



Department of Justice

STATEMENT

OF

JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINES AMENDMENTS

ON

MARCH 5, 1991

Chairman and Members of the Commission:

I appreciate the opportunity to appear before you on behalf of the Department of Justice to discuss the sentencing guideline amendments the United States Sentencing Commission has recently proposed. The amendments cover a number of important guideline areas, and we commend the Commission for considering many of the concerns we raised with you early in this amendment cycle.

I would like to highlight a few of the most important proposed guideline amendments in my statement today. First, in the areas of criminal history, firearms, and the reentry of aliens, the proposed amendments will significantly improve the guidelines from a law enforcement standpoint, and we urge the Commission to promulgate final amendments along the lines proposed. However, the Department believes that the amendments affecting financial institution fraud and substantial assistance either do not go far enough or create new problems.

CRIMINAL HISTORY

Category VII (Amendment 31)

The Commission has proposed a new criminal history Category VII to provide increased sentences for offenders with particularly extensive criminal backgrounds. We strongly believe that this new criminal history category is needed to provide adequate sentences for the most serious recidivists. Under the current guidelines defendants with criminal history scores of 13 or more are all included in Category VI. Unless the sentencing judge departs from the guidelines on the basis of criminal history, a defendant with a criminal history score of 18, for example, would

receive the same sentence for a particular offense as a defendant with a score of 13. Of course, a judge is not bound to depart from the guidelines, even when sentencing a defendant with a substantial criminal history score, and defendants with extremely diverse backgrounds may be sentenced alike. We urge the Commission to include an additional criminal history category in order to recognize distinctions that so far have been ignored.

The Commission has proposed three alternative approaches to creating a new Category VII. We favor the third, which provides that Category VI would include cases with 13 to 15 criminal history points and Category VII would include those with 16 to 18 points. Option three follows the pattern established for Categories III, IV, and V, each of which incorporates a three-point spread in criminal history points. Option three also specifies that courts may either sentence defendants with more than 18 criminal history points within the range prescribed for Category VII or depart upward.

Option three best addresses the need for an additional criminal history category by focusing on those offenders whose criminal history scores exceed the current cap of 13 by just several points. In addition, by authorizing upward departures, this option provides flexibility for judges sentencing defendants with even higher criminal history scores.

Related Cases (Amendment 30)

We also urge the Commission to adopt an amendment to address the problem of criminal history scoring for prior cases consolidated for trial or sentencing. The current criminal history guidelines artificially count such sentences for unrelated offenses as a single sentence.¹ The fact that cases were consolidated for trial or sentencing for purposes of efficiency in the administration of justice should not dictate criminal history results.

The Commission has proposed to address these concerns by presenting three options, all of which would exclude from consideration as "related offenses" those which resulted from separate arrests. The Department favors the adoption of option two but believes that any of the options would improve the current guidelines' treatment of related sentences.

Option two states that prior sentences are not considered related if they were for offenses that were separated by an intervening arrest or if they were not the type of offenses that would have been subject to grouping under the guidelines on groups of closely related counts. Of the three options published for comment, we believe this one most closely reflects the Commission's prior judgments about what types of cases are related for purposes of increasing or decreasing penalties. The multiple-count rules are now familiar to all components of the criminal justice system,

¹ United States Sentencing Commission, Guidelines Manual, §4A1.2(a)(2) and Application Note 3.

and extending their use to criminal history scoring should not prove overly burdensome. By contrast, the other options inject new and unfamiliar rules into the determination. If the Commission believes that further refinements are needed to address the issue of "double recidivists" -- i.e., those who committed offenses in the past following incarceration -- the guidelines could be amended to provide an addition to the criminal history score on this basis.

FIREARMS (Amendment 22)

The Commission has proposed a number of significant guideline revisions regarding firearms offenses. The proposed amendment consolidates four existing guideline sections into one comprehensive guideline on firearms offenses. In general, we believe that this proposal would substantially improve the firearms guidelines and contribute significantly to the deterrence of firearms-related crime.

While amendment 22 makes numerous changes, several stand out as being prominent from a law enforcement perspective. First, the proposal would improve proportionality in sentencing by creating several categories of sentences for offenders who have been convicted of violent felonies or drug offenses but who are not armed career criminals within the meaning of section 924(e) of title 18, United States Code. This statute imposes a mandatory minimum 15 years' imprisonment for the unlawful receipt, possession, or transportation of firearms by convicted felons who have three previous convictions for violent felonies or serious drug offenses. The Commission addressed this statutory requirement

in guideline §4B1.4 last year. However, because of the operation of the armed career criminal provision, offenders with one or two prior violent or drug offenses are sentenced at substantially lower levels than those with three prior convictions of this type. The armed career criminal provision produces a sharp cliff that can be smoothed by provisions aimed at offenders who are on their way to becoming armed career criminals but have not yet arrived.

