

FCKI 37/92

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December 4, 1991

VIA MESSENGER

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

Re: 1992 Amendments

Dear Chairman Wilkins:

The ABA Sentencing Guidelines Committee has been following, with interest, the process by which the U.S. Sentencing Commission ("Commission") has been reviewing possible amendments to be promulgated by the Commission next year. We commend the Commission for the approach it has adopted, allowing various working groups to generate proposals for the Commission's consideration.

We believe the usefulness of this process will be enhanced if the Commission would publish, in the Federal Register for public comment, all of the various options it has been or will be considering for each proposed amendment. We note that the Commission did prepare several options for public comment in its consideration of the Sentencing Guidelines for Organizations, an expansive approach that generated substantial public comment.

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Additionally, we have discussed within our committee several issues of guideline application which may deserve the Commission's attention during the amendment process. While some of these matters may be addressed by the current working groups, we list below several areas of concern to our membership. As you will see, they range in significance, but each addresses a real problem.

First, the Sentencing Table and corresponding guidelines unnecessarily restrict the discretion of the Court to order probation with conditions of confinement and/or the new "split sentence. We believe that consistent with the Sentencing Reform Act's language regarding the sentencing of first offender's, the Commission should, at the very least, expand the eligibility for these alternative forms of punishment for those persons within criminal history category one. In other words, offenders beyond level 12 would be eligible, without a departure, for some form of sentencing. Similarly, we believe that the option of probation should be further expanded, again at least for first offenders. The Commission's annual report data appears to justify such amendments, given the extent to which the guidelines appear to require imprisonment in many more cases and for much greater periods of time than under prior practice.

Second, given the expansive nature of the relevant conduct standard set forth in Section 1B1.3, the number of relatively minor drug offenders receiving substantial periods of incarceration is significant. Without attempting to address the separate issue of Congressionally mandated mandatory minimum penalties, the Commission should create an exception from the drug quantity table for those offenders peripherally involved in distribution activity. While the definition of "peripheral role" need not conform to the prior Parole Commission definition, there should be a category of drug offenders, particularly the so-called "mule," that are excepted from the application of the quantity table.

Third, while the Commission has only a limited role in describing actions to be taken by members of the Executive branch and defense bar regarding pretrial discovery, there is a significant problem in guideline application that could be at least partially addressed by a Commission policy statement. The problem is that prosecutors will charge defendants in such a manner as to allow them to limit their disclosure obligations pursuant to Rule 16 and, after negotiating a plea a plea of guilty, submit additional evidence for use at sentencing. In other words, because the relevant conduct for sentencing is often so much more expansive than the discoverable evidence as to the indicted charges, the prosecutor may induce a plea without the defendant having any awareness of the actual evidence to be considered at sentencing and without having adequate knowledge, therefore, of his/her true guidelines exposure. A Commission policy statement encouraging

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pretrial disclosure of all information to be used in the calculation of the applicable guideline range, if not departures, would at least help create a more level playing field.

Thank you. I look forward to speaking with you about these and other amendments in the future.

Sincerely,


Steven M. Salkey
Chairman, ABA Sentencing
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P CRT-38/92

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December 9, 1991

VIA MESSENGER

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United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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Re: Federal Register Publication of Proposed Guideline
Amendments

Dear Chairman Wilkins:

Over the past several months, the Practitioners' Advisory Group (PAG) has worked with the Commission's working groups on proposed guideline amendments for the current cycle. In order to engage in this process, the PAG divided itself into a number of subcommittees addressed to the specific working group areas. I would like to thank you and the Commission staff for the opportunity that you have provided to us to work with and review the product of the working groups.

It is my understanding that the Commission will meet on December 12, 1991 to consider which of the various working group and other proposals should be published in the Federal Register. I have asked each of my subcommittee chairmen to communicate with you directly and forward a copy of their subcommittee report, including our position on which proposals should be published in the Federal Register. I am transmitting herewith the report of the subcommittee on the criminal history working group report. The committee was chaired by PAG member Lyle J. Yurko. In addition to the PAG subcommittee's report, I have enclosed four additional amendments which we ask that the Commission consider for publication in the Federal Register. These amendments deal with creation of a Category 0, creation of a Category VII, Career Offenders and the Decay Factor.

