

WRITTEN TESTIMONY
TO BE PRESENTED TO THE SENTENCING COMMISSION
ON FEBRUARY 25, 1992
CONCERNING UNITED STATES SENTENCING COMMISSION'S
PROPOSED AMENDMENTS TO SENTENCING GUIDELINES
AND POLICY STATEMENTS

SUBMITTED BY THE MEMBERS OF
THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
SENTENCING AND POST CONVICTION COMMITTEE

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The Federal Sentencing Guidelines are like a highway that is always going to be insufficient despite its expansion. By the time the expansion interests are met, the needs will already be greater than the adjustments being made.

The Sentencing Commission strives to achieve an etherial sense of perfection that could no more be achieved in the pre-1987 guideline sentencing format than it will be achieved in the present guideline sentencing format. However, since all of us strive for perfection and growth, it is admirable that the Commission, in this latest set of proposed amendments has put forth the most significant changes to come in a long time.

1. PROPOSED COMMENTARY AS TO SECTION 1B1.3: Relevant Conduct; the expanded definitions of Relevant Conduct should help eliminate some of the conflicts represented by this nebulous concept and how it should apply to individual defendants as compared to other defendants. We do, however, recommend that those individuals (such as an off-loader or mule) who are involved in a drug offense should not be imputed with the scope of conduct of the defendant(s) who imported the drug. It is unlikely that an off-loader, or mule, per se, would have

the knowledge necessary to understand the scope of the conduct of the co-defendant's (organizers) involvement nor the quantity of drugs intended to be disposed of in relationship to that conduct. It is difficult for an off-loader to have any reasonable awareness of the quantity of drugs being off-loading or the intent of the organizers "distribution or sale" of said quantities. Therefore, the concept is not related to the "number of bales" off-loaded by that individual who is an off-loader, but moreso as to whether they would have had the ability to foresee the quantity of drugs being distributed. Therefore, imputing liability to an off-loader as to the quantity of drugs, off loaded at the time of the off-loading activity, places this individual in a position to receive a penalty far in excess of their involvement. (This is true even with mitigating role deductions).

Additionally, as to relevant conduct, there are many individuals who enter a conspiracy at different times during the life of the conspiracy. Therefore, that individual defendant who participates in the conspiracy during a certain portion of the life of the conspiracy, including extricating themselves out of the conspiracy, should be held accountable only for those acts, or group of acts, involving that defendant during the course of their participation in the life of the conspiracy. This seems to be the intent of the Commission in Example F of the commentaries of the Section 1B1.3.

2. **SECTION 1B1.8: USE OF CERTAIN INFORMATION: (COOPERATION);**

Part of the amendment should read that the information given will also not appear in the presentence report. If it is used, then the probation office should be required to incorporate some commentary dealing with the proposed amendment (i.e., "...incriminating information provided by the defendant, as part of a cooperation agreement with the government, shall not be used to determine the outcome of the guideline range in cases in which the only information provided pertains to the defendant's own unlawful activities").

The constant conflict between the defendant's conduct, cooperation agreements and that which appears in the presentence report, creates a completely different disposition than the government's interpretation as it relates to relevant conduct and that which the probation office interprets as it relates to relevant conduct. This is particularly true when the defendant reveals that cooperation information to the probation officer in accepting responsibility for his conduct. This included, but is not limited to, admitting to additional offense information that the defendant may have provided to the government for the purposes of complying with their cooperation agreement with the government.

3. **PURSUANT TO SECTION 2B1.1, LARCENY, EMBEZZLEMENT AND OTHER FORMS OF THEFT, SECTION 2F1.1, FRAUD AND DECEIT;** Section 2F1.1 starts at a base offense level of 6. It is recommended

that this base offense level be reduced to 4, thus eliminating a need to adjust the internal operations of the guideline table itself. This reduces by two levels the exposure of defendant's experiences in the no loss category, but leaves the present loss table in tact without additional changes. This also compensates for reduction of two levels for more than minimal planning. More than minimum planning should be eliminated in that the conduct prescribed by statutory violation incorporates the extent to which a defendant is involved in a particular fraudulent activity. Furthermore, multiple count indictments clearly reflect the scope and scheme of a multiple fraudulent acts. (Grouping of closely related counts also compensates for this aggravation issue).

As to revisions to the loss tables, in recognition of 2B1.1 and 2F1.1, Alternative Fraud Table 1 should be the basis for graduating increases based upon the actual loss involved. This would remain most consistent with the previous tables.

4. **PURSUANT TO 2B1.1(b)**, revisions 7 and 8, the increase of 4 levels based upon the effect the defendant's conduct had on a financial institution is without rational basis. This is particularly true when coupling the 4 point increase with an automatic increase to level 24 if the 4 points plus the actual fraud, did not reach a level 24. This "24" is an arbitrary numerical value that does not conform to the reasons for adding 4 points in the first place. If you are going to incorporate a 4 level increase for offenses affecting a

financial institution, then do not arbitrarily pick a minimum number required with or without this 4 level increase if a financial institution were affected. It is as if you are trying to double count the basis for which to increase the offense level if a financial institution were affected. This may be an aggravating feature of the offense, but it does not carry a different base offense level than those established by the crime charged under the statutes relevant to this section of the federal sentencing guidelines. Stick with the facts in determining a base level. Add 4 points, if you must, with no minimum.

The Sentencing Commission suggests that the reasons for the amendments, pursuant to the aforementioned subsections and the increased base levels under 2B4.1 and 2B1.1, are to keep the sentencing guidelines consistent with congressional interests in increasing the maximum penalties for fraudulent offenses against financial institutions. The sentencing commission must not be influenced solely by increased statutory provisions. The Commission should be concerned with consistency and rational relationships between the sentence imposed, the offender and the offense. Each time Congress increases the potential penalties under statutory provisions does not automatically suggest an increase in the penalty pursuant to the sentencing guidelines.

5. SECTION 2D1.1 UNLAWFUL MANUFACTURE, IMPORTING, EXPORTING, OR TRAFFICKING (INCLUDING POSSESSION WITH THE INTENT TO COMMIT THESE OFFENSES). If you are going to make a consistent sentencing system, there should be a graduating effect on the quantity of drugs in relationship to each of the schedules for which the drug appears. There must continue to be a difference in schedule narcotics as it relates to offense severity rating. In other words, if the scheduled narcotic is a less severe controlled substance then the penalty should be less severe than those that are of a higher schedule. A more uniform concept of scheduling may be more appropriate in light of the conflict presented by the commission.

Though the Commission's commentaries here do not specifically relate to cocaine and crack, it is imperative that the Commission start to consider the problems inherent in the penalties imposed for these offenses and scheduled narcotics.

Crack cocaine is a poor man's cocaine most often represented in the black communities. Statistics have unequivocally shown that the black community will more often buy crack cocaine than cocaine itself based on cost effectiveness. Crack cocaine contains elements that are legal with the illegal element of cocaine itself. The legal elements of crack create the structure which allows the cocaine (the illegal substance) to be placed in hard form, thus causing it to be "smoked" instead of "snorted".

Frequently, the Commission, as well as Congress, and the DEA have tried to suggest that Crack/Cocaine should require more severe penalties because it creates a more rapid rate of addiction. This is an irrational argument. Crack/Cocaine simply does not contain any other illegal substance but cocaine itself. Therefore, to punish more severely those offenders who purchase, sell, distribute, and/or possess, crack/cocaine is to create an internal narcotics disparity sentencing process that predominantly affects the minority community. It is important for the commission to examine this conflict by imposing less severe sentences on those individuals who are likely be involved in criminal activity dealing with crack/cocaine. Regular cocaine offenders are predominantly latin and white and will on the average, as compared to the average crack offender, be sentenced to less time than those offenders who engage in crack/cocaine offenses.¹

¹ (i.e. 300 to 400 Grams of Cocaine equals Level 22 as compared to only 3 to 4 grams of Crack for Crack/Cocaine (2D1.1 et. seq.) "A U.S.A. Today analysis of drug arrest statistics show that urban blacks are being detained in numbers far exceeding their involvement. The analysis done for the second year found that in 1989, 41% of those arrested on drug charges were black, but blacks are only 15% of the drug using population. In 1988, 38% of those arrested were black, versus 12% of the drug using population. The 1989 data confirm our worst fears, that the war against drugs continues to be focused disproportionately on the black community." says Barry Krisberg, National Counsel on Crime and Delinquency. (U.S.A. Today survey December 20, 1990.) An examination of a successful challenge to a criminal statute for having a disproportionate impact on racial minorities is the recent case of State v. Russell, Hennepin County, Minnesota District Court Number 8967-067, December 27, 1990. The statute under attack was a provision under Minnesota law which penalized crack/cocaine

The Commission must address this disparity and disproportionate problem as well as the issue of marijuana as to weight when there are more than or less than 50 plants. It is in this very section of the sentencing commentaries that this whole matter can be further addressed and resolved in properly scheduling drugs, determining their appropriate weight and properly identifying them as it would relate to a criminal prosecution.