The Commission should fill in the gaps created by Congress, which we believe rightly recognized that felons with serious drug or violent crime backgrounds require substantial punishment for unlawfully receiving or possessing firearms. The Commission has included several alternative offense levels for these intermediate armed career criminals. Since offenders with three prior violent or serious drug felonies are sentenced at level 33 and Category IV or higher (guideline §4B1.4), then the proposed offense levels of 20 and 24 for those with one or two qualifying prior convictions, respectively, are the proper choices to implement concerns of proportionality.

The proposed firearms amendments would also increase the base offense level for the receipt, possession, or transportation of firearms by convicted felons and other prohibited persons from offense level 12 to either 14, 15, or 16. For a defendant who used or possessed the firearms solely for lawful sporting purposes or collection, the offense level would be decreased to 6, 7, or 8, according to the proposal. We welcome the proposed increase in offense level for convicted felons and other prohibited persons who

unlawfully receive, possess, or transport firearms. The current level is not sufficient from a punishment and deterrence standpoint, particularly in light of the "sporting purpose" reduction. Congress has set the maximum statutory penalty for this offense at 10 years for convicted felons and most other categories of prohibited persons.² Moreover, there are lawful means available for a convicted felon to possess firearms. For example, convictions which are expunged or set aside do not generally trigger the federal prohibition against receipt or possession of guns.³ In addition, a convicted felon may seek relief from federal firearms disabilities in accordance with federal law.⁴ A convicted felon who does not successfully pursue these methods to possess firearms lawfully is, in our view, deserving of punishment when he or she violates the law. Any increase in the offense level would improve the guidelines; an increase to level 16 would send an important message to convicted felons who fail to heed the firearms laws.

We also approve the Commission's proposed change to the "sporting purpose" reduction that makes this reduction unavailable when the firearm was obtained for lawful purposes but has subsequently been possessed otherwise. The fact that a felon had initially obtained a gun for hunting should not qualify him for the

² 18 U.S.C. 922(g) and 924(a)(2).

³ 18 U.S.C. 921(a)(20).

⁴ 18 U.S.C. 925(c).

substantial "sporting purpose" reduction if he later decides to use the gun in crime.

Finally, we applaud the Commission's proposed addition of a firearms table to the guideline so that firearms receipt and possession offenses that involve more than two guns are punished more severely than those that involve only one or two. The current guidelines incorporate such a table only for gun trafficking offenses, but not gun possession offenses. A convicted felon who unlawfully possesses a stash of firearms should receive a stiffer sentence than one who possesses a single gun.

We urge the Commission to adopt these changes proposed in the published firearms amendments. There are many other significant improvements in this amendment that the Commission should also adopt. In several instances we believe that further refinements to the proposal are needed. However, these concern relatively minor points, and we would be pleased to work with the Commission to detail these refinements. In light of the level of violent crime in our country, the firearms proposals will prove to be one of the most important amendments the Commission considers in this amendment cycle. The proposed revisions could go far in addressing this serious law enforcement problem.

REENTRY OF DEPORTED ALIENS (Amendment 23)

The Department strongly supports the Commission's amendment of guideline §2L1.2 to reflect the substantial increase in the maximum penalties in the Anti-Drug Abuse Act of 1988 for unlawful reentry into the United States following deportation subsequent to

a felony conviction.⁵ Previously, the maximum penalty was two years' imprisonment. However, under the amendment the maximum prison term is five years if the defendant was deported after conviction of a felony and 15 years if the defendant was deported after conviction of an "aggravated felony."⁶ The term "aggravated felony" includes murder, drug trafficking, and illicit trafficking in firearms or destructive devices.⁷ An increased penalty of this magnitude -- two years to 15 years -- and limited to particularly defined offenses must, in our view, be reflected in the sentencing guidelines if the will of Congress is to be effectuated.

We recommend that the new specific offense characteristic designated as guideline §2L1.2(b)(2) increase the applicable guideline by 20 levels for all prior "aggravated felony" violations. While this is a steep specific offense increase, as a practical matter, we do not think it is too harsh. In the ordinary case, an alien drug dealer who illegally returns to the United States to practice his trade will continue this pattern of conduct until there is a substantial disincentive to do so. In the exceptional situation involving an illegal alien drug dealer who has some sympathetic reason to reside here illegally, the court may depart downward. A large number of United States Attorneys have brought the need for this guideline amendment to our attention, and we consider it an urgent Departmental priority. A

⁵ 8 U.S.C. 1326(b).

