it. It is admirable that the goal of the Guidelines is to establish consistent, and uniform sentences. However, I believe the sentences should first, and foremost be fair.

Respectfully yours,



J. W. Coyle, III

JWC/sa

LAW OFFICES OF
PILLSBURY, MADISON & SUTRO

OTHER OFFICES

SAN FRANCISCO, CALIFORNIA
LOS ANGELES, CALIFORNIA
SAN DIEGO, CALIFORNIA
SAN JOSE, CALIFORNIA
WALNUT CREEK, CALIFORNIA

WRITER'S DIRECT DIAL NUMBER

SUITE 1100
1667 K STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE (202) 887-0300
TELECOPIER (202) 296-7605

March 15, 1991

Proposed Amendments to Section
2R1.1 of Sentencing Guidelines

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1331 Pennsylvania Avenue N.W., Suite 1400
Washington, D.C. 20004
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United States Sentencing Commission
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Page 4

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Thank you for your consideration of these comments on Section 2R1.1 and the Commission's proposed amendments thereto.

Very truly yours,

PILLSBURY, MADISON & SUTRO

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LAW OFFICES OF

SAUL, EWING, REMICK & SAUL

3800 CENTRE SQUARE WEST

PHILADELPHIA, PA 19102

(215) 972-7777

CABLE ADDRESS: BISSAL
TELECOPIER (215) 972-7725

TWX 83-4788
(W. U.) EASYLINK: 62073872

300 CHESTER FIELD PARKWAY
SUITE 200
GREAT VALLEY CORPORATE CENTER
MALVERN, PA 19355
(215) 251-8050

PLAZA 1000 MAIN STREET
SUITE 205
EVESHAM AND KRESSON ROADS
Voorhees, NJ 08043
(609) 424-0098

222 DELAWARE AVENUE
R. O. BOX 1285
WILMINGTON, DE 19899
(302) 654-1413

1020 19TH STREET, N.W.
SUITE 800
WASHINGTON, D. C. 20036
(202) 223-7860

TWENTY-FIRST FLOOR
237 PARK AVENUE
NEW YORK, NY 10017
(212) 551-3502

DIAL DIRECT (215)

972-1959

March 18, 1991

VIA TELECOPY

Paul K. Martin, Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, DC 20004

Dear Mr. Martin:

I am writing on behalf of the Money Laundering Subcommittee of the White Collar Crime Committee of the American Bar Association's Criminal Justice Section. This letter is in response to the Sentencing Commission's request for public comment on its proposed amendments to the Sentencing Guidelines that appear in the January 17, 1991 issue of the Federal Register (56 Fed. Reg. 1846).

The Subcommittee notes that the Commission has proposed amendments 26, 27 and 28 to three guidelines with regard to money laundering offenses -- specifically, U.S.S.G. §§ 2S1.1, 2S1.3, and 2S1.4. The Subcommittee does not have substantive comments on the merits of these three proposed amendments. However, if passage of these three amendments would preclude the Commission from considering during the 1992 amendment cycle a more significant amendment to the money laundering guidelines, then we strongly recommend that the Commission defer action on the proposed amendments until it has considered the more significant one.

The Subcommittee maintains that a more significant amendment to U.S.S.G. §§ 2S1.1 and 2S1.2 is called for and should be given immediate priority. In a September 11, 1990 letter to the Sentencing Commission, I identified an apparent anomaly in the way in which U.S.S.G. §§ 2S1.1 and 2S1.2, applicable to violations of 18 U.S.C. §§ 1956 and 1957, operate in relation to the guidelines for certain comparable offenses. I pointed out that because of

this apparent anomaly, the government's charging decision with regard to money laundering offenses can effectively undermine the policy choices made by the Commission in promulgating guidelines for other "white collar" criminal offenses. By letter dated September 19, 1990, the Money Laundering Subcommittee endorsed my position that a working group should study this issue and further recommended that the issue be given immediate priority. Indeed, the Money Laundering Subcommittee, together with the Criminal Justice Section's Sentencing Guidelines Committee and members of the Commission's staff, had endeavored to prepare a formal proposal for the Commission's consideration. Unfortunately, that was not accomplished in time for the Commission's consideration in the 1990-91 amendment cycle.

