

**STATEMENT OF THE FEDERAL CRIMINAL PROCEDURE COMMITTEE  
OF THE AMERICAN COLLEGE OF TRIAL LAWYERS  
REGARDING THE PROPOSED AMENDMENTS TO THE  
FEDERAL SENTENCING GUIDELINES**

The American College of Trial Lawyers is an organization dedicated to the promotion of excellence in the trial court.

The Federal Criminal Procedure Committee ("Committee") of the American College of Trial Lawyers monitors the operation of the Federal Rules of Criminal Procedure and other Federal criminal procedural developments generally.

One of the best evaluations of the application of the U.S. Sentencing Guidelines is provided by those who must apply the Guidelines every day - the U.S. District Court Judges.

The Committee supports the recommendations made by the Judicial Conference of the United States to the U.S. Sentencing Guidelines which are discussed in this commentary. These are amendments borne of experience in the trial court, and should be given the deference accorded to the individuals who actually apply the Guidelines.

**Proposed Amendment to §1B1.3, Relating to Relevant Conduct**

The Committee supports this amendment regarding relevant conduct which was proposed by the Judicial Conference. The amendment will ensure that offense levels are tailored to individual culpability.

Some courts have held that quantities of drugs or firearms possessed by co-conspirators should not be attributed to a defendant unless he or she was aware of them or should have foreseen them. There is also a limitation concerning the scope of criminal activity in which a defendant agrees to participate. However, these limitations are often over-shadowed by the common scene or plan language found in the text of the Guideline itself.

In pre-Guideline sentencing, the judge would determine the extent the individual co-conspirator had adopted to join in the entire plan and would tailor the sentence accordingly. It was common for a judge to sentence the ring leaders of conspiracies to more severe sentences than persons who only had joined the conspiracy for a limited purpose. The Sentencing Guidelines have operated to prevent this important evaluation by sentencing judges. The Guidelines should be revised to clarify that knowledge, foreseeability, and the scope of the defendant's agreement can be used to tailor the offense level, as suggested in Judicial Conference Recommendation 7. Such a revision will help prevent imposing disproportionate punishment on couriers or other minor participants in conspiracies involving large amounts of drugs or money.

**Proposed Amendment to §1B1.8, Relating to Use of Certain Information Supplied by Defendant About His/Her Activities**

The Committee supports the proposed amendment to this section and its commentary which permits a defendant to receive credit for

providing incriminating information about his/her own activities when he/she has no information to give about other participants.

The amendment addresses a practical problem that arises on many occasions. Often a single defendant, in a complicated matter can save the government months, even years, of investigation by pleading guilty and giving information about himself/herself. Under the present Guidelines, this cooperation will not serve the Defendant any purpose except to give him/her the two point reduction for acceptance of responsibility. As the commentary suggests, this type of cooperation should be used to support granting a \$5K.1 departure, for substantial cooperation for saving the government considerable time and effort. The cooperation is especially important in income tax cases where a defendant involved in a solitary scheme to evade taxes may be the only person who can give an inside story on the amount of tax evaded. The effort may save the government considerable time in arriving at both criminal and civil penalties.

**Proposed Amendment to §3E1.1, Relating to Acceptance of Responsibility**

The Committee supports the amendments to this section, especially the amendment to subsection (d), entitled "Demonstrates Full Acceptance of Responsibility by Taking Timely Affirmative Steps." The amendment provides an additional one level of reduction for taking affirmative steps such as making early restitution, giving assistance to authorities, and resigning from position, or office, or position of trust which caused such a

crime. The option rewards the individual who, once having recognized his/her wrongful conduct, takes extra steps to rectify the harm done to society.

**Proposed Amendments to §5B1.1, §5C1.1, Relating to Split Sentences**

The Committee supports the amendments to §5B1.1 and §5C1.1 which are proposed by the Judicial Conference.

The amendments would redefine the split sentence to require at least a month of imprisonment, but not 50% of the minimum term, as now required.