⁶ 8 U.S.C. 1326(b).

⁷ 8 U.S.C. 1101(a)(43).

very substantial increase in the offense level is needed to deal with this type of offender.

FRAUD INVOLVING FINANCIAL INSTITUTIONS (Amendments 4, 5, and 6)

The Department's most significant problem with the proposed amendments to the guidelines concerns fraud involving financial institutions. During the past several years, Congress has dramatically increased the penalties for financial institution fraud by making the maximum terms of imprisonment for major bank fraud and embezzlement offenses as much as 15 times greater than they were in 1988, sending what is clearly a strong signal that individuals whose criminal conduct jeopardizes the integrity of our nation's banking system should receive harsh sentences, including lengthy periods of incarceration.⁸

As recently as this past November in the Crime Control Act of 1990, Congress made significant increases in the penalties for financial fraud. In section 2504 of that Act, Congress increased the maximum terms of imprisonment from 20 to 30 years for violations of 10 major title 18 bank fraud and embezzlement offenses.⁹ In addition, in section 2507 Congress directed the Sentencing Commission to provide in the guidelines that a defendant convicted of violating, or conspiring to violate, one of these bank

⁸ See, Crime Control Act of 1990, Pub. L. 101-647, §§ 2504, 2507, 104 Stat. 4789 (1990); Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub.L. 101-73, §§961(a), 962(e)(1), 103 Stat. 1199 (1989).

⁹ Title 18, United States Code, sections 215(a); 656; 657; 1005; 1006; 1007; 1014; 1341; 1343 and 1344.

fraud statutes, as well as a newly enacted bank fraud statute,¹⁰ who derived significant personal benefit (more than \$1,000,000 in "gross receipts"), be assigned not less than offense level 24.

In section 2510 of the Crime Control Act, Congress enacted a new statute¹¹ aimed at "financial crime kingpins" which provides for a mandatory minimum penalty of 10 years and up to life imprisonment for those individuals who organized and exercised authority over the most serious fraudulent activity and received substantial personal gain.

These amendments send a forceful message that Congress considers fraud offenses involving financial institutions a more serious matter than in the past and that greater punishment is in order for such offenses than for most other fraud offenses. However, the Sentencing Commission's response to the Crime Control Act amendments is limited and, in the Department's view, inadequate to properly reflect the intent of Congress with respect to these increased penalty levels.

First, with respect to increasing the maximum bank fraud and embezzlement penalties from 20 to 30 years, the Commission proposes to amend guidelines §§2B1.1 and 2F1.1 to expand the dollar loss tables for theft and fraud offenses by adding four offense levels for cases in which the amount of the loss ranges from more than

¹⁰ 18 U.S.C. 1032 relating to concealment of assets from a conservator, receiver, or liquidating agent of a financial institution.

¹¹ 18 U.S.C. 225.

\$160 million to over one billion dollars. While we have no objection to this approach which will provide higher guideline sentences in the rare and most extraordinary cases with such high losses, it does not affect the majority of cases in the "heartland" in which the losses, while they may be substantial, are often much lower than \$160 million.

The current guidelines are structured for these fraud offenses as they existed before 1988, with two and five year maximum penalties.¹² We believe that in raising the maximum penalties for major bank fraud offenses six-fold and more, Congress intended that the sentences be increased over the entire range of offense levels, including those at the lower and middle levels. In order to respond to the Congressional concerns about financial fraud addressed in the penalty increases in the Crime Control Act and FIRREA, we urge the Commission, as we did last year, to revise the guidelines applicable to the amended statutes to provide appropriate enhancements relating to financial institutions for all offense levels. We recommend that the Commission amend the guidelines to provide in new specific offense characteristics that if the theft and fraud offenses affected a financial institution, the offense levels should be increased by at least several levels in addition to other enhancements already in these guidelines.

Second, the Commission proposes to amend the theft and fraud guidelines §§2B1.1, 2B4.1 and 2F1.1 to require that the offense level be raised to level 24 if a defendant is convicted of

¹² See Background Commentary to §2F1.1.

violating, or conspiring to violate, any of 11 fraud offenses affecting a financial institution and "derives more than \$1,000,000 in gross receipts from the offense". However, Congress has directed that level 24 serve as the minimum sentence, and that such defendants be assigned no less than offense level 24. These guidelines should be amended further to provide for increases above offense level 24.