Unless the commission starts to truly examine the problems encompassed within the scheduled narcotics, and the way in which a sentence is imposed, there will continue to be inherent disparities and proportionality problems within these particular sections of the Federal Sentencing Guidelines for drug offenders.²

Marijuana plant weight categories encounter the same type

offenses more severely than powder cocaine offenses. The physical properties of crack cocaine and powder cocaine are the same. (State v. Russell, 15) In Russell, defense counsel made an impressive showing that racial minorities were more likely to be charged with crack cocaine offenses, while whites were generally charged with powder cocaine offenses. This case not only brings to light important disparity treatment and the impact of crack cocaine on the minority community in terms of time to serve, versus cocaine offenders, but it also brings to light the real distinction between crack/cocaine and powder cocaine. "Racial minorities use crack while respectful white people use powder cocaine. Racism is at the core of the statutory penalty for crack offenses. Similar claims should be considered and challenged at the state and federal sentencing guidelines." (Excerpt from Does Race Matter In the Criminal Prosecution by Charles J. Ogletree, Champion, July, 1991)

² Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, discussing criteria for cruel and unusual punishment.

of conflict as crack and cocaine. If an offender possess less than 50 plants he/she will be sentenced to actual plant weight (regardless of size) as it relates to a minimum weight per plant ratio, while more than 50 plants (regardless of size) automatically equates to a one kilo per plant ratio for determining the sentencing guideline offense level. This to is an irrational sentencing process and must be reconsidered. There is no rational basis for determining that more than 50 plants, regardless of their size, automatically equates to one kilo of marijuana per plant. Actual weights must be considered including actual weights of seedlings. There is no way to know what size a plant will reach under varying growing conditions and circumstances.³ Therefore, to have a true

³ Within the Sentencing Guideline scheme questions have therefore arisen as to what constitutes a marijuana plant, how the plants are counted, and when is a plant a plant no longer. While there are few cases on this subject, the available opinions answer these questions in a logical, rational and sensible manner. Plants are counted per plant rather than by weight in order not to concede an "advantage" to a grower who is apprehended early in the growth cycle rather than later. See U.S. v. Bradley 905 F.2d 359, 361 (11th Cir. 1990). A marijuana plant is considered such when it has a root system and the capacity to survive in the ground. See U.S. v. Corley, 909 F.2d 359, 361 (9th Cir. 1990), U.S. v. Carlisle, 907 F.2d 94, 96 (9th Cir. 1990), aff'd., U.S. v. Carlisle, 907 F.2d 94, 96 (9th Cir. 1990), aff'd., U.S. v. Graham, 170 F. Supp. 1290 (N.D. CAL. 1989), U.S. v. Bechtol, No. 90-2799 (8th Cir. July 24, 1991) WL 134487.

In U.S. v. Graham, the district court approved the analysis by the United States Probation officer who did not include approximately 800 "seedlings". That consideration is consistent with the above definition of a marijuana plant, assuming a root system and sufficient leaf material had not developed to permit a reasonable finding that the seedling could survive on its own. Similar reasoning would cause clones or cuttings not to be counted until they developed roots. See U.S. v. Carlisle, *supra* (counting cuttings which did have developed root formations).

A marijuana plant stops being a plant when it is harvested. See U.S. v. Graham, supra, cited with approval in U.S. v. Corley, supra. Accord U.S. v. Bradley, supra. This rational finds that at the point in time the plant is harvested the eventual weight is known and there is no longer any reason to measure severity by reference to something other than what a defendant possesses.

Plants are counted as plants unless there are fewer than fifty marijuana plants in which case they are counted by weight. Title 21 USC Sec. 841 (b) (1) (D).

In U.S. v. Streeter, 907 F.2d 781 (8th Cir. 1990), and U.S. v. Prine, 909 F.2d 1109 (8th Cir. 1990), the Eighth Circuit invalidated the provision of the drug quantity table in guideline section 2D1.1 insofar as it presumes, in cases involving less than fifty plants that a plant is equivalent to one gram of marijuana. Both Ninth Circuit cases, Corely and Carlisle, require that the actual weight be used. These cases recognize the effect of the definition of marijuana in Title 21 USC 802(16) which excludes, "mature stalks of such plant". On a practical harvesting level seized marijuana plants are cut down in addition to being pulled by the roots, and branches are separated during the storage and handling of plants. Marijuana plants have a number of subsidiary branches which are indistinguishable from the main stalk of smaller plants when observed separately. marijuana plants however, have only one root ball which makes them the only reliable indicator of plants. See FEDERAL SENTENCING MANUAL, McFadden, Clark and Daniels, Matthew Bender and Co., Inc., 1991, 8-22.

A footnote to the drug quantity table provides that in cases involving marijuana plants, one plant is equivalent to one hundred grams of marijuana when there are fewer than fifty plants and that one plant is equivalent to either one kilogram of marijuana when there are more than fifty plants or to the actual weight which ever is greater. There has been advanced no legal or rational justification for the differentiation between the accountability factors between the number of plants (more or less than fifty). It would appear that this differentiation between the number of plants (more or less than fifty) relies upon the "Statutory Equivalency" rationale rather than an applied logical empirical weight equivalency rationale. See U.S.S.G. 2D1.1, app. note 10.

The rational for the one kilogram-plant equivalency was suggested by the Sentencing Commission in material published for public comment when the amendments to the drug quantity table were proposed. The Sentencing Commission stated that data provided by the Drug Enforcement Administration suggested that 0.4 kilograms per plant was a fair average weight to be expected from a mature

sentencing system, actual weight must be relied on.

6. SECTION 2N2.1 VIOLATION OF THE STATUTE OF REGULATIONS DEALING WITH ANY FOOD, DRUG, BIOLOGICAL PRODUCT, DEVICE, COSMETIC, OR AGRICULTURAL PRODUCT. Again, we would protest the section of the commentary under application notes of 2N2.1 dealing with the offense being increased by two points for violation of a judicial administrative order, injunction, decree or process while at the same time stating that even with this two point increase, if this conduct did occur and the base offense level did not reach a level 10, to increase the base offense level to 10. Either start the base offense level at 10 or use the two levels to increase for aggravation purposes only. You cannot have two different levels of aggravation built into one type of conduct. It seems ridiculous to enhance two levels for a specific type of conduct and then say it is not enough if the level did not reach a certain minimum base offense level. This creates unnecessary and unwarranted disparity and confusion in the guidelines and creates a system that is not based on point value aggravation after a base level is set.
7. 2Q1.2; MISHANDLING OF HAZARDS OR TOXIC SUBSTANCES OR PESTICIDES; RECORD KEEPING, TAMPERING, AND FALSIFICATION; ISSUES FOR COMMENT. NACDL identifies the need for

marijuana plant and that only the most horticulturally sophisticated growing operations could expect one kilogram per plant. See 54 Fed. Reg 9121, 9136. The Sentencing Commission needs to resolve this disproportionate and disparit sentencing problem.

coordination between the 2Q1.2 and 2Q1.3 offenses in terms of the applicable base offense level and adjustments. It appears that 2Q1.2(b)(4) would constitute double counting the actual base offense level. As stated, the actual offense is the mishandling of hazardous or toxic substances yet 2Q1.2 (b)(4) describes the same conduct. It would appear that in almost every circumstance the base offense level would be increased by the relevant conduct that caused the charge to be imposed in the first place. This concept may, in fact, affect the entire process of trying to enhance penalties under 2Q1.2 and 2Q1.3. The relevant conduct described should be the basis for any offense level increase only where bodily injury may occur, where public utilities may have been disrupted by evacuation of the community and where there is a substantial expenditure for clean up. The ongoing nature of the conduct should be more clearly defined to determine if one or two incidents are sufficient versus five to ten incidents in order to increase the base offense level by 6 levels.

8. COMMENTARY TO SECTION 2T1.9 "APPLICATION NOTES", NOTE 4:

There should be no enhancement for individuals who encourage persons other than the participants directly involved in the offense to violate tax laws. Since the commission has focused this example on "tax protest" groups, this may interfere with their right of free speech. This country is made up of minority organizations who frequently protest government action and do so in violation of the law in order to get

attention. To violate the law is a decision made by each individual and they should be held accountable for that. However, their encouragement to others is different. Free speech is the right to express views and encourage others, even if this means encouraging people to take action to violate the law to get attention for their protest interests. There should be no enhancement particularly focusing on "tax protest groups" in light of their right to speak out against taxes in this country as such an enhancement would bring forth questions as to the right to free speech and whether or not there is additional criminal conduct by just encouraging others to join a protest group. Thus, a decision to join the group, and thereby violate the law, then becomes an individual problem and not a collective problem. It is unnecessary to punish those groups who feel they have a right to protest and encourage others to do so. It is recommended that this be completely deleted from the commentary. The remainder of the notes in this section should remain in force as this exception is not like persons who procure or counsel tax fraud, such as a CPA, or other tax consultant.