In many cases, the present Guidelines force a choice between a term of imprisonment that is longer than needed or no imprisonment at all. A judge may want to give some prison time to punish the offender who is slipping back into criminal habits and to send a clear signal to the community, but one-half the minimum term is too much. Extended prison time could induce the offender to new criminal lifestyles and would tax an already crowded prison facility. After the first month of imprisonment, there are diminishing returns both in general deterrence and punishment values for certain individuals. The difference between one and five, or even three months in prison, will, for some defendants, be the difference between losing or keeping jobs, finding family to care for children, or being able to make prompt restitution.

The amendments would also remove requirements for a term of imprisonment in cells with minimum terms of seven to ten months,

thus permitting the use of the currently available substitutes to incarceration at current rates.

**Proposed Amendments to Chapter 5, Part B, Relating to  
Expanding the Range for Which Probation May Be Given**

The Commission specifically requests comment on whether the proposed amendments compromise the Guidelines as originally drafted.

Permitting probation to a small class of individuals at the very bottom end of the sentencing table cannot possibly disturb the uniformity of the Guidelines as drawn.

The original commentary to the Guidelines indicated that the Guidelines were to be amended or modified, based upon actual application experience. This particular amendment is based upon the valuable experience of the District Court judges.

The Committee disagrees with the suggestion that expansion of probation should be applied on an offense by offense approach, e.g. excluding white collar offenders.

An exclusion of this nature would do damage to the original Guidelines approach. If a certain class of individuals are eligible for probation, it would be destructive to the Guidelines to exclude those who commit less violent crimes. There is no rational basis for making such an exclusion.

Congress directed the Commission to "insure that the Guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is

a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. 994(j).

The arguments presented by the Judicial Conference in support of the foregoing amendment are practical and compelling. While they are too lengthy to be repeated here, the Committee invites the Commission's attention to the rationale set out at page 11 of the "Report of the Judicial Conference" in support of this amendment.

**Proposed Amendment to Chapter 5, Part H, Relating to  
Specific Offender Characteristics**

The Committee supports the amendment to the introductory commentary to Chapter 5, Part H, which is proposed by the Judicial Conference.

The amendment provides for departures that may be appropriate when offender characteristics, that are ordinarily not relevant to a Guideline departure, are present to an unusual degree, either alone or in combination, and are important to the sentencing purposes in the particular case. This particular recommendation is addressed to unusual cases where the total picture created by offender characteristics suggest that sentencing goals could best be met with a sentence outside the Guideline range. Some defendants, who present no danger to the public, can adequately be punished by a short period of imprisonment in combination with community confinement or other non-incarcerative sanctions.

This particular amendment recognizes the importance of the trial judge in evaluating a defendant whose circumstances require a departure.

**Proposed Amendment to §6B1.2, Regarding Sentencing  
Procedures and Plea Agreements**

The amendment encourages government attorneys involved in plea discussions, prior to the Rule 11 Colloquy, to disclose to the defendant facts and circumstances of the offense and offender characteristics, known to the government, that are relevant to the application of the Sentencing Guidelines.

The commentary is a recognition of the application of Brady v. Maryland, 373 U.S. 83 (1963). The commentary urges the government to turn over, prior to a sentencing colloquy, all relevant evidence that could affect the operation of the Sentencing Guidelines. Brady has become important in the operation of the Guidelines and places an added responsibility on the government regarding sentencing.

The Sentencing Guidelines require a careful evaluation of the conduct of the defendant and his criminal history. Brady information may not affect guilt or innocence directly, but may have a profound effect on the various adjustments in the Sentencing Guidelines regarding the defendant's punishment. It is the government's burden to turn over the information at a very early stage.

**Request to Comment on Paragraph 34, Subsection C,  
Relating to Offenses of Which Defendant is Acquitted**

The Commission requests comment on whether it should deal expressly with conduct of which the defendant is acquitted but which the court, at sentencing, nevertheless determines to have been established by a preponderance of evidence, and thus may be used for determining an offense level or as a basis for imposing a sentence above the Guideline range.

The Committee strongly opposes the use of evidence of conduct of which a defendant is acquitted to increase the punishment, and urges the Commission to reject such use in clear language.

The use of acquitted offenses to further punish a defendant would render the trial of a case a nullity. It would be a rejection of the judicial function, and is in violation of the due process clause of the Fifth Amendment to the United States Constitution.

RESPECTFULLY SUBMITTED,

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