Third, the Commission has proposed to address the financial crime kingpin statute by amending the theft and fraud guidelines §§2B1.1, 2B4.1 and 2F1.1 to apply the offense level applicable to the underlying theft and fraud offenses, apply specified adjustments, and then raise the guideline sentence to ten years if the sentence is less than ten years. This approach is wholly inadequate to implement the requirements of the statute. The Commission has created a guideline sentence which will amount to a maximum of 10 years in most cases, while Congress enacted 10 years as the mandatory minimum sentence. The 10 year mandatory minimum should not be the guideline maximum. The statute also provides that the sentence may be life imprisonment, while the proposed guideline amendment makes no provision for any sentence approaching life imprisonment. It is also unclear how the amount of "gross receipts" received by a defendant would relate to the amount of loss to the institution.

Because the financial crime kingpin legislation was modeled after the "Continuing Criminal Enterprise" drug statute in section 848 of title 21 and its provisions are completely analogous, we

strongly recommend that the Commission adopt a financial crime kingpin guideline using the same approach. A base offense level tied to the ten-year statutory minimum would be appropriate because the same rationale as under the drug kingpin statute applies, that a conviction under the statute establishes that a defendant controlled and exercised authority over one of the most serious types of ongoing criminal activity.

In summary, we strongly urge the Commission to revise the guidelines relevant to the statutes amended in the Crime Control Act in order to respond to the Congressional determination that defendants convicted of fraud affecting a financial institution in the majority of fraud cases be subject to substantially greater punishments.

SUBSTANTIAL ASSISTANCE TO AUTHORITIES (Amendment 35)

The Commission has proposed an amendment to policy statement §5K1.1 to make clear that a motion by the government is necessary before a court may depart below the applicable guideline range based on a defendant's substantial assistance to the authorities. The amendment would also state in the commentary that a court could depart downward in the absence of a government motion where the government in bad faith breaches an agreement to file the requisite motion.

While we support the Commission's clarification of this policy statement, we recommend that the proposed statement regarding bad faith be deleted from the commentary. We believe this language is ill-advised because it introduces questions of bad faith into what

has usually been a relationship of trust between prosecutor and defense counsel. It will also create the possibility of routine allegations by the defense of bad faith by the prosecutor.

If the Commission decides to retain the bad faith language, then the Department strongly urges the Commission not to adopt any changes whatsoever to the language of policy statement §5K1.1.

CONCLUSION

The Department plans to provide the Commission with its views on all of the proposed guideline amendments in the coming weeks. There are a number of additional areas in which we will urge the Commission to take final action in accordance with its proposals. For example, the proposed amendments in the areas of money laundering and restitution represent a substantial improvement in the guidelines. We will be pleased to assist the Commission in finalizing the many important guideline amendments it has proposed.

United States District Court

District of South Carolina

Charleston, S. C. 29402

Falcon B. Hawkins
Chief Judge

P. O. Box 835

March 13, 1991

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

Attention: Guidelines Comment

Gentlemen:

Your Proposed Amendments to the Sentencing Guidelines were forwarded to me upon receipt by my Charleston office to Columbia, South Carolina, where I was presiding at a two-week criminal trial. Unfortunately, the proposal contained only odd-numbered pages; all even-numbered pages had been omitted from your correspondence to me. A call to your office proved fruitless; and, by the time I tracked down a complete copy of the proposed Amendments, it was March 5th before copies of the proposal were mailed to the judges in my district. The delay did not leave any of us sufficient time to fully analyze the changes suggested or the various options set out.

Thomas N. Whiteside, our Deputy Chief U. S. Probation Officer, has fully reviewed the Amendments and has forwarded his comments to Mr. Michael Courlander, your Communications Director. From a cursory review of the proposal it would appear to me that the various Amendments are warranted, and I place considerable faith in Mr. Whiteside's comments in this regard. If I receive any in depth written comments from my fellow judges within the next few days, I will forward them to you.

Sincerely,


Falcon B. Hawkins
Chief District Judge

FBH:pik

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Charles and Pauline Sullivan

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CITIZENS UNITED FOR REHABILITATION OF ERRANTS

"A National Effort to Reduce Crime Through Criminal Justice Reform"

March 14, 1991

United States Sentencing Commission
 1331 Pennsylvania NW Ste. 1400
 Washington, D.C. 20004

Attn. Paul Martin

Dear Commissioners:

The Federal Correctional System Division of CURE includes as its members inmates, related families, and members of the public with an interest in the federal prison system. Please consider this our organization's comments in connection with current revisions to the sentencing guidelines.