9. **CHAPTER 2, PART D/OFFENSES INVOLVING DRUGS AND CHAPTER 3 PART B/ROLE IN THE OFFENSE:** We support the clarification of the role in the offense commentaries and believe that the expanded version for application of mitigating role is extremely helpful. This opens the door for more latitude for certain individuals who have limited cooperation information, but who

are also at a lower level position in a drug organization. They will have the opportunity to receive additional deductions which will balance out the difference between those who cooperate fully because of their knowledge being a person at the top of a drug organization, versus that individual who cannot provide as much information. Individuals who are at the head of a drug organization have a great deal of information to provide in terms of cooperation, this often results in substantial sentencing mitigation. While at the same time, those individuals at the lower end of the drug organization have limited cooperation abilities and very seldom receive the benefit of a great deal of mitigation. Two ways that will help in balancing this problem are (1) increasing the opportunities for mitigating role in the offense deductions, and (2) acceptance of responsibility deduction.

We oppose the deletion of "five or more participants to four or more participants", pursuant to section 3B1.1(a). This subsection is restrictive enough as it is and should not be reduced any further to aggravate the sentences that are often in the highest and most severe range of the guidelines.

Additionally, unindicted co-conspirators or unindicted individuals that are not co-conspirators should not be counted as individuals under this "five or more participant" aspect of the sentencing guidelines, particularly focusing on eliminating anyone who simply had knowledge of the

conspiracy, but was not a participant. This would include girlfriends and wives, which have often been used to bring the number of participants up to the required level for aggravation of the offense severity rating.

We would also not support the use of any undercover agent as a individual to be counted under this subsection of the guidelines. If the Commission considers using law enforcement agents recruited by a criminal defendant as an individual participant, then the Commission must identify further that, if a law enforcement officer brings in any other agents, recruited or not by the agent themselves, or the defendant, that they would not be considered beyond the first agent recruited. This eliminates any conflict for introductions of other law enforcement agent to the defendant, but not the actual recruitment of that law enforcement agent to participate in the offense other than by the actions and conduct of the defendant. There is a fine line between what would constitute recruitment by a law enforcement agent by bringing in another agent, versus the encouragement of the defendant to bring that agent into the drug organization after the introduction by the original agent was made. Introduction and recruitment are two different actions. This could become an area of abuse in the guidelines in terms of how it would apply to the number of participants.

We would support the proposed amendment Section 3B1.2 under minimal role in increasing the number of points

available and the clarification of its application. 3B1.2(a) should be increased to 5 levels and 3B1.2(b) should be increased to three levels with cases falling between (a) and (b) increased by four levels. This again brings more balance to individuals who cannot provide as much cooperation as an individual in a higher position within a drug organization.

In regards to those who receive a reduction under subsection (a) minimal role, the clarification of the guidelines should be as follows:

- (A) Performed unskilled or unsophisticated tasks (off-loading, mule, minimal supervisory control over other off-loaders, boat crew, lookouts, etc.).
- (B) No (substantial) proprietary interest in criminal activity.

This would clarify the remainder of these paragraphs and its application to the proposed criteria.

The remainder of this subsection is excellent guidance for the courts and defense attorneys in helping them advocate for minimal and minor role participation interests. It gives more criteria to clarify where this would or would not apply.

It is still of importance to try to expand as much as possible the mitigation aspects of minor drug offenders. Because drug crimes are notoriously severe, more deductions for role should be used.

As to additional issues for comment, we would respond as follows:

1. The overall culpability of an individual defendant to the group of defendants is important in terms of one defendant's ability to receive a deduction for minimal role. However, if that person is not intricately connected to the full panoply of defendants, then one should look to individuals that supervised the defendant, who may be considered for minimal or minor role deductions as the basis for determining that individual's role. That breaks up any multiple defendant conspiracy into tiers. Those who may not have had knowledge of, or are intricately connected to the full scope of the conspiracy and drug organization, would not be subjected to a comparison of role in relationship to all of the defendants. It is possible that a "lieutenant" could actually be a minor participant in relationship to the total scheme. This individual may only be a supervisor of a group of off-loaders, but not involved with the main traffickers, importers or suppliers, and may not even know who they are.
2. We would support automatic eligibility for minimal role for individuals who can clearly be identified as off-loaders, drivers, transporters, or look-outs and some individuals who actually supervise those particular defendants. An onshore supervisor of

lookouts, off-loaders, and drivers may have no knowledge of the individuals who supplied the marijuana, or those who will purchase the marijuana for distribution in the United States.

3. No one should be automatically disqualified from being considered for minimal role. Every part of a drug organization is needed in order to accomplish the goals the drug organization intends. Therefore, no one would be eligible if you look at the picture from the prospective that all participants who are needed for that object of the conspiracy have some skill. They do, but in terms of their connection with that skill to the big picture, there is a substantial difference in responsibility and culpability.
4. The factors represented by the Commission in its attempt to delineate role in the offense adjustments is an excellent effort and should be pursued for further expansion. The more criteria a judge can follow in applying the minimal role issue, the more likely that it will be applied.

There is a substantial conflict within the guidelines that needs to be clarified further, and that is the issue of whether or not role in the offense applies solely to the count of conviction. It is believed that in order for a person to get the benefit of a plea bargain agreement, that role in the

offense adjustment has to be associated with the offense of conviction. This includes, but is limited to the offense of conviction being that which is applicable to the sentencing guidelines.⁴ There should be no enhancement for role in the offense if the individual involved is the sole participant in the offense other than drug agents or other law enforcement agencies.⁵ The cases referenced in the footnotes reflect some further clarification to assist the Commission in its determination of how role in the offense adjustment should be applied. The Commission should consider using these application notes to help the Courts better interpret role in the offense issues. The majority of the cases cited clearly represent limited role in the offense. Cases that state reasons for mitigation should be incorporated in the contents of the application notes to encourage Courts to apply these

⁴ U.S. v. Zweber, 913 F.2d 705 (9th Cir. 1990). Additional conflict arises when a defendant's role is also related to uncharged conduct or acquitted conduct. Opposition U.S. v. Felze 920 F.2d 1179 (4th Cir. 1990), role based on relevant conduct, not just offense of conviction. U.S. v. Pettit 903 F.2d 1336 (10th Cir. 1990). The 10th Circuit holds that "role in offense" adjustment applies only to offense of conviction. See also U.S. v. Bogas 731 F.Supp. 242 (N.D. Ohio, 1990). Ohio District ruled that the defendant cannot be an organizer if he is the only culpable person. See also U.S. v. Williams 891 F.2d 921 (D.C. Cir. 1989). D.C. Circuit held that role enhancement must be based on offense of conviction and offense of conviction must involve more than one person.

⁵ U.S. v. Tetzlaff 896 F.2d 1071 (7th Cir. 1990). 7th Circuit vacated the role enhancement where the defendant was the only person involved in the offense of conviction. See also U.S. v. Anderson -F.2d- (9th Cir. 1991), (En Banc) 89-10059.

deductions more often.

We would also suggest that the commission incorporate the term "extra ordinary" mitigating role as a reason for a downward departure. Though this would be a rare occasion, it does happen.⁶ It is important that the sentencing commission delineate examples between minimal and minor role. Most of the Courts have addressed any mitigating role as that of minor participant versus minimal participant, even drug mules. Therefore, the more terms applied to individual conduct, the more likely the courts will start to apply the minimal role deduction considerations. Drug quantities would also be a consideration in determining role in the offense and should remain as part of the reasoning within the present sentencing guideline application notes concerning same.

We also believe it is imperative that this Commission identify that minimal role participation is applicable even if the defendant is the sole participant in the offense and the only other persons involved are drug agents.⁷ It is clear from all of the case law reviewed that the courts are confused over how to apply minor and minimal role participation. Very seldom do any of those particular role applications get any consideration in drug offenses. Therefore, the more definitive the commission can be in regards to this, the more

⁶ U.S. v. Restrepo, 936 F.2d 661 (2nd Cir. 1991).

⁷ U.S. v. Bierley, 922 F.2d 1061 (3rd Cir. 1990).

likely that the courts will begin to apply more mitigation to certain defendants who qualify.