The Money Laundering Subcommittee still believes that this issue involving Guidelines §§ 2S1.1 and 2S1.2 is an important one and requires the study of a working group. Accordingly, the Subcommittee renews its request that the Commission give immediate priority to this issue in the 1992 amendment cycle. If the Commission decides to form a working group on this issue, the Subcommittee respectfully requests an opportunity to have formal input.

Respectfully submitted,

James M. Becker
James M. Becker

JMB/mv

cc: Whitney Adams, Esquire
Chairperson, ABA White Collar
Crime Committee, Criminal
Justice Section

Steven C. Tabackman, Esquire
Co-Chairperson, ABA Money
Laundering Subcommittee of
the White Collar Crime
Committee

JANA V. JAY
ATTORNEY AT LAW
3061 TERRACE AVENUE
NAPLES, FLORIDA 33942
TELEPHONE (813) 793-3321
TELEFAX (813) 793-2584

March 15, 1991

Communication Director
U.S. Sentencing Commission
1331 Pennsylvania Avenue NW Ste 1400
Washington, D.C. 20004

Re: Proposed Amendments to Sentencing Guideline

Dear Sir or Madam:

It is my understanding that the Commission has before it at this time certain proposed amendments to the Federal Sentencing Guidelines that provide for alternative considerations for first-time offenders. This is a matter of substantial concern to me; my fiance is a resident at Ray Brook FCI, having been committed to the custody of the Bureau of Prisons for some twenty-seven years.

Robert Fowler was convicted of possession of cocaine in a reverse sting operation conducted in the Southern District of Alabama. The prosecutor, with one eye on the guidelines and another on the scale, told the jury that the group of men whose fates they were to decide, lined up there across the courtroom like ducks in a shooting gallery, were responsible for poisoning the nation with five hundred plus kilos. Defense counsel had requested an opportunity to test the substance, which had actually come from the government's warehouse in Texas, not, as the jury was led to believe, from Central America. During the time prior to trial, they were told that testing to ascertain the amount was not relevant. After the trial, the defense was told that the substance had been destroyed, and that they had been told that there had been a deadline after which testing would not be permitted. None of the fifteen lawyers representing defendants recalled any such deadline, but it was not the first misrepresentation that had been made by the prosecution team.

At trial, the prosecution put on evidence that Mr. Fowler was in a warehouse on April 18, 1990, underneath a Nissan automobile, allegedly attempting to find and gain access to a secret compartment that was supposed to hold sixty kilos. Also present were several co-defendants, two tractor-trailers, a pile of packages, and the case agents. Robert had been there, the agents said, for twenty to thirty minutes, trying to find the compartment. Robert Fowler knows cars cold. If he was truly an integral part of a well-planned drug conspiracy, he would have been in the compartment, if it exists, in a heartbeat. He was under the car when he felt a shotgun in his ribs and heard someone say "Freeze, motherfucker, or I'll blow you away".

I suppose the streets will be safer for twenty-seven years, now that Robert Fowler will not be able to hide under station wagons. We know the theory--put away the people who make the

substance accessible, wipe out the distribution network, and you will eliminate the problem. It makes for great press for people running for re-election, that they are responsible for the remarkable progress being made in the drug war (if you don't count all of the importation done at the hand of customs agents). But isn't it a gross misallocation of resources, to spend the estimated \$1,900 per month to incarcerate a man like Robert Fowler?

Robert is a middle-aged free spirit, with a soft spot for children and animals. He has a whiskey sour from time to time, and smokes too much; such is the extent of his substance abuse. He was a merchant seaman for a time, and saved his money rather than going ashore to drink and womanize. He bought land, behind mine, in the pine and palmetto. I met him at our neighbor's house, on New Year's Eve four years ago; we had both happened to stop by to wish Judge Lansdale a good year. He walked me home, through the woods.

He did carpentry work for a living, rented out the house on his property to cover the mortgage payment, and took up residence in a little travel-trailer underneath a tangle of Brazilian pepper. He drove an old pickup truck. With his skills at construction work, he had planned to build a home on his land, but there was no money for materials.