We first wish to commend the concept of the guidelines because of their intent to bring uniformity to sentences which had too often been a matter of whim and caprice of individual judges.

The length of sentences is of major concern to us. Lengthy sentences are expensive to society for the direct cost of incarceration and the indirect cost of the removal of a potentially productive person from the economy. Lengthy sentences are expensive in the social cost of family destruction and damage to offspring of inmates. The Commission should direct its attention to these costs when determining the length of sentences.

First time offenders should get sentences which are substantially less than repeat offenders. Society should show compassion on a first mistake but not a second or third.

Sentences should be materially reduced for inmates over age 60. The chance of repeated crime by people in this age group is small. Health problems are magnified. This group can be handled through alternative punishment.

The practice of keeping a terminally ill inmate confined without access to his or her family seems especially cruel. Some means of release upon determination of a terminal health condition should be instituted.

Founded in '72 in San Antonio, Texas; expanded statewide in '75 and nationally in '85

U.S. Sentencing Commission

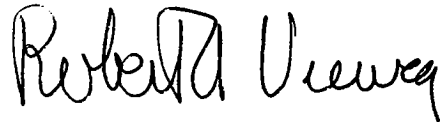
March 14, 1991 Page Two

Keeping foreign national incarcerated instead of deporting them seems a needless expense to the taxpayer which should be eliminated.

Our request is that you consider these concerns in your deliberations and that you keep us advised with sentencing developments.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert A. Vieweg". The signature is fluid and cursive, with the first name "Robert" and last name "Vieweg" clearly distinguishable.

Robert A. Vieweg
Member Executive Committee
Federal Correctional System
Division of CURE

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March 25, 1991

Mr. Robert A. Vieweg
CURE
11 15th Street, NE #6
Washington, DC 20002

Dear Mr. Vieweg:

Thank you for your thoughtful comments on the sentencing guidelines. The Commission appreciates the input you have provided us on these issues.

Thank you for taking the time to respond.

Sincerely,

A handwritten signature in cursive script that reads "Michael Courlander".

Michael Courlander
Public Information Specialist

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

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March 7, 1991

Mr. Michael Courlander
Communications Director
U.S. Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, DC 20004

Re: Proposed Guideline Amendments for 1991

Dear Mr. Courlander:

On behalf of the District of South Carolina U.S. Probation Office, I submit the following comments pertaining to certain 1991 proposed amendments.

As to Amendments 7(A) and (B): I recommend that both of these proposals be submitted, although we are seeing, in many instances, the dismissal of the underlying offense in 924(c) cases. Nevertheless, many robberies in this district involve the defendant simply going in and demanding money without brandishing a weapon. However, trauma to the victims is extremely high because it is assumed that the defendant has a weapon or is willing to use some other type of force. Certainly the brandishing of a weapon has a tremendous effect on the victims involved.

Under proposed Amendment 7(C), where the defendant's level is enhanced due to multiple instances of robbery whether convicted or not, I would recommend the change. As it stands now, a judge can always depart to account for other robberies, but I see a great potential for disparity around the country due to inconsistency in departing. I am currently on a task force to revise the presentence report format, and we debated at length as to where additional, unconvicted robberies should go in the presentence because they are not part of relevant conduct. It was my position that additional, unconvicted robberies should go under the offense conduct section, although unaccounted for in the guidelines. Judges have always considered the entire spectrum of behavior in sentencing. Also, there seems to be an inconsistency where the guidelines account for unconvicted additional checks, cars, etc. but not robberies.

As to proposed Amendment 11, I think that too much reliance is placed upon drug quantity for less culpable offenders. However, lowering their exposure may make them less inclined to provide substantial assistance. Nevertheless, I do think it would be proper to lower their exposure. I would suggest that in drug cases the Commission explore the possibility of level caps for those persons determined to be minor and minimal participants. That is, if the

March 7, 1991

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defendant was a minimal participant, as defined in Application Note No. 2 under 3B1.2, Mitigating Role, but would otherwise be in Level 42 because he saw the entire ship be unloaded waiting for his small portion, I would suggest that his offense level be capped at a significantly lower point. If this is not feasible, I would suggest the possibility of an overall cap for persons in that low category. I think the question is whether a minimal role player is more culpable in a large drug case than he is in a small drug case.

Pertaining to Amendment 16, we have not had enough experience with these chemicals for me to properly comment on this change.

I am in wholehearted agreement with proposed Amendment 22. This will cut down on some confusion as to which guideline applies and will also shorten the section.

Proposed Amendment 30, Option 3, is a needed change. The current related case rules create disparity in this area. I think that this option is fairest because it covers all related cases. This will eliminate much of the disparity that we see pertaining to inadequacy of criminal history.