Couriers should be considered as minimal participants, mules, off-loaders, lookouts, some people in the supervisory capacity of lookouts should be considered small quantities of drugs to be used to determine role in the offense, particularly concerning an individual purchaser or seller of the drug as it relates to the whole schematic of the drug organization. As indicated, most courts have attached a minor deduction for role in the offense, but very, very few have considered minimal role deductions, even for courier status. Therefore the Commission must take steps to help the courts decide what constitutes minimal role considerations.⁸

10. **CHAPTER 3/ACCEPTANCE OF RESPONSIBILITY:** First and foremost, There are not enough points given for acceptance of responsibility consideration. The Commission, in its list of examples of what acceptance of responsibility may constitute suggests seven different types of options that an individual may participate in that would grant them acceptance of responsibility credit. Several of these seven options may apply to an individual. It is believed that an individual point value for each of the options identified would give more opportunity for judges to use discretion in applying

⁸ See U.S. v. Cepeda, 907 F.2d 11 (1st Cir. 1990), U.S. v. Paaz-Urbe, 891 F.2d 396 (1st Cir. 1989), and U.S. v. Garcia 920 F.2d 153 (2nd Cir. 1990).

acceptance of responsibility credits beyond the present two point deduction. We have consistently heard complaints that defendants who plead guilty to drug offenses, receive no other deductions other than two points for their plea. This route is meaningless in the total scheme of point values related to offense severity. It is particularly true when a minor participant is subjected to a quantity of drugs represented in a large conspiracy, even though his role is less severe. Generally, a defendant will at best receive maybe 2 points for acceptance of responsibility and, hopefully, 2 points for minor participant status. This leaves very little, if any, consideration for the individual who accepts responsibility but has little to offer in the way of cooperation. This may also eliminate some of the abuse of discretion that prosecutors have been known to initiate in cases where individuals can only cooperate in a minimal capacity. On these occasions the defendant does not receive the benefit of a 5K1.1 motion or anything other than the 2 points for acceptance of responsibility. At the very least, the acceptance of responsibility should go to 4 levels of consideration and allow the courts to determine what range should be applicable depending on the extent of the conduct described.

A list of factors can be used to determine the weight of

the acceptance of responsibility credit to be given. This would put the acceptance of responsibility Section into providing a 1, 2, 3 or 4 level reduction, dependant upon the magnitude of the defendant's conduct subsequent to entering a plea of guilty. It would also allow individuals who do go to trial to protect their due process rights to be given some consideration for acceptance of responsibility after the jury verdict has been determined, and they then decide to show remorse and contrition for their conduct.⁹

We would suggest that under Section 3E1.1 (a) (2) that the Guidelines add to the delineation of reasons for going to trial to receive acceptance of responsibility consideration, the "entrapment defense".

Option 4: Subsections (A), (B), and (C) of Section 3E1.1 should be increased from your present amended recommendation for each level by one point. For example, (1) if someone has accepted responsibility for the offense in a timely manner in a pre-indictment or post indictment capacity, before pretrial motions; decrease the offense level by 4 (instead of 3).

(2) If a defendant is convicted upon a plea of guilty or Nolo Contendere entered prior to the opening of government's case at trial, decrease by 3 (instead of 2). (3) If the defendant is convicted upon a plea of guilty or Nolo after the opening of the government's case at trial, decrease the offense level

⁹ (The Commission has suggested a 1 point value for this consideration.)

by 1, (or by 2) if the defense was an affirmative defense as represented in the Amendment, examples given under the commentary of 3E1.1 Section(a)(2).

11. **COMMENTARY ON SECTION 3E1.1, BACKGROUND INFORMATION:** As to Option 1: Option 1 has a great deal to offer in insuring that the defendant gets the benefit of the plea bargain that they enter into. A defendant who pleads guilty should be held accountable not only to the base offense level as to the count of conviction, but also to the acceptance of responsibility level as to the offense of conviction. This would eliminate problems that keep arising at sentencing where the government can bring in information under the "relevant conduct" theory, and only has to use the preponderance of the evidence standard to support that relevant conduct to enhance an offense level. Even when some plea agreements are made with the offense level predetermined, where the plea is entered on the understanding that the offense of conviction will be used as a basis for the offense level, the probation office will prepare a presentence report and represent a different relevant conduct basis. Conduct that has not been proven, other than by a preponderance of the evidence, which includes hearsay and statements made without foundation or additional evidence submitted in accordance with due process protected rights. This conflict gives the government an opportunity to enter into plea agreements without having to carry the burden of reasonable doubt standards for the enhancement of relevant

conduct issues. Often times, going to trial actually helps the defendant in reducing their exposure to these relevant conduct problems by identifying the actual role that defendant played beyond the scope of what was represented during the course of the investigative process prior to indictment. These problems must be narrowed by the commission's conduct in identifying mitigation opportunities and eliminating the ability to try a case at the sentencing phase under a lesser standard of proof.

Option 2 would help those individuals who are involved in criminal conduct, particularly drug offenders, above the offense level of 30, and open doors for more mitigation, particularly for first offenders and youthful offenders. The tragedy of our system at present is that there is no youthful offender considerations. Many young people from the ages of 18 to 25 are given severe penalties in light of their involvement with drug activities, with limited ability to obtain mitigation without cooperation other than acceptance of responsibility and role deduction. With an additional 4 point mitigation opportunity, where the base offense level is over 30, the potential for mitigation on cases of first offenders and youthful offenders who engaged in serious criminal conduct is increased.

As to Option 3, this is also supported, but the increase in the number of levels available for this option should be enhanced by 1 level.

Option 4 overly restricts the issues of a defendant having to go to trial to put the government to its burden on not only relevant conduct, but role in the offense and other issues that may affect the final sentence. That right should be preserved but it should not eliminate the opportunity for receiving acceptance of responsibility credit to some degree at a later time and under certain circumstances in the exercise of constitutional rights to trial when presenting an affirmative defense.

12. DISCUSSION ON 4B1.1 CAREER OFFENDER AND SECTION 4B1.2 DEFINITIONS AND TERMS USED. We would support Option 1 under proposed amendment 27(A). Supporting this option keeps from having the enhancement of the statutory maximum used in determining the offense level.

It is our intent to support the commission in clarifying certain types of offenses that would be considered violent or non-violent when counting those convictions for enhancement purposes. Commentaries should include a provision identifying the fact that an offense of an alleged violent crime or narcotics offense, that resulted in a fine or probation, or a sentence of less than a 6 months should not be counted under the enhancement provisions. It also may be helpful to delineate quantities of drugs applicable to the prior offenses. Some minor offenses from years past, concern minimum quantities of drugs yet have been used to enhance criminal sentences irrespective of quantity. The Sentencing

Commission should incorporate into its commentaries, concerning career offender terms, definitions, and application notes, factors dealing with the court's downward departure power when the career offender enhancement penalties or the prior record overemphasizes the severity of the upgraded base offense level.¹⁰

13. **CHAPTER 5, PART A, SENTENCING TABLE COMMENT 28 (A):** We support a criminal history category of 0, but not an increased criminal history category of up to 7. We believe that the departure powers of the court have been clearly applied when the court believes that the criminal history score is not adequately reflected in the most severe category as to prior record. The courts have also been given guidance on how to depart.¹¹

In regards to opening categories up for prior record with a zero point value, the guideline ranges should expand the availability of probation by using a criminal history score of zero from offense level 7 through 12, of a range of guidelines from zero to 16 months respectively. This would open up more opportunities for first offenders to receive probation but

¹⁰ U.S. v. Lawrence 916 F.2d 553 (9th Cir. 1990), Court stated that downward departure can be made from the sentencing guidelines even when sentencing a defendant as a career offender if the defendant's criminal history category significantly overrepresents the seriousness of his history or likelihood that he will commit further crime.

¹¹ U.S. v. Diaz-Villafane 874 F.2d 43 (1st Cir. 1990) cert denied 110 S.Ct. 177 (1989).

leave within the discretion of the court the need to impose a period of incarceration. The following table gives an example of this consideration.

CRIMINAL HISTORY SCORE

0

OFFENSE LEVEL

GUIDELINES

1	0-6 months
2	0-6 months
3	0-6 months
4	0-6 months
5	0-6 months
6	0-6 months
7	0-7 months
8	0-8 months
9	0-10 months
10	0-11 months
11	0-14 months
12	0-16 months

Expanding the availability of probation optioned sentences expands the availability of alternatives to incarceration. Thus, if a Court wanted to impose probation on a higher level offense, but still provide some necessitated period of punishment or an alternative program as previously described, the court would have the latitude to do so without being mandated to preset minimums.

14. CHAPTER 5; PART A, B, AND C: As to option 4, chapter 5, part A of the sentencing table, any definitive mitigation in the criminal history scoring category as it relates to offense level is supported. An expansion of this mitigation is recommended to allow for more categories of offenses in criminal history scores of 0, 1 or 2, to receive the benefit of probation, split sentences or community service alternatives. This commentary constitutes affirmative support

for reductions in offense levels opening the door for more mitigation under the different career history categories and higher base offense levels.