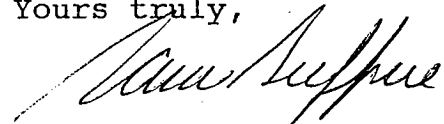
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We have found the availability of the Commission's working group reports to be of invaluable assistance in our review of guideline amendments during the current cycle. We urge the Commission to include within its publication in the Federal Register an indication to the public that working group reports have been prepared, listing the subject matter of each working group report and encouraging the public to obtain copies by writing to the Commission.

Out of town business will preclude my attendance at the December 12, 1991 Commission meeting. The interest of the PAG will be represented by Fred Bennett and other PAG members who will attend.

Thank you for your consideration to these matters.

Yours truly,



Samuel J. Buffone

SJB:sag

cc: Lyle Yurko (letter)
Fred Bennett (via federal express)

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**SUMMARY OF CRIMINAL HISTORY WORKING GROUP
FOR PRACTITIONERS ADVISORY GROUP**

by
Lyle J. Yurko, Member
Practitioners Advisory Group

The Group is considering guideline modifications in the following areas:

1. Creation of a Category O.
2. Creation of a Category VII.
3. Narrowing Qualifying Priors for Career Offenders.
4. Modifying the Decay Factor for Priors.
5. Clarifying Application of Career Offenders.

What follows is a bare bones review of the findings and options in each area.

1. Category O

Because 61% of the offenders in the sample studied (FY 90) were classified as Category I offenders and because some have suggested that Category I is overbroad in including certain offenders in this category, the Group studied creating a Category O. Currently Category I includes:

- A. Persons with no prior contact with justice system, i.e., no arrests.
- B. Persons with 0 points but with some arrests.
- C. Persons with 0 points but some convictions which currently would not be counted.
- D. Persons with one point.

The Group study found that the "no arrest" sub-category had a higher percentage of offenders in the white collar area. All Category I offenders have lower incidences of victim injury and weapon use, but again the lowest are offenders with no arrests. While "no arrest" offenders commit singular acts of crime and act alone more often than other Category I offenders, the seriousness of the "no arrest" sub-group is slightly less than other Category I offenders.

"No arrest" offenders were female, non-black, married, and were better educated.

The report concludes that the "no arrest" offenders were "sufficiently different" on a variety of variables.

The Group attempted to answer only the question of what sub-groups to include in Category 0 and did not comment on what punishment ranges should apply to this category.

These sub-groups were identified for possible inclusion in Category 0:

Class I No arrest or other contact.

Class II No convictions.

Class III Convictions not counted or persons with serious instant convictions.

The report noted that it would be difficult to justify enhanced punishment based on arrest criteria although proof of guilt even though no conviction might be a basis for differentiation.

OPTIONS

Option 1. No change - no prior would continue to be sentenced as harshly as person with priors.

Option 2. Modify to punish less severely one or more of the sub-categories.

CRITIQUE

The statistical justifications for separating out "no arrest" offenders from others who score 0 appears to be too tenuous to support justifying less severe sentences solely on a "no arrest" basis. The constitutional and fairness problems with such a proposal are monumental. Separating out "no arrest" offenders might institutionalize differences in local arrest practices which are racially and sexually discriminatory.

Creating a Category 0 which somehow would exclude offenders based on criteria that was not counted for other criminal history score purposes would likewise upset the internal logic and consistency of the guidelines and again the statistical differentiation supporting such treatment is too tenuous to justify disparate treatment.

There is a continuing problem with basing guidelines action on factors which occur outside of the guidelines setting.

The guidelines system was instituted because of a recognition that other systems tended to foster disparate treatment which often

was based on constitutionally impermissible criteria such as race, sex or religion.

Most criminal history events occurred in such systems. Although criminal history should be taken into account in the guidelines system, over-reliance on criminal history factors to justify different sentencing results has the dangerous possibility of building into the guidelines system factors which the guidelines were designed to exclude from consideration.