Pertaining to Amendment 31, I would think that there will be more people falling into the new Criminal History Category VII, particularly in view of Amendment 30. As for the options, I would submit that as the criminal history points increase, culpability increases also. I don't think that a more culpable offender should find it more difficult for his range to be increased than a less culpable one. Therefore, I recommend Option 3 because it also suggests departure for a more severe criminal history. I think a career offender should have a floor of VI with those qualifying for VII doing so.

Amendment 33 addresses a thorny issue. It is almost impossible to correctly assess how much time a person will serve on an undischarged term of imprisonment when he comes into federal court for sentencing. Therefore, there will always be some disparity as far as term of imprisonment is concerned. Many probation officers find the current guideline confusing because they seldom deal with the multi-count rules. Nevertheless, in looking at the proposed amendments, I feel that the amendment is worthwhile with Option 2.

I hope that this information will be of use to you. Thank you for considering my suggestions.

Sincerely,



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

TNW/bl

cc CUSPO James W. Duckett, Jr.

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Honorable William W. Wilkins, Jr.
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United States Sentencing Commission
1331 Pennsylvania Avenue, NW - 14th Floor
Washington, D.C. 20004

Re: Proposed Amendments to Federal Sentencing Guidelines

Dear Chairman Wilkins:

I write first to thank you for your kind letter of March 6, 1991, and for having given our organization the opportunity to express its views on proposed amendments to the sentencing guidelines. As I mentioned at the public hearing, the New York Council of Defense Lawyers has not previously participated in dialogue with the Commission, but we would very much like to do so in the future. Our members pride themselves as being among the "leaders" of the defense bar in New York and elsewhere. We hope that our collective, daily experience in practicing under the sentencing guidelines might be of use to you and to other Commissioners and staff members.

Honorable William W. Wilkins, Jr.

March 13, 1990

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With respect to specific proposed guideline changes, we would like to amplify briefly on the views expressed in our previous written submission and oral presentation.

First, with respect to downward departures based on substantial assistance to authorities (Guideline § 5K1.1), we hope that the Commission will entertain our view that a government motion should not be required in all cases as a precondition to a departure. We recognize that the government typically does act in good faith, and that individual prosecutors generally do make a departure motion where the circumstances so warrant. However, in a small but significant number of cases, prosecutors have unreasonably failed to make departure motions. I mentioned at the public hearing an example from my own practice, in which the "Departure Committee" of a particular U.S. Attorney's Office simply failed to convene prior to sentence, and therefore failed to make the motion contemplated by § 5K1.1. There was no "bad faith" involved in this case, but the sentencing judge felt compelled to distort the application of the guidelines in other respects in order to reach the sentence that would have been appropriate had the Government made the departure motion to which my client was entitled.

Other Council members likewise have had matters in which individual prosecutors, for a variety of reasons, have refused to make departure motions despite significant cooperation from the defendant. Frequently, disputes arise in the context of defendants who are not the first ones "through the door," but are the second or the third defendants to commit to cooperation, whose assistance may not have been as important as that rendered by the first cooperator. A government decision not to make a departure motion in such cases may leave the cooperator with nothing to show for his assistance, since frequently a sentence at the bottom of a guideline range is already indicated, and the only meaningful reward for cooperation is a departure.

We recognize that the government's evaluation of a defendant's cooperation must be of prime importance. Judges, however, have always relied heavily on what a prosecutor has to say about a defendant's cooperation, and there is no reason to think that courts will routinely grant departures where the government has a well-founded objection. At the very least, we believe that courts should have the power to grant a departure in those rare circumstances in which the government's failure to make a 5K1.1

Honorable William W. Wilkins, Jr.

March 13, 1990

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motion is objectively unreasonable. The "bad faith" standard, articulated in the current proposed application note 1 to § 5K1.1, is far too restrictive.

Finally on this score, we wish to call the Commission's attention to the Second Circuit's recent decision in United States v. Garcia, Dkt. No. 90-1274 (February 8, 1991). The court there affirmed a downward departure for a defendant whose early cooperation and willingness to testify led his co-defendants to plead guilty and broke the "log jam" in the case. For reasons not articulated in the opinion, the Government failed to make a motion for a downward departure under § 5K1.1. The court nevertheless granted a departure based on "activities facilitating the proper administration of justice." We believe that this case is an illustration of a situation in which the sentencing judge correctly believed the defendant to be entitled to a departure despite the Government's failure to file a departure motion. Judges should have the ability to grant such departures without engaging in the kind of strained logic and intellectual gymnastics to which the trial judge and the Second Circuit had to resort in the Garcia case.