Additional issues for comment concerning Chapter 5, Part A, B, and C are to encourage the Commission to support the use of alternative programs such as intensive supervision, public service, shock incarcerations, boot camps, or maximum 90 day custody programs for certain qualified youthful first offenders, day reporting centers and half way house programs. The Commission should expand the application of these programs to the commentaries pursuant to Chapter 5, Part C et. seq., by allowing the Courts to propose these options as an alternative to a required minimum period of incarceration.

It is also recommended that the boot camp programs and day reporting centers be expanded as to those who are eligible. A criteria for eligibility may be beneficial to help the courts in guiding them through circumstances which would warrant consideration for the proposed alternative programs. In addition to eligibility issues, primary targets for this program should be the following:

1. Youthful offenders (18-26 years of age).
2. Elderly offenders who have never been in trouble previous to this experience. (See Attached Story of 66 year old first offender who received 60 months for 500 grams of cocaine.)
3. First offenders of non-violent crime.

4. First offender of minor offenses including some minor drug offenses.
 5. Some addicted, behaviourly disturbed persons who have committed their first criminal act and have not received appropriate treatment for their addiction or behavior problems.
15. **COMMENTARY AS TO APPLICATION NOTES SUBSECTION 5C1.1(c) and (d):** One month of imprisonment followed by a term of supervised release effectively eliminates the Court's requirement in having to split the minimum term of imprisonment between incarceration and non-incarceration. However, since the Commission considers reducing this to a one month term of imprisonment, why not give the court complete discretion and leave it at 0 to 1 to serve at the court's discretion. If the court wants an individual to serve a minimum of one month in prison, the court can impose such an option by making a totally discretionary decision.
16. **CHAPTER 5, PART A; DEPARTURES:** We support the elimination of the requirement that a motion be submitted by the government for the purposes of determining 5K1.1 departure considerations. This should be a complete matter for the court to decide. There have been enumerable complaints and problems in leaving so much discretion to the prosecutor to determine the weight and value of the cooperation even before filing a 5K motion, thus, exposing the defendant to releasing said information to the prosecutor in hopes that it will be

significant enough. Yet, this is not determinable until after the fact. Once the information is released and the prosecutor feels it is not of value, not usable, or somehow not significant enough, despite the good faith effort of the defendant, the government can completely refuse to file a 5K1.1 motion.

Even when the government agrees to file a 5K1.1 motion based on a plea agreement, problems can arise when the government contends that the defendant has not properly conformed to the plea agreement in relationship to that defendant's cooperation, or that he has not met the burden required of the prosecution from its interpretation of the facts and circumstances negotiated in the plea. This confusion keeps the entire 5K issue in the hands of the prosecutor and leaves vulnerable the defendant to complete exposure of information that may or may not be used to the benefit of the government, but not to the benefit of the defendant.

By eliminating the motion requirement, the proper person, the Judge, can do the job in balancing the weight of defendant's cooperation between the contentions of the defense and prosecution, and its impact on the defendant's sentence. Both the prosecution and defense should have every right to make a statement concerning the depth and breadth of the cooperation. Once both parties have submitted their perceptions of a defendant's cooperation to the court, the

court can then take it under advisement and make a discretionary, proper, balanced decision as to the application of that cooperation to the mitigation of a sentence via a downward departure.

17. CHAPTER 6, SENTENCING PROCEDURES AND PLEA AGREEMENTS; 35 (A):

We support the requirement that the government disclose completely, and in advance, anything that might effect the relevant conduct aspect of the case as it would relate to the determination of the offense level for sentencing purposes.

It is difficult to convince a defendant that he is getting the benefit of a plea bargain when he pleads to one count describing one set of relevant conduct considerations and yet must be exposed to the full panoply of relevant conduct related in the indictment. Further, no client should be subjected to having conduct that he was acquitted of represented as part of the basis for relevant conduct. That conduct should be eliminated from any aspect of guideline application or sentencing.

For example, if a defendant is acquitted of conspiracy to import five kilograms of cocaine, but is convicted of a substantive count of possession, based upon hand to hand sales, of approximately 8 ounces, then that five kilos should never be considered in relationship to the substantive counts for which the defendant was found guilty. Going to trial is a constitutionally protected and sacred right. If a jury of your peers finds you not guilty of a certain aspect of a case,

then you have the right to not be held accountable for that under any circumstances. To breach that concept is to erode the foundation of the constitution to the point where trials themselves could be eliminated altogether.

The court can always consider relevant conduct, not directly acquitted, that has some indicia of reliability in terms of its relationship to the counts of conviction if there is a cross over between those counts in terms of the conduct identified. But generally, that problem will take care of itself. For example, in a 2 count indictment, if a conspiracy count was for a kilo of cocaine, and the substantive count was for possession and distribution of a kilo of cocaine, and the defendant was acquitted of one of those counts, the other count would take into consideration the same quantity of drugs as to relevant conduct. Leave the relevant conduct issue for the charged and convicted offense behavior.

To make plea agreements more conducive to reasonable mitigation beyond two points for acceptance of responsibility, the Commission must either enhance acceptance of responsibility point values for deduction, or give the benefit of the doubt to the defendant for pleading guilty to one charge and not putting the government to its burden on all of the charges. The benefit of the bargain is for a defendant to be held accountable for the plea offense and its relevant conduct.

The commission is soliciting additional comment on

whether the conduct underlying acquittal of unpled counts should or should not be considered as grounds for an upward departure. This should not be considered as grounds for an upward departure moreso than a disposition within the upper level of the applicable guidelines.

We should never allow a defendant to be acquitted of conduct through the reasonable doubt standard and then be subjected to a revisiting of that conduct through the preponderance of evidence standard at the sentencing phase. This effectively eliminates due process rights, subjects the defendant to an undue burden of two trials under two standards of evidence. Acquitted conduct, unless it is somehow interrelated to the conduct that was not acquitted should not be used in determining the offense level or as a basis for imposing a sentence above the guidelines. If it is interrelated, and the acquitted conduct does not negate the full value of the relevant conduct of the non-acquitted counts, then the acquitted count can be used in selecting a sentence within the guideline range itself. This is the most effective way to achieve balance and justice with this problem. Justice comes through the back door if the preponderance of evidence standard is used to convict, punish or hold accountable a defendant who otherwise met his burden by proving conduct did not exist through the use of a higher standard, reasonable doubt. If we allow this, what we do is put the defendant in a catch 22 position where he will always

loose.¹²

CONCLUSION

This is one of the most aggressive efforts the Commission has made to incorporate mitigation within the guidelines and to open doors for more judicial discretion. The Commission's efforts are commendable. There is room for more growth; perhaps more should have been initiated by now, but at least there is some.

We hope you will take into consideration the full interest of our comments, the cases cited, the conflicts represented and the suggestions made in terms of increasing the recommendations made for mitigation options. If some of these suggestions are taken under advisement before making the new amendments part of the guidelines, then the commission will be ahead of itself looking to a much brighter future where the guidelines have more human interests. Too many judges and too many comments have been made that reflect dissatisfaction in the manner in which the guidelines are applied. Some of the strongest arguments in opposition to the guidelines were reflected in minimum mandatory sentencing. We have attached for your consideration some articles from various judges throughout the country who have clearly expressed their

¹² There is a plethora of case law dealing with defendant's being given the benefit of the bargain when pleading guilty. There is no benefit unless the defendant is told what consequences may befall him upon pleading guilty to one set of facts yet having his sentence potentially exposed to another set of facts. If we are to live up to the concept established most clearly in New York v. Santa Bello 404 U.S. 257, 92 S. Ct. 495, 30 L.Ed.2d 427 (1971) then we must return the bargain to the defendant when pleading guilty.

dissatisfaction with the guidelines, their application and their harshness. It is our hope that you, as the Sentencing Commission will work with Congress to not only get them to change their minds on some of these problems and to stop using the Sentencing Commission and the Criminal Code as a political football, but to get them to hear the cries of those who are in the system, who work in it daily and who see the consequences daily.

The public is mislead by politicians who try to get the public to believe that punishing crime more severely will reduce crime in this country. That is not the case and there is no statistical support for this. It is time that we all start educating the public on the difference between violent and non-violent crime and long and short term sentences for first offenders of non-violent crimes. There is a great deal of latitude for more sentencing alternatives. We cannot put into one pot all offenders, stir it up, and then throw every one in a prison.

It is our hope that the Commission will not only hear our words, but listen, will not only look at what we have said, but see what we mean and not just think about doing something, but doing it. At every level of justice, including through the community, and families against minimum mandatories, there is a cry for remembering humanity in a system that can never be perfect.

Respectfully submitted on behalf of all members of the National Association of Criminal Defense Lawyers and the Sentencing and Post Conviction Committee with special thanks to Jeff Weiner, President of the National Association of Criminal

Defense Lawyers.