On April 9 last year I picked a fight with Robert, over the lint in the dryer filter or something. He borrowed some money, and left to visit his mother. As always, he called home from time to time. Then he was gone; I received the One Phone Call. Prosecutor Bedwell faxed the indictment to my office. I read it, then laughed, thinking 'this is not my Robert, not to worry', then my knees buckled. Two months later I miscarried.

We are little people, with a rich little life that we share. I have a small family law practice, representing women who can never afford to pay, or unwed dads who want to see their children. Robert took care of the house when his work was slow, and looked after my children when they were sick. The richness in our lives isn't the kind that is kept in banks, or driven, or lived in. It is honest sweat, and genuine love.

When Robert was arrested, he reportedly said that he was sorry he got greedy. His previous criminal history consists of a state misdemeanor possession charge twenty years ago, which was dismissed. Now he serves twenty-seven years, for having been tempted by something that is foreign to us, and contrary to our principles. This is harsh, this is draconian. This is not a sentence that is sufficient, but not greater than necessary. This is not my Robert.

Please consider the situation of first-time offenders who truly have a minor role. There never was so penitent a man as Robert Fowler. There is no safer bet than that he will not so much as spit on a sidewalk when he is free.

Respectfully submitted,

JANA V. JAY

JVJjav

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 626-8500
FAX (202) 662-7631

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



March 20, 1991

Jana V. Jay
Attorney at Law
3061 Terrace Avenue
Naples, Florida 33942

Dear Ms. Jay:

This is to acknowledge your recent letter to the Sentencing Commission.

Thank you for your thoughtful comments on the sentencing guidelines. Your letter will be reviewed by the appropriate staff member.

We appreciate your taking the time to write to us.

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael Courlander".

Michael Courlander
Public Information Specialist

ONE BATTERY PARK PLAZA
NEW YORK, NEW YORK 10004
212-637-6000

47, AVENUE GEORGES MANDEL
75116 PARIS, FRANCE
(1) 45-53-99-01

Hughes Hubbard & Reed
555 South Flower Street
Los Angeles, California 90071

TELEPHONE: 213-489-5140

TELECOPIER:
213-629-3511 213-629-0827

901 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301
202-371-6240

801 BRICKELL AVENUE
MIAMI, FLORIDA 33131
305-358-1666

DAVID A. LOMBARDO
213-236-0883

March 11, 1991

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

Re: Proposed Guideline Amendments

Ladies and Gentlemen:

Although I have not been able to review all of the proposed guideline amendments that were recently published for comment, I thought you might find my comments on the few proposed amendments I did review to be of some value.

Proposed Amendment No. 2

I have not reviewed the guideline in sufficient detail offer any opinion as to its substantive reasonableness. However, the wording of paragraph (b)(5) is problematic for at least three reasons. First "in connection with" is vague and probably is overly broad. It could require the court to examine and decide whether to apply any number of guidelines. Second, "offense level from the offense guideline applicable to that other offense" should read something like "the offense level for such offense as provided in Part II, without adjustments from Part III." Third, "or otherwise takes such conduct into account" is vague.

Proposed Amendment No. 3

This amendment should not be adopted for two reasons. First, the concept of treating a theft statute as if it were a jurisdictional "hook" for some other offense. Firearms and drug offenses ~~can~~ be prosecuted under federal law without resort to prosecution for theft. The mere ~~fact~~ that a firearm is involved does not provide a justification for departing from the underlying philosophy of offense of conviction sentencing. Second, the reference "apply the relevant guideline" is unworkably vague and can produce nonsensical results. What is the "relevant guideline" if someone steals a firearm that he could lawfully own, and possession of which does not violate federal law, or if he steals a controlled substance not knowing that it is a controlled substance (so that he would not be guilty of unlawful

possession)? What if someone steals \$10 million of property, including one firearm worth \$200, or a marijuana joint? Should we apply the guideline for unlawful possession, thus producing a much lower offense level? Similarly, what if someone is convicted of both theft and a federal firearms violation? The result under the proposed amendment would be lower than under the current guidelines, because the structure of the proposed amendment precludes an enhancement for the conviction of multiple counts.