The creation of a Category 0 is something which the Practitioners Advisory Group supports, but the proposal which we endorse is that Category 0 be made up of individuals who have 0 criminal history points and that such be based on criterion consistent with all other criminal history categories.

2. Category VII

Eight percent of guidelines cases during the study period were classified as Category VI and in raw numbers that was about 1,500 defendants.

Currently some courts are treating offenders with criminal history scores of greater than 13 as grounds for upward departure. These courts have fashioned a reasonableness standard to review sentencing choices for defendants for which such a departure was selected. Only the 7th Circuit required the District Court to extrapolate a new category.

The Group next assumed a Category VII would be created and then chose to distribute Category VI offenders in new VI and VII in one of two ways:

- | | |
|----------------------|-----------------|
| A. VI - 13-15 points | VII - 16 or 16+ |
| B. VI - 13-19 points | VII - 20 or 20+ |

A statistical profile was then created using these two proposals. Offense type, victim injury and weapon use were not factors in either proposal. Role in offense and offense level factors appear to shift the more serious offenders to Category VII if the second proposal is used. Other factors were examined.

There was very little statistical difference between the two proposals selected, and no statistical justification for creating one rather than the other.

OPTIONS

The Group considered the following issues:

- A. Should VII be added, or should departure be the sole method of sentencing harshly for serious offenders?

The general similarity of Category VI offenders argue against further division.

Offenders with unusually high points may need longer incarceration. A structured departure for such offenders may be recommended in the commentary.

To rely on departure may be to invite disparity, but criminal history points may not truly reflect seriousness.

- B. What should the point spread be if VII is added?

Three points is consistent with the differentiation of other categories, but the higher the point total, the less significant three points becomes. Making the point spread greater can separate out only the most serious offenders for VII.

- C. What new ranges?

Group thought this to be a policy issue.

- D. How to trigger departure?

"Inadequacy" or structure at every three points. The second proposal may reduce disparity, but may not achieve desired result of severe punishment for most serious offender.

- E. Would career offenders be placed in VII or VI?

Because of statutory mandate, problem arises in leaving such offenders in Category VI.

CRITIQUE

This report provides no empirical justification for creating a Category VII. The Practitioners Advisory Group endorses a structured departure commentary to guide but not mandate courts departing for inadequacy as the only change. Allowing a court the continued and supervised authority to depart upward for an "of a kind and to a degree" departure is an adequate avenue to sentence the offender whose crime or crime past demands a greater sentence than called for in Category VI. We oppose any Category VII creation.

3. Narrowing Predicate Career Offenses

Because a crime of violence under the current definition includes barroom brawls and heated verbal disputes, some have suggested that these offenses are not serious enough to constitute predicates for career status. Also minor involvement in predicate drug offenses may harshly include defendants as "career" candidates.

The Group report reviewed the legislative history of the enabling statutes and found that arguments could both be made that this legislation precluded narrowing and allowed narrowing. It appears that "crime of violence" is not defined anywhere in the history. Also because of the "at or near the statutory maximum language", the legislative history might not preclude creating two career offender categories for predicate offenses of lesser and greater severity.

There also appears to be no legislative history impediment to narrow qualification for career status on the basis of age of the prior offenses or on the basis of counting a "spree" as only one offense.

Several cases have ruled that a 4A1.3 downward departure for over-representing an offender's criminal history is inapplicable to career offenders because of the fact that career status is legislatively mandated.

There appears to be disagreement among the circuits as to whether, in determining when a predicate offense is a crime of violence, the court may only consider the statutory definition of the offense or may also look to the individual offender's predicate conduct. In interpreting the "crime of violence" language of 924(e), the Supreme Court has opted for a statutory definition approach.

The Group examined a 50% random sample of career cases for the study period (FY 90) and discovered that the most common instant offense was for drug violations and that weapons or force was used in 40% of instant crimes. Less than one-half of the instant offenses were single acts and in more than one-half of the cases the career offender played a more culpable role in the instant offense. The most common predicate crimes were drug offenses and robberies. Only one-third of the offenders had merely two qualifying predicate offenses. These offenders had a high rate of recidivism. One-half of the sample were convicted of multiple count instant offenses and 37% went to trial. The differential between offense levels before and after career analysis is applied was remarkable. Judges depart downward more often in career cases. Ninety-eight percent of career offenders are male and 48% are black.