Marcia G. Shein
Chairperson
National Association of Criminal
Defense Lawyers/Sentencing and Post
Conviction Committee

Richard Crane
Attorney
Member of the Sentencing and Post
Conviction Committee

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

* * * * *
UNITED STATES OF AMERICA

CR. 91-20-1-D

v.

EDMUND T. SCHMIDT/
Defendant.

July 12, 1991
9:00 o'clock a.m.

* * * * *

COMPLETE TRANSCRIPT OF HEARING
BEFORE THE HONORABLE SHANE DEVINE

Appearances:

For the Government:

Brian Tucker, Esq.

For the Defendant:

Andrew Isaac, Esq.
Marcia Schein, Esq.

Court Reporter:

Susan J. Lamoureux, CSR
Official Court Reporter
U.S. District Court
55 Pleasant Street
Concord, New Hampshire 03301
(603) 228-3279

Proceedings recorded by mechanical stenography, transcript
produced by computer-aided-transcription.

years I have been in the business of consulting strictly on sentencing factors, and I have testified before congress on the guidelines.

THE COURT: And you know that the guidelines have drastically changed things; that the Congress of United States now believes all first offenders, as well as those who carry heavy criminal records, are to be punished irregardless, and they're not interested much in compassion, and they don't think that the things used to guide those of us who are engaged in what the congress has decided is disparity of sentence should be of any use. As a practical matter, as I've said before, I don't know why I'm sitting here, because there should be a computer facing you, and you and the Government should push buttons and that should come out and we should be going on with other things. But that's the way the congress wants it. I don't like it. I have to face it, and I have to live with it as such.

You did an excellent job in the preparation of this sentencing memorandum and in the objections which were filed prior, and I've gone over all of them as such with respect to this case.

I'm going to take this a little backward. But for the purposes of the record here, first of all, I reject the argument as to this being aberrant behavior on

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE: THE HONORABLE STANLEY A. WEIGEL, JUDGE

UNITED STATES OF AMERICA,
PLAINTIFF,

VS.

MICHAEL B. ESCHENBACH,
DEFENDANT.

CR-91-0527 SAW
SAN FRANCISCO, CA
DECEMBER 5, 1991

EXCERPT OF PROCEEDINGS

A P P E A R A N C E S:

FOR THE PLAINTIFF:

WILLIAM T. MC GIVERN, JR.
UNITED STATES ATTORNEY
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CA 94102
BY: STEPHEN MEAGHER
ASSISTANT UNITED STATES ATTORNEY

FOR THE DEFENDANT:

LAURENCE J. LICHTER, ESQUIRE
SERRA, PERELSON, ANTON, LICHTER & DAAR
473 JACKSON STREET
SAN FRANCISCO, CA 94111

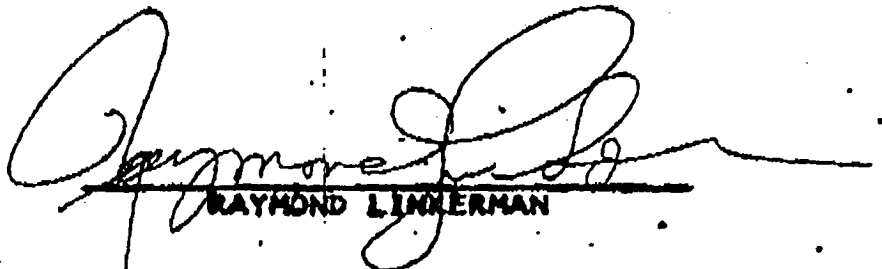
COURT REPORTER:

RAYMOND LINKERMAN
450 GOLDEN GATE AVENUE
BOX 36052
SAN FRANCISCO, CA 94102

CERTIFICATE OF REPORTER

I, **RAYMOND LINKERMAN**, THE UNDERSIGNED OFFICIAL
REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVENUE,
SAN FRANCISCO, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED
1 THROUGH 3 INCLUSIVE, CONSTITUTE A TRUE, FULL
AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE
ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY
ABILITY.


RAYMOND LINKERMAN

1 THURSDAY, DECEMBER 5, 1991

2 (EXCERPT OF PROCEEDINGS)

3 THE COURT: THIS CASE ILLUSTRATES THE FOLLY OF THE
4 SO-CALLED CRIMINAL JUSTICE ACT WITH ITS GUIDELINES. HERE IS A
5 MAN WHO HAS BEEN CAREFULLY EVALUATED BY A RESPECTED PROBATION
6 OFFICER OF THIS COURT. THE COURT HAS FOLLOWED HIS RECOMMEN-
7 DATION IN THE SENTENCE JUST IMPOSED. THE UNITED STATES ATTORNEY
8 WAS QUITE RIGHT IN SAYING HE'S FORTUNATE THAT THE TIMING OF THIS
9 OFFENSE WAS WHEN IT WAS, OTHERWISE I UNDERSTAND THAT HE WOULD
10 HAVE HAD TO HAVE HAD A SENTENCE OF WHAT?

11 MR. MEAGHER: 10 YEARS MANDATORY MINIMUM.

12 THE COURT: 10 YEARS IN PRISON. WHICH, IN VIEW OF HIS
13 REFORMATION, WOULD HAVE RUINED HIS LIFE, AND WITH NO CONTRI-
14 BUTION TO ANY EFFECTIVE REDUCTION IN THE DRUG PROBLEM IN THIS
15 COUNTRY.

16 THE GUIDELINES ARE SUPPOSED TO ELIMINATE DISPARITY IN
17 SENTENCING, BUT DISPARITY IN SENTENCING IS THE STUFF OF WHICH
18 REAL JUSTICE IS MADE. THE GUIDELINES HAVEN'T EVEN, EXCEPT AS TO
19 MANDATORY SENTENCING, HAVEN'T EVEN ELIMINATED DISPARITY, BECAUSE
20 OF, AT LEAST TO SOME EXTENT, THE DISCRETION OF JUDGES IN
21 INTERPRETATION AND IN DETERMINING A SENTENCE BETWEEN THE
22 SO-CALLED GUIDELINE LEVELS.

23 THOSE WHO ARE INTERESTED IN JUSTICE IN THIS COUNTRY, IN
24 MY OPINION, OUGHT TO BE WORKING FOR THE ABOLITION OF THE
25 GUIDELINES, AND SHOULD BE CONCERNED WITH THE FACT THAT THERE IS

1 VERY LITTLE TO ESTABLISH THAT HARSH SENTENCES GREATLY REDUCE
2 CRIME. IN SOME CASES, A HARSH SENTENCE KEEPS A PARTICULAR
3 CRIMINAL FROM COMING BACK TO COMMIT MORE CRIMES, BUT THE
4 DETERRENT EFFECT ON OTHERS IS FAR FROM ESTABLISHED.

5 THERE ARE STATISTICS SHOWING THAT, FOR EXAMPLE, IN TWO
6 CONTIGUOUS STATES, WITH THE DEMOGRAPHIC POPULATION ABOUT THE
7 SAME IN EACH, ONE STATE HAD CAPITAL PUNISHMENT, THE OTHER DID
8 NOT, THERE WAS NO SHOWING THAT IN THE STATE WHICH HAD CAPITAL
9 PUNISHMENT OVER A LONG PERIOD OF YEARS THAT CRIMES OF MURDER
10 WERE ANY LESS, INDEED, THERE WERE MORE, THAN IN THE STATE WHICH
11 DID NOT.

12 THE WHOLE BUSINESS OF CRIME IN THIS COUNTRY -- I'M
13 SORRY TO BURDEN YOU WITH THIS LECTURE; I KNOW YOU'D LIKE TO
14 GO -- BUT THE WHOLE BURDEN OF CRIME IN THIS COUNTRY IS DUE
15 PRIMARILY TO FAILURE TO ELIMINATE HORRENDOUS CONDITIONS IN CITY
16 GHETTOS AND BARRIOS, AND OUR FAILURES IN EDUCATION. ELIMINATION
17 OF POVERTY AND IMPROVEMENT IN EDUCATION ARE THE MAIN REMEDIES
18 WHICH WILL REDUCE CRIME, RATHER THAN HARSH SENTENCES, WHICH ARE
19 DOING NOTHING PRIMARILY, EXCEPT TO REQUIRE THE BUILDING OF MORE
20 PRISONS, AND THE GREAT EXPENSE OF MAINTAINING THEM. WE NEED TO
21 DO SOME SERIOUS THINKING ABOUT THESE MATTERS AND GET AT THE ROOT
22 CAUSES OF CRIME RATHER THAN JUST AT SYMPTOMS.