Proposed Amendment No. 5

The numerical amounts and offense levels are arbitrary. It is better to encourage the judge to depart upward in such unusual cases.

Proposed Amendment No. 7(A)

Based upon my knowledge of the data, the proposed change is unwarranted to conform to past practice; if anything, the current offense level is above past practice. Nor is an increase required to reflect the seriousness of the offense, in my opinion.

Proposed Amendment No. 7(B)

No compelling argument is provided for departing from the offense of conviction principle and the multiple count rules. Why should robbery be treated differently from other non-grouped counts? The Department of Justice can adequately control plea bargaining. Furthermore, the proposed rule will simply force plea and sentencing bargaining to be concealed from public view: the prosecutor will not indict the defendant for all possible charges (or will file an information) if he pleads guilty.

Proposed Amendment No. 25

The increased reliance on prison and decreased reliance on fines would not appear justified. The literature suggests that short prison sentences are an effective deterrent, but not that much longer sentences will be significantly more effective. In addition, prison is a costly sanction, whereas fines create revenue for the government. I also do not believe that an antitrust violation (even price fixing) is equally serious as fraud from the standpoint of its moral reprehensibility.

I hope you will find these comments helpful. If I can be of assistance to the Commission, please let me know.

Very truly yours,



David A. Lombardero

John F. Gardner
Attorney at Law
833 N.E. Thompson
Portland, Oregon 97212
Tel: (503) 284-1803

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

**Re: Proposed Changes in Sentencing Guidelines Re:
Sentencing for Drug Offenses**

Dear Sir or Madam:

I am writing in strong support of reforms to the current sentencing guidelines to reduce the reliance of the current standards on the quantity of drug involved in punishing drug offenders, and to place more emphasis on the merits of the individual offender based on mitigating factors such as those stated in Section 3B1.2 (Mitigating Role) of the Guidelines. Without such reforms, courts will tend not to give adequate consideration under 18 U.S.C. Section 3553(a) to the following factors:

"the nature and circumstances of the offense and the history and characteristics of the defendant;"

under 18 U.S.C. Section 3553(a)(1) and:

"the need for the sentence imposed - ***(D) to provide the defendant with needed educational and vocational training,..., or other correctional treatment in the most effective manner;"

under 18 U.S.C. Section 3553 (a)(2)(D). Both of these factors are mandated to be considered under 18 U.S.C. Section 3553(a) "Factors to be Considered in Imposing a Sentence."

I believe that the following at least the following issues should be considered by the Commission in considering reforms to the Sentencing Guidelines:

**I. Over-reliance on the "Drug Quantity" to Determine is a
Oversimplifies A Multi-Dimensional Issue of the Proper
Sentence for an Individual Drug Offender**

A number of factors should be considered in any proper decision on the length of a sentence that a particular person is given for a drug offense; the current guidelines are much too

arbitrary in their strong emphasis on the quantity of drug involved. This is readily and easily illustrated by the following examples:

Drug Offender A, a first offender, and an otherwise upstanding citizen, who was an Honor student in High School and College and who has a steady job and has performed outstanding service to his community, is convicted of manufacture (or possession) of quantity 2X of drug #1. Following his initial arrest, and before sentencing, Offender B cooperated fully with authorities, broke off his ties to any illegal activity, showed genuine remorse for his crime and attempted to make redeem himself to his family and society by becoming a productive, hardworking, loyal employee and by providing more voluntary community service with local organizations. Sentence for Offender A based on drug quantity: 5 years.

Drug Offender B, with a long criminal record, and a history of criminal activity of various types, a poor academic record in school, with no employment history, is convicted of manufacture (or possession) of X quantity of drug #1. Following his initial arrest Offender B did not cooperate with authorities, made no attempt to pursue a crime-free life but instead continued to be involved in illegal activity of other types, showing no remorse for his crime or attempt to make reparations to society for his crime. Sentence for Offender B based on drug quantity: 2.5 years.