The Group indicated an analysis of this sample was continuing but noted that the statistical analysis of the sample indicated more of a problem with application of the existing career guidelines rather than a need to amend.

OPTIONS

- A. (1) Identify and exclude minor offenses from crime of violence definition.

This could prevent harsh results if predicate or instant crime is trivial if allowed by statute, although there may be definitional problems.

(2) Exclude these crimes where the mens rea element is negligence, such as involuntary manslaughter.

Carries out congressional intent.

- B. Disqualifying an offender for career treatment if offender's predicate offenses are both lesser offenses.

- C. Modify career ranges so that serious instant or predicate offenses are at statutory maximum while lesser offenses are near the maximum.

This amendment might mitigate the harsher treatment for minor offenders, but defining lesser offenses may prove difficult.

- D. (1) Restrict crime of violence by modifying the definition of felony so as only to include those crimes so designated by the jurisdiction of conviction.

A better gauge of the seriousness of the offense, although, might foster disparity based on state variances.

(2) Restrict crime of violence to those offenses punishable by more than two years.

- E. (1) Require strict consecutive sequence to limit "spree" inclusions.

By requiring an intervening prosecution between offense career status is accorded to true recidivism.

(2) If predicate offenses were joinable but not related, count as only one offense.

Again, prevents double counting.

CRITIQUE

Obviously Congress failed in not providing a clear definition of crime of violence in its enabling statute. This lack of definition should not now be used nor should it have ever been used to create breadth in determining the scope of career status.

It is clear that bar fights and arguments which do not lead to injury are now absurdly included in the career categories if a jurisdiction happens to provide for more than one year's punishment.

The Practitioners Advisory Group favors total exclusion of such trivial offenses for career qualifiers rather than creating a double career structure.

Exclusion by definition is problematic and indeed has proven quite difficult.

Exclusion by raising the qualifying maximum punishment level to a maximum of greater than two years and by requiring that the jurisdiction of conviction regard the predicate offense as a felony are essential narrowing amendments.

The two-year requirement will eliminate most trivial offenses and should be adopted even though some serious conduct may escape career treatment. Again, career status cannot be tolerated for minor offenders and breadth of coverage must not be the Commission's goal. Rather, lenity should especially limit the harshest punishments to only those who clearly deserve such treatment.

The felony predicate insures that a state conviction was obtained under conditions approaching due process. Many misdemeanants are processed in "meat market", "justice of the peace" type court systems which have spawned the very criticisms which fostered the creation of guidelines sentencing systems. A conviction obtained in such systems should not subject the offender to career treatment. Only felony convictions obtained in record proceedings after indictment under circumstances comporting with traditional notions of fair play and justice should count as predicate offenses when the end result is the harshest of punishments.

The Commission should note that the only appropriate question here is recidivism and not the seriousness of the instant offense which is treated elsewhere in the guidelines or by departure.

The Practitioners Advisory Group also supports requiring sequencing and broadening the definition of "related" to include offenses which would have been joinable for trial to prevent double counting.

4. Modifying the Decay Factor

The premise of this proposition is that career status punishes recidivism so that excluding older convictions does not follow logically.

Six hundred cases were examined and 2.5% were discovered to result in inclusion if the decay factor were eliminated.

OPTIONS

- A. (1) Eliminate entirely the decay factor for career offenders.
(2) Eliminate for all offenders.
- B. (1) Construct a new decay factor requiring a crime-free period, not just simple conviction age for career offenders.
(2) This new factor should apply to all offenders.
- C. Except a career offender only if both predicate offenses are outside the period.
- D. Begin the limitation after parole rather than incarceration.
- E. Modify 4B1.2(3) so that a prior conviction is counted as of the date of arrest and not conviction (for instant offense?)

CRITIQUE

No empirical need has been demonstrated for any of the proposed changes. The Practitioners Advisory Group opposes any modification.

The decay factor recognizes that convictions obtained more than 15 years before the instant offense are simply not reliable enough to cause inclusion in career status. Such convictions may have been obtained in state