

PREPARED STATEMENT OF FREDERIC N. SMALKIN,
UNITED STATES DISTRICT JUDGE, DISTRICT OF MARYLAND
RELATING TO PROPOSED 1992 AMENDMENTS TO THE SENTENCING GUIDELINES

Before addressing specifically the amendments proposed for the 1992 cycle, I should point out the general concern that I share with many of my colleagues, as well as attorneys and probation officers, over the Guideline amendment process. The amendments, in the span of just a few years, have become so numerous and voluminous that they must be contained in a separate volume of the Guidelines Manual. Many amendments pose ex post facto and other interpretative problems, and there is a feeling, especially among probation officers (who are the front line troops here), that the whole process of Guideline sentencing--tremendously complex to start with--has become practically unmanageable due to the frequency and volume of amendments. There is also a concern that the Guidelines increasingly will come to resemble the Internal Revenue Code, as interest groups, criminal justice professionals, and academics try to incorporate every one of their soi-disant good ideas into the Guidelines. Also, as a practical matter, we perceive that the courts of appeal are treating everything the Commission promulgates as black-letter law. This tendency also argues against larding up the Guidelines with more and more specific amendatory language. I realize that, on these points, I am not exactly preaching to the choir, but these things need to be said.

Turning to specific items on the 1992 agenda, I endorse the position of the Judicial Conference committee on criminal law

regarding the inadequacy of the current Guidelines scheme for dealing with first offenders who do not deserve incarcerative treatment. Option 6 of Amendment 29 appears to give the greatest flexibility in fully implementing the Congressional mandate (28 U.S.C. § 994(j)) that first offenders generally should not be sentenced to incarceration, unless they have committed an offense so serious as to warrant that treatment in lieu of other, less costly, and more effective, treatment.

I think almost all judges would agree that all parts of (A)-(D) of Amendment 33 should be adopted, to give them the flexibility to treat atypical cases appropriately within the departure discretion that Congress specifically reserved to the judiciary under the enabling act. The power of the courts of appeal to review departures for reasonableness should certainly keep the judges in line with the language of the Guidelines.

I believe that Option 3 of Amendment 23 appropriately encourages offenders to accept their responsibility, while mirroring the reality that acceptance of responsibility can and should have more manifestations than simply pleading guilty. The reality under the current scheme is that the acceptance of responsibility adjustment is treated as an automatic "discount" for pleading guilty, which is simply not appropriate. It is especially important to allow more than just 2 offense levels to be deducted for acceptance of responsibility in significant cases, given the tremendous societal costs of trial as opposed to guilty pleas.

The relevant conduct amendment, Amendment 1, is particularly troublesome, given the perceived tendency, pointed out above, of the courts of appeal to treat everything between the covers of the Guidelines manual as black-letter law. I think that pointless pettifogging litigation will be brought on by the greater detail of the proposed amendment language. Absent evidence that the current language as to relevant conduct has caused insurmountable problems in the field, it simply ought to be left alone.

There are two amendments not proposed by the Judicial Conference that I should like to address. First, Amendment 10, certainly is warranted from my personal experience in sentencing a pollution case. Although the cumulation in present sections 2Q1.2 and 1.3(b)(1) and (4) can be justified on the basis that acting in violation of a permit or not obtaining a permit is a separate affront to the sovereignty of the government from simply dumping pollutants, the current scheme does allow too much double-counting. I also support Amendment 5, to eliminate the "more than minimal" planning adjustment in section 2F1.1(2), which is the source of much pointless litigation.

The other major area, beyond the Judicial Conference recommendations, that I wish to address today is the question of adjustments for role in the offense, especially in drug cases. This is a matter of specific interest and concern to me, as I was among a number of judges in our District, including Chief Judge Black and Senior Judge Harvey, who met with the Commission's working group on drug offenses under Commissioner Carnes some time

ago to discuss these matters. Our sentiment then, as it is now, was that too many "fringe players" in drug conspiracy cases were being sentenced to very long periods of imprisonment, given that their sentences were driven in general by the scope of the overall conspiracy (as to drug quantity) of which they usually had considerable knowledge, often as girlfriends or spouses of major players. These people now have only the possibility of a small downward adjustment for their minimal or minor roles in the offense under § 3B1.2, unless they cooperate against their family members or others close to them. Proposed Amendment 19, Option 2, appears to be the simplest way to approach this problem without unnecessary drawing of fine lines, and without a major change in the concept of minimal and minor roles as they exist under the current Guidelines. I think most participants in the process realize that, given the breadth of the relevant conduct for which a drug conspirator can usually be held accountable, the current adjustment simply does not provide for fair and just differentiation among conspirators in proportion to their real culpability and need for long incarceration. Therefore, the second option of proposed Amendment 19 is a sound one and ought to be adopted.

Thank you for hearing me out today.