It is obvious that Drug Offender B is (1) more likely to repeat his crime; (2) less likely to respond to any rehabilitative effort outside of prison (such as probation or a work release program); (3) more less likely to intergrate himself into a community in a productive manner when he is released from prison than Drug Offender A.

Yet, the sentencing guidelines, mandatorily dictate the length of Offender A's sentence based largely and arbitrarily upon the drug quantity involved in the individual case, not the much more important factors of the background, character, interest in pursuing education and employment record, or societal contributions of the individual defendant before or after his conviction. Thus, the sentencing guidelines not allow the judge any significant discretion to adjust the sentence of Drug Offender A downward to meaningfully reflect his basicly good moral character.

As a result, the Drug Offender A is forced to endure a long prison sentence, even though it is highly unlikely he will never repeat his crime, and even though the sentence will have a very destructive effect upon his family, and his prospects for . This result should not occur under any humane or reasonable system of justice.

II. Economics Dictates more Consideration be Given to Individual Offender Characteristics

If humanity does not dictate that mitigating factors be given more consideration, surely economics must: it is beyond dispute that the imprisonment of certain offenders, like Offender A in the above hypothetical (who are not being rehabilitated by imprisonment) is a waste of precious taxpayer funds in this time of budget deficits!!! Although the United States has the highest per capita incarceration rate of any county in the world, it is clearly not having an effect on the crime rate.

III. Certain Offenders Should be Allowed Alternative Means of Rehabilitation and Restitution to Society Outside of Prison

By a broadening of the consideration given to mitigating factors, the Commission can allow certain types of offenders to demonstrate that they should be rehabilitated through less prison time and more supervised rehabilitative efforts outside of prison, e.g., work release, community service, halfway houses, restitution to victims and society. There is no benefit to society in "warehousing" offenders who clearly pose no danger to society!

Conclusion

The current sentencing guidelines give far too little consideration to mitigating factors which would allow individual offenders to demonstrate their underlying good moral character and efforts and desires to attain or regain status as upstanding moral citizens. This causes an inordinate waste of taxpayer money, human resources, and tears at the emotional fabric which ties the offender's family together. Reforms to change this situation must be adopted as soon as possible!

Sincerely,

John F. Gardner

BAUER, PARSONS & CAMPBELL

**ERIK L. BAUER
LES J. PARSONS
THOMAS A. CAMPBELL
THOMAS A. BALERUD**

Attorneys at Law
1008 South Yakima Avenue
Tacoma, Washington 98405
(206) 383-2000
(206) 272-6871

March 27, 1991

United States Sentencing Commission
1331 Pennsylvania Avenue N.W., Suite 400
Washington DC, 20004

Dear Members of the Commission:

I am a member of the CJA panel in Tacoma, Washington. I write to you with regard to the contemplated amendments to the Federal Sentencing Guidelines for 1991. In this regard, I have reviewed a letter by Mr. Thomas W. Hillier, II, of the Federal Public Defender's Office in Seattle, Washington, a letter by the Honorable Frederic N. Smalkin and the statement of Barry J. Portmen, rendered before the commission on March 5, 1991. In this regard, I agree with all three of those authors whole-heartedly in their comments to the commission.

I have enclosed a copy of Mr. Hillier's letter because of his recommendations to the commission regarding the treatment of minimal or minor participants in drug cases. I am particularly concerned with that issue because I have become very frustrated and disappointed with the law as it treats those individuals. I think that Mr. Hillier's recommendations are well thought out and I would encourage the commission to adopt his recommendations. Additionally, I am in agreement with Mr. Hillier's recommendations regarding guideline §5K1.1. I think that logic and fairness require that the Court be able to consider the full extent of a defendant's cooperation, even when the United States Attorney is not willing to denominate that cooperation as substantial. The Court, as an independent third party, should be made available for resolution of the disagreement between counsel for the United States and for the defense.