23 WELL, I THINK THAT'S ABOUT ALL.

24 (END OF EXCERPT)

8. Administrative Form 70 Inmate Staff Interview Request ("Cop Out Request);
9. Segregation/Isolation Protective Custody Memoranda, if any;
10. All TWX's related to inmate status;
11. U. S. Parole Commission Initial Hearing "Mini File" Materials (Handwritten or Typed) including the Initial Hearing Summary (Handwritten or Typed). Summary (Parole Form H-38), Parole Guideline Worksheet (Parole Form H-10) and the Tentative/Advance Parole Guideline Worksheet, and/or Parole Violation "Packet" Material/Data;
12. Sentencing District Court Presentence Investigation Report (PSI), or a Summary thereof;
13. A.O. 235, Sentencing Court Memorandum;
14. D.J. 792 U. S. Attorney's Report;
15. Any related Memorandum, Letters, Military Records, Telephone Messages or U. S. Parole Commission's Notice of Action;
16. Medical records to the extent that they are non-exempt from disclosure (28 CFR 16.43(d) (1980)); and
17. All hearing tapes.

In the event that any of the requested information is deemed exempt from disclosure, please advise with specificity and particularity the reasons therefor including an itemization and index which would correlate specific statements in such justification with actual portions of the requested documents. See, *Vaughn v. Rosen*, 484 F.2d 820, 836-38 (D.C. Cir. 1974). Additionally, if any material is deemed exempt for disclosure please provide "reasonably segregable portions" of same after deletions are made and justification and itemization for the same are correlated and disclosed.

It is our understanding that your agency will determine within ten (10) working days whether this request will be complied with and we will be promptly informed as to the disposition and projected schedule of and for implementation of this request. This is also an ongoing request for all disclosable information in your files referencing the above-captioned, even those records which post-date this request and which are prepared during or prior to its processing.

We believe this places upon your agency an affirmative duty to update your response (e.g. by furnishing recently received or soon to be prepared documents and records covered herein).

We appreciate your timely compliance with this request.

Sincerely,

co-chairman of the Democratic Party. After being on the superior and federal court bench, I found out it made no difference what party affiliation you had. You call them as you see them.

Advocate: Having a large family with seven children, did you find it difficult to raise your family while concentrating on your legal career?

Loughlin: Well, it was difficult. I did a lot of traveling once I became a judge and the financing was difficult. When I started out, it was pretty hard to get a job. When I first took the bar, there were forty-nine others also taking it and at that point that was the largest number of bar applicants. Fifty percent passed. There was one available job that I knew of in the state. There may have been others but that was the only one I was aware of. There are more jobs now but proportionately more lawyers, so it is still difficult.

Advocate: Do you find many Suffolk alumni in your courtroom?

Loughlin: I do. In fact, I believe proportionately that there are more Suffolk graduates practicing in this state than any other non-domestic law school.

Advocate: During your eleven years of sitting on the federal bench, what decision or decisions are most memorable to you?

Recently we had a case. . . . We were told it was destroying government property in a federal park. We found out that a woman had broken a branch to toast marshmallows for her kids. That case was quickly thrown out by the magistrate.

Loughlin: The most arduous case I ever had was an environmental case out of Kingston which involved and still involves 32 million dollars. It started on May 15, 1980. It has been up to the First Circuit. It is the longest environmental case ever tried, 185 trial days. I still have the case as I am monitoring the settlement and there is still some litigation between the two litigants. They figure the premises in this particular case will not be cleaned up until the year 2042.

Advocate: I believe, as a senior judge on the federal bench, you have the opportunity to choose the type of case you wish to hear. Which type do you prefer and why?

Loughlin: As a senior judge, I am taking everything but criminal cases. I have cut back on my case load. I do perhaps 75% to 80% of what I did as a non-senior judge. The reason why I have stopped taking criminal cases is because

of my strong feelings about the sentencing guidelines. I can unequivocally say that I would still be trying criminal cases, which are very interesting and easier, if it were not for the sentencing guidelines that went into effect on November 1, 1987.

Advocate: Regarding the sentencing guidelines, the argument against them is that they take away much of the discretion a judge would otherwise have. It must be difficult for you when you are powerless to consider any of the extenuating circumstances in a case.

Loughlin: It not only takes away much of the discretion, it takes away practically all your discretion. It takes away any compassion. It takes away any ability to deal with unusual cases which call for either an upward or downward adjustment. They pay lip service and say you can go upward or downward in some cases but if you look at federal guideline cases, especially from the First Circuit, very few downward departures have been sustained. Under the old rule 35 [Federal Rules of Criminal Procedure], the only one who can really proffer a reduction in sentence is the United States Attorney, if he gets substantial cooperation from the defendant. If the defendant decides to inform on someone else, then only the U.S. Attorney can bring an appropriate motion and the judge will sit there and say "yes" or "no" to it, but the court cannot initiate the process. That has many untoward effects. I had a situation where a defendant cooperated 100% but he had nothing to offer so his sentence stayed as is. I could give a multitude of examples why I disagree with the guidelines. They have created their own frankenstein. Under the sentencing guidelines, everybody goes to jail. Our prisons are already overcrowded. I think that the shock incarceration programs you now see are a very subtle way of saying, hey, we have too many people in prison and we want to get them out. The guidelines, however, are inconsistent with this approach.

Advocate: Do you think the sentencing guidelines will be repealed?

Loughlin: I doubt that they will ever be repealed. Modified possibly, but not repealed.

Advocate: The demeanor in the courtroom is often serious. Could you comment on the lighter side of your courtroom experiences?

Loughlin: There were many humorous experiences. Perhaps this story is not considered humorous but there was a trial up in Coos County where two defendants had been accused of breaking and entering and stealing twenty bottles of liquor from the legion post. The liquor was introduced into evidence and after the judge charged the jury, the jury went out to deliberate. Within two or three hours, they seemed to be a very jovial bunch. We later found out that they had been imbibing from the evidence. A mistrial resulted. In another case, a domestic relations case, an at-

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DESI TRIPLETT,

Defendant.

No. 91-30031

PRESENT: The Honorable William L. Beatty

ATTORNEY FOR GOVERNMENT: Ranley R. Killian, Esq.

ATTORNEY FOR DEFENDANT: Pearson C. J. Bush, Esq.

SENTENCING HEARING

OCTOBER 10, 1991

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Do you understand that?

be plainer to him.

MR. BUSH: Judge, if I may. The point that I want to make is that we are asking you to look behind that.

THE COURT: I can't.

MR. BUSH: In other words -- wait, wait.

THE COURT: I wish I could. But if you can show me -- Mr. Bush, I have made it very plain in a number of these cases that I think this ten year minimum sentence is certainly not what I consider to be reasonable, and I could even go into stronger language than that. I don't agree with it. I think it's wrong. In this case, apart from the ten year minimum, apart from the guidelines, from what I've seen in the presentence report, I don't think ten years is a fair sentence for your client. But I don't think that that's up to me. That's my personal opinion. But under the law, as I understand it, I have to give him ten years, and the only way that I can do less than that is if the Government comes in and files a motion and asks me to go below that ten years. The Government hasn't done it. The case you have cited, Connor, I don't think applies in this case. I don't think it's up to me. I don't think I can -- you said earlier that you want me to do the equitable thing. This isn't a Court of equity, unfortunately. I would -- believe me, I wish we were back to the old sentencing practice where it was up -- where

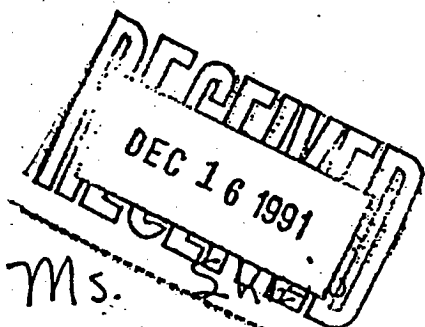
the discretion was mine. I think the Government has all the discretion now, and I could sit here and talk all afternoon about some of the other problems I have with the Sentencing Act, but that's not for me to decide. Congress has passed the statute imposing the ten year minimum for this offense, and Congress also passed the Sentencing Guideline Act, and I am sworn to uphold the laws the Congress passes, whether I agree with them or not. As I say, if you can -- I said I don't think the Connor -- am I correct, the Connor case there was a plea agreement and that the Government agreed to file a 35 motion, and the only question was whether the man had cooperated or not?

MR. BUSH: Well, I guess the point that I would make about that is you had an agreement. He had an agreement. This man provided --

THE COURT: Not at the time of the plea. There was no plea agreement in this case.

MR. BUSH: All right. The timing, Your Honor, I think is -- becomes insignificant in light of the substantial assistance this man has provided. The timing of it is -- and that's what -- part of the problem with Connor, is the timing of it. In other words, the prosecutor didn't file the motion or chose not to file and the Court, I think, from my reading of that case, can do what is fair in terms of sentencing. You know, I use the word equity. All we're saying is fair.

copy to
Mabel
Jude



12/9/91

Dear Ms.