In our previous written submission, we also addressed a proposed amendment to § 1B1.8, which is the guideline that permits a cooperating defendant to agree with the government that self-incriminating information that the defendant provides to the prosecutors will not, under certain circumstances, be used against the defendant in the calculation of his sentence. One proposed application note would restrict the availability of such agreements to those that relate "to the provision of information about the unlawful activities of others." Thus, under the proposed application note, § 1B1.8 would not apply to a defendant's agreement to supply information about his own unlawful activities.

As we pointed out in our written submission, and as I emphasized in my oral remarks, there are certain cases in which the government may have a strong interest in obtaining information from a defendant that does not relate to illegal acts of others. The paradigm case involves espionage. The government may have a strong interest -- indeed, an overwhelming interest -- in finding out the full extent of the defendant's own crimes in order to determine the amount of damage done to national security. In such cases, the government and the defendant should be able to agree that a defendant may provide information about his own crimes without fear

Honorable William W. Wilkins, Jr.

March 13, 1990

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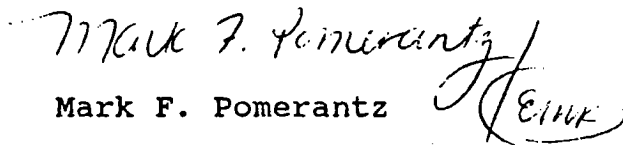
of thereby enhancing his sentence. We therefore think that the proposed application note should not be adopted, and that the existing language of § 1B1.8 should be changed to delete the phrase "concerning unlawful activities of others" from § 1B1.8(a).

At an appropriate time, we would like to express our views on other important guideline issues. For instance, we share the views of many others that substantial injustice occurs in cases involving defendants who play minimal roles in larger criminal enterprises, particularly in drug and fraud cases. As the guidelines are now written, for instance, a minimal actor in an offense involving 10 kg. of marihuana will be sentenced at a base offense level 12 (level 16 less a 4 level reduction for minimal role). The main defendant in a case involving 2 kg. of marihuana, however, will be sentenced at a base offense level 10. In our view, this is an unjust result.

We are aware that the Commission members and their staff will be studying these and other important guideline issues in the upcoming weeks and months. We would like to contribute our expertise and analysis whenever and wherever we may be helpful. We believe that our members share a strong interest with the Commission in achieving a fair, just, and intelligent set of sentencing guidelines.

Sincerely yours,

Mark F. Pomerantz

A handwritten signature in dark ink, appearing to read "Mark F. Pomerantz", with a stylized flourish or initial at the end.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
POST OFFICE BOX 65
MACON, GEORGIA 31202

CHAMBERS OF
WILBUR D. OWENS, JR.
CHIEF JUDGE

March 25, 1991

AREA CODE 912
752-3491

FAX 912-752-3498

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

Attention: Guidelines Comment

Gentlemen:

The Proposed Amendments to the Sentencing Guidelines have been reviewed and comments concerning several of the proposals and the options are provided.

Section 2A3.2 (Statutory Rape)

Perhaps it would be appropriate to adopt both options with a proviso of a maximum six (6) level increase in any given case. The implementation of both options would permit consideration of the age difference between the victim and defendant as well as the 14-year-old age factor for the victim.

Section 2B3.1 (Robbery)

Considering the concern that the guidelines may result in lower sentences in certain multiple robbery cases than under pre-guideline practices, the proposed revision that would add levels for additional robberies appears appropriate. Further concurrence is expressed with the proposed enhancement for 2B3.1(b)(1) and the enhancement for involvement of a weapon in a robbery. These enhancements would more adequately reflect the seriousness of the offense when a defendant robs a financial institution with a weapon.

Section 2J1.3 (Perjury)

In reviewing the proposal as to how to treat separate acts of perjury, Option 1 is favored. It would seem preferable to not group the separate acts in order to reflect the seriousness of the defendant's conduct rather than to use the grouping principle where a departure may be necessary to reflect the seriousness of the offense.

Section 4A1.1 (Criminal History)

Relative to the proposed methods of dealing with prior sentences pending appeal, Option 1 is preferable. This option appears to provide specific instructions in such cases. Option 3 for the proposed new subparagraph (f) to Section 4A1.1 provides a definite sentencing scheme to add criminal history points for "closely related" crimes of violence.