Finally, I believe that guideline §1B1.3 has no place in our criminal justice system. I have seen this section used to deprive the defendants of their day in court and relieve the government of its obligation to prove its case beyond a reasonable doubt. The unforeseen consequences of a plea agreement can be shocking when the government releases the full quantum of its evidence to the probation and parole officials to be included for consideration in

a presentence report. Frequently, the information has not been seen by defense counsel and could not be the basis for advice prior to the entry of the plea agreement. The disputed facts become fodder for a sentencing hearing when the burden of proof has been greatly diminished and the jury right has expired. In essence, the current guideline structure gives the prosecution the opportunity to deceive the defense into a plea agreement on less than full information. I can not believe that the commission intended this type of result. I think that this section brings the guidelines back to a pure real offense system.

In closing, I would like to thank the commission for considering my input.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Campbell' or similar, written in a cursive style.

THOMAS A. CAMPBELL
Attorney at Law

TC:TN

cc: Thomas W. Hillier

LAW OFFICES OF
KATRINA C. PFLAUMER
2300 SMITH TOWER
SEATTLE, WASHINGTON 98104
(206) 622-5943

March 26, 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:

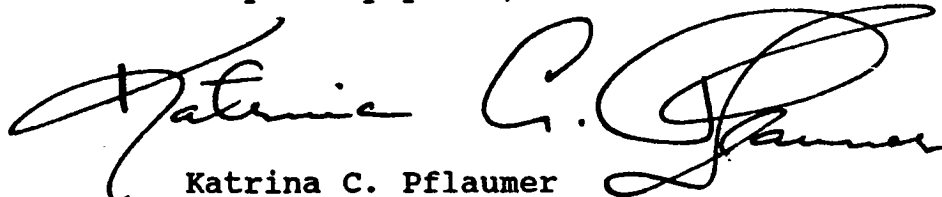
I have reviewed some of your proposed amendments to be reported to Congress in May. As a general practitioner who represents primarily federal criminal defendants, I would like to make a few comments. First of all, the entire system seems to be sinking with the complexity of continuing amendments to the Guidelines. Second of all, the continuing trend of ever greater sentences for criminal offenders is leading to a large population of seriously institutionalized individuals, who do not know how to reintegrate into society. The general disparity in sentences continues, now largely controlled by the prosecutors' offices.

As to specific comments, I want to reiterate the many comments I am sure you have had which indicate that to great an emphasis is currently placed on a quantity of drugs in an overall conspiracy, resulting in wildly disproportionate sentences for minor participants who play essentially the same roles. Secondly, acceptance of responsibility should be given a larger range, allowing some meaningful credit where it is appropriate. Thirdly, "substantial assistance to authorities" should be considered regardless of whether the government makes a motion to that effect. Next, section 5G1.3 should not be amended, leaving the court with the discretion regarding consecutive and concurrent sentences.

Finally, I oppose the new proposed §5H1.11. An individual should be given the benefit of his or her prior contributions to the community.

Thank you in advance for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Katrina C. Pflaumer", written in a cursive style.

Katrina C. Pflaumer

KCP:nz

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 626-8500
FAX (202) 662-7631

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



April 4, 1991

MEMORANDUM:

TO: Chairman Wilkins
Commissioners
Senior Staff
Legal, Drafting, Hotline Staffs

FROM: Mike Courlander

SUBJECT: Public Comments on Proposed Guideline Amendments

Appended for your review is a letter from a private, defense attorney in Seattle, Washington who comments on guideline complexity, prisonization, sentencing disparity, and several specific, proposed amendments to the guidelines for individuals.

Martin & Associates

Attorneys at Law

COMM

C. Rabon Martin

Associate:
Stuart Southerland

Of Counsel:
Charles W. Prather

RECEIVED MAY 01 1991

April 24, 1991

Communications Director
United States Sentencing Comm.
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 24004

Dear Director and Commission Members:

I respectfully wish to bring to your attention my observations respecting the federal sentencing guidelines, insofar as the same deal with the sentencing of drug offenders, and the relationship of the quantity of drugs involved to the length of the sentence imposed.

I have practiced law for 22 years and the emphasis of my practice has been in the defense of drug related criminal cases. I have also been the State Director of the Oklahoma Chapter of the National Organization for the Reform of Marijuana Laws (NORML) since 1972. Since the adoption of the federal sentencing guidelines, I have had occasion to represent a number of individuals in federal court who were convicted and sentenced under the guidelines.