My name is J. B. Williams, I have been sentenced to 60 months for drugs possession. I am 46 years old, I don't know what exactly was in the brief case that was given to me, but I must admit it was wrong. The Government says it was 500 grams of Cocaine, but what proof I don't know. All and all I've made a terrible mistake. I didn't know anything about a mandatory sentencing guideline for anything like this, is there any help for me or a possible reduction in sentencing. I can't do 60 months in this place, my health is bad, I'm seeing the doctor all the time. Please, there must be some help some how. I was just used, I don't know anything about drugs, although I am wrong, and the law must be upheld, it's ashamed that I have to be here for 60 months. I don't have the money to fight this case to my benefit. I was drawing S.S.I. before it happened, now I'm wondering if I'm going to be able to continue that. Do you know of anyway I could get a downward departure from these 60 months.

Please! I am 46 years old, I don't have 60 months to stay here. Please! instruct and direct me to my assistant available. Thank you very much. God Bless You. J. B. Williams

West Palm federal judge says drugs should be legal

By CAROLYN SUSMAN
Palm Beach Post Staff Writer

WEST PALM BEACH — A respected federal judge, frustrated by a court system overloaded by drug cases, says that drugs should be legalized.

"I have joined that group of people who believe that the use and sale of controlled substances should be legalized," U.S. District Judge James C. Paine said in a



Paine

speech last week to the Federal Bar Association in Miami. The judge, based in West Palm Beach, compares outlawing drugs such as heroin, marijuana and cocaine to Prohibition.

"Alcohol didn't cause the high crime rates of the '20s and '30s, Prohibition did. And drugs do not cause today's alarming crime rates, but drug prohibition does."

It was the first time that Paine, appointed to the Southern District in 1979 by President Carter, has publicly stated his position. He said no specific incident prompted him to make his remarks, adding,

Please see DRUGS/21A

geties on 88 of Miami for their ninth straight win. **SPORTS, 1C**

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Judge compares drug war to Prohibition

DRUGS/from 1A

"Most people don't agree with me."

Paine, 67, said decriminalizing drugs would reduce crime, reduce corruption of law enforcement officials, lead to the production of weaker drugs, reverse the trend toward abuse of civil liberties and eliminate the futility of fighting a war the government isn't winning.

"Trying to wage war on 23 million Americans who are obviously very committed to certain recreational activities is not going to be

any more successful than Prohibition was," he said.

Palm Beach County Juvenile Judge Howard Berman is intrigued with Paine's idea. "I think the whole thing needs to be rethought," he said. "I'd be open-minded about it."

He said many of the young people who come through his courtroom are selling drugs to make money.

Illegal drugs are scarce and high-priced. That makes them an appealing source of revenue. Buy-

ers, meanwhile, often commit crimes to pay for them.

"The decent people, who would like to sell drugs as they might liquor or tobacco, are squeezed out of an increasingly violent business," Paine said.

Paine doesn't believe legalizing drugs would be difficult. "Our society has had a lot of experience with legal dangerous drugs, particularly alcohol and tobacco, and we can draw on that experience when we legalize marijuana, cocaine and heroin."

CITY/AREA

Judge assails guidelines, gives man 1 1/2-year term

By Mike BUCSKO
Post-Gazette Staff Writer

A judge yesterday rallied against the federal judiciary's sentencing guidelines and warned that some judges might "resign or engage in civil disobedience" because of the inflexibility of the guidelines.

The comments from U.S. District Judge Donald E. Ziegler were prompted by the case of a former Dormont man who faced 12 1/4 years to 15 1/4 years in prison on charges that would have gotten him a maximum eight-month sentence in state court. Ziegler

called the sentence under the federal guidelines "Draconian and void of any reason."

He said federal judges had little leeway under the guidelines to sentence defendants in criminal cases for offenses that occurred after Nov. 1, 1987. Defendants receive a sentence from a narrow range determined by a complicated formula calculated from factors that include criminal record and the severity and type of offense. Judges must hand out a sentence that corresponds to the calculation under the guidelines.

In rare instances, a judge can deviate

from the prescribed sentence. Such was the case yesterday, when Ziegler sentenced James D. Limbert to 1 1/2 years in prison instead of the minimum 12 1/4 years required by the guidelines.

Ziegler was able to give Limbert the reduced sentence because the U.S. attorney's office filed a motion for a downward departure from the guidelines because of Limbert's cooperation in a Drug Enforcement Administration investigation.

Limbert, 34, pleaded guilty to possession with intent to distribute LSD. The charges

against him involved 2,500 doses of the hallucinogen. Limbert has been in jail since his arrest June 19.

Ziegler, in comments from the bench before he sentenced Limbert, said a similar case recently in Common Pleas Court resulted in a defendant being sentenced to six months in jail. That defendant's case involved 8,000 doses of LSD, much more than the Limbert case.

"The sad part about it is the American public doesn't know what goes on in federal court today and, I suspect, neither does

Congress," he said.

Ziegler, 55, was appointed to the federal bench in 1978 by President Jimmy Carter. He was a Common Pleas judge from 1974 to 1978.

He said he expected to be faced with a case similar to Limbert's some day when a defendant faces a stiff jail term, but there will be no request by the government to reduce the sentence. At that time, "I'm going to have to make a decision of conscience of whether I will follow the law or will end up resigning," he said.

Exception Made to Sentencing Guidelines

By WADE LAMBERT
And ARTHUR S. HAYES

Staff Reporters of THE WALL STREET JOURNAL

Carving out a controversial exception to the federal sentencing guidelines, a judge said the rules don't necessarily apply if a defendant is a single parent and a family's sole breadwinner.

The decision—in the case of Bonnie Gerard, a businesswoman who pleaded guilty to defrauding her clients out of \$1.6 million—is bound to stir concern among prosecutors. Many judges say the guidelines, which took effect in November 1987, leave them with little discretion to sentence defendants as they see fit.

Judge Robert Sweet's decision last week in the Gerard case, in federal court in Manhattan, is one of the few in which a court has found that family circumstances allow a departure from the guidelines. The guidelines, largely based on victims' losses and the defendant's criminal past, called for a sentence of 33 months to 41 months for Ms. Gerard. But Judge Sweet instead placed the divorced 49 year old, who lives with her children on Manhattan's Upper East Side, on five years' probation and ordered her to make restitution.

The guidelines, the judge said, failed adequately to address the situation of a defendant who is "the sole care provider of her two teen-age children." The guidelines were designed to create more uniformity among sentences for equivalent crimes.

Defense attorneys praised the decision. Stanley Arklin, a lawyer in New York, said the ruling "demonstrates how intelligent and sensitive courts are dealing with the unjust rigidity in the guidelines."

The U.S. attorney's office in Manhattan asked Judge Sweet to reconsider his ruling, however, arguing that there are no legal grounds for departing from the guidelines because of family duties. At a hearing Friday, Assistant U.S. Attorney Paul Engelmayer said that many defendants who also are single parents could take advantage of the ruling.

"The facts [of Ms. Gerard's case] don't distinguish her from many other defendants who are single mothers," Mr. Engelmayer said in court. He said that only in extraordinary circumstances are family relationships grounds for departing from the guidelines.

Judge Sweet said he won't reconsider his decision. A spokesman for the U.S. attorney's office said it hasn't decided whether to appeal.

"The government apparently wants a general rule that would always preclude a judge from looking at family circumstances," said Stephen Feingold, Ms. Gerard's attorney at the New York law firm Spengler Carlson Gubar Brodsky & Frischling.

Mr. Feingold said Ms. Gerard is unemployed. He said Ms. Gerard has received "intermittent" child-support and divorce payments from her ex-husband, Bertram Cohen. Under a divorce order that has been appealed by both sides, Mr. Cohen was ordered to pay child support of \$500 a week, plus \$70,000 a year, to Ms. Gerard. Stuart Gartner, an attorney for Mr. Cohen, said his client can't afford the payments.

The government said it didn't oppose probation for Ms. Gerard, only the judge's reasoning regarding Ms. Gerard's family duties. The judge also cited Ms. Gerard's

cooperation with prosecutors and her agreement to make restitution as reasons for departing from the guidelines.

Meanwhile, in Washington, Attorney General William Barr continued the administration's election-year focus on anti-crime measures by pushing for more aggressive use of the federal sentencing guidelines. Mr. Barr said Friday that he had instructed federal prosecutors across the country to seek stiffer punishments by urging judges to employ an option in the guidelines allowing for "upward departures" in particularly egregious cases.

Mr. Barr, stressing the administration's determination to assist state and local police in the fight against violent crime, told a press conference that the new policy would apply to defendants charged with using semiautomatic weapons and engaging in drug gang activities.

The attorney general also said that he had asked the U.S. Sentencing Commission, the federal agency that oversees the guidelines, to increase the punishments available to judges in cases involving semiautomatic weapons, such as the AK-47 "assault" rifle, and drug gangs.