Sentencing Table

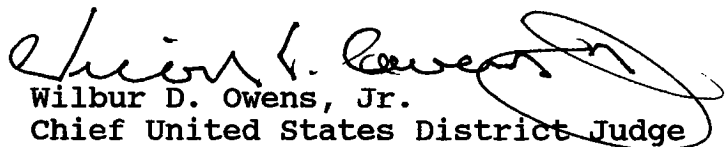
The current sentencing table with six criminal history categories appears adequate in most cases. If a new Category VII is adopted, it is suggested that 16 points rather than 20 be implemented. This would be consistent with the level differences of the present scheme. Should Category VII be implemented, it is suggested that career offenders continue to be sentenced at the Category VI level unless Category VII is otherwise applicable due to a particular defendant's record.

Section 5G1.3

Option 2 appears to be a better method to deal with the imposition of sentences of defendants who are already serving an unexpired sentence. It is preferable to take into consideration the unexpired portion of the pre-existing sentence and then impose an appropriate consecutive sentence for the two offenses combined. The instant offense would run consecutively to the extent necessary to achieve the total sentence so that a reasonable incremental punishment is imposed for the instant offense.

The opportunity to comment on the proposed amendments is appreciated.

Sincerely,


Wilbur D. Owens, Jr.
Chief United States District Judge

FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF WASHINGTON

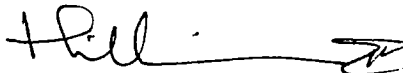
March 18, 1991

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

TWH:ifh/wilkltr

bckd 150

Statement of

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

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

18

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

The Honorable William W. Wilkins, Jr.
January 3, 1991
Page 5

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.

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

TWH:ifh/wilkltr

cc: Legislative Subcommittee Members

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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

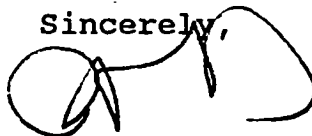
If the mails were used as part of the scheme, creating a mail fraud predicate offense, Section 1956 would permit the same conduct to be charged as a money laundering violation with an intent to evade taxes, pursuant to § 1956 (a)(1)(A)(ii). Under the money laundering guidelines, the offense level would 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 be "IAN M. COMISKY", written over a circular stamp or mark.

IAN M. COMISKY

IMC:smh

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

LAW OFFICES OF
PILLSBURY, MADISON & SUTRO

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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.

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PAUL D. LAXALT
SENIOR COUNSEL

March 19, 1991

By Telecopier

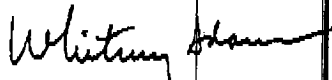
Paul K. Martin
United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

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.

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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.

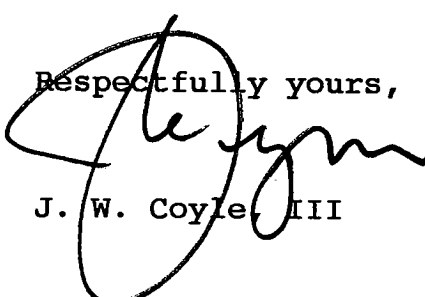
An additional solution is to change the role in the offense application so as to provide further adjustment for minor and minimal participates.

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

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PILLSBURY, MADISON & SUTRO

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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.

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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

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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

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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

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DAVID A. LOMBARDO
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March 11, 1991

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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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

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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 basically 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

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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,



THOMAS A. CAMPBELL
Attorney at Law

TC:TN

cc: Thomas W. Hillier

LAW OFFICES OF
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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:

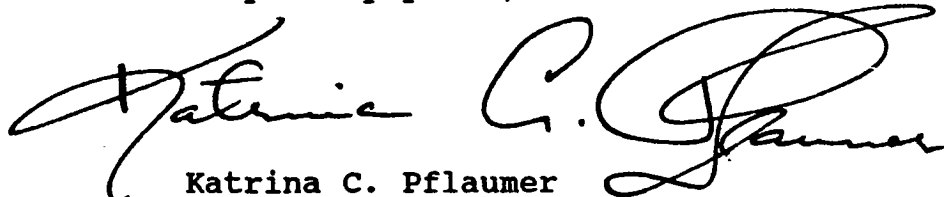
I have reviewed some of your proposed amendments to be reported to Congress in May. As a general practitioner who represents primarily federal criminal defendants, I would like to make a few comments. First of all, the entire system seems to be sinking with the complexity of continuing amendments to 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

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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

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Reply to: **TULSA**

Communications Director
April 24, 1991
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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.

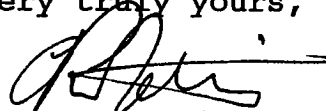
5. Another unfortunate collateral effect of the sentencing guidelines is the listing of a substantial portion of the fact finding process out of the constitutionally protected context of a jury trial and placing it

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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