From my experience, and in my estimation, the federal sentencing guidelines, particularly in the area of drug offenses, are a source of extraordinary hardship and injustice. Much like a turnpike cloverleaf design which looks good on a blueprint, but results in a horrendous traffic jam once the interchange had been built according to that blueprint, the sentencing guidelines may have looked good on paper, but are a disaster in the reality of their implementation.

Specifically, I invite you to consider the following:

1. For the first 150 of America's 200 years of existence, drugs were legal, yet America somehow survived. In the last fifty years, we have become irrationally

1023 W. 23rd Street
Tulsa, OK 74107
(918) 587-9000

4910 N. Classen
Oklahoma City, OK 73118
(405) 848-9001

Seven Waterfront Plaza
Suite 400
500 Ala Moana Boulevard
Honolulu, HI 96813
(808) 538-3300

Toll Free: (800) 324-7141

FAX (918) 587-8711

Reply to: **TULSA**

Communications Director
April 24, 1991
Page Two

obsessed with paranoia over illicit drugs, to the point where between one-third and one-half of all new prison inmates are being incarcerated for drug offenses. Our state and federal prisons are overflowing and the solution seems not to be the incarceration of fewer people, but the building of more prisons. Sentences are longer and probation and parole appear to have been effectively abolished.

2. Sentencing of drug offenders seems muddled by a preoccupation with quantity. This preoccupation has led us to such silliness as the U.S. Supreme Court deciding whether or not the weight of the blotter paper that contains the LSD should be included in determining quantity for sentencing purposes under the guidelines.

3. It has been my experience that the guidelines are hated equally by U.S. Judges, prosecutors, probation officers and defense attorneys alike, primarily because they reduce the stature of a federal judge to that of a robot, stripping him of the power to be compassionate or to take into account mitigating factors for which there is no slot provided in the sentence calculation formula. I recently represented a gentleman accused of running a methamphetamine laboratory. His projected release date is 2038, when he will be in his mid-80s. This provides a striking contrast to the average 7-1/2 years served by a person convicted of first degree murder.

4. Although the stated objectives of the sentencing guidelines was to achieve uniformity in sentencing, in reality this objective has been overshadowed by the far more striking result of an across-the-board radical increase in the severity of sentences imposed in all federal prosecutions. Sentences are now measured in terms of decades, rather than years. Many sentences, particularly in drug cases involving a larger quantity, are now the effective equivalent of a death penalty, since the offender will in all likelihood die of old age and natural causes while still in custody. Stricter sentences will certainly not solve the drug problem and these Draconian penalties reflect a total departure from the original objective of straightening out the offender and turning him back into society as a productive citizen.

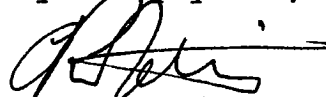
5. Another unfortunate collateral effect of the sentencing guidelines is the listing of a substantial portion of the fact finding process out of the constitutionally protected context of a jury trial and placing it

Communications Director
April 24, 1991
Page Three

in the unregulated hands of a probation officer. After conviction, the probation officer prepares a presentence report with guideline sentencing calculations. This unregulated fact gathering process turns the probation officer into judge, jury and executioner. There is no right of confrontation, no due process, no presumption of innocence and no trial by jury. The probation officer is not limited to the confines of the charging indictment, let alone the confines of the count or counts upon which the defendant was convicted. To the contrary, the probation officer can include quantities relating to counts upon which the defendant was acquitted by the jury. True, the defendant has the right to object to the presentence report and is entitled to a hearing. However, this only serves to corrupt a simple sentencing hearing into a contested factual tug of war in which the judge must review the unilateral investigation, prosecution and adjudication functions of the probation officer.

All in all, while your efforts to achieve uniformity in federal sentencing are to be applauded, the sad truth is that the result actually achieved, as distinguished from the idealistic goal, is almost universally detested and despised by the bench, the bar and, last but not least, the individual defendants who fall victim to its rampant and extreme injustices.

Very truly yours,



C. Rabon Martin

CRM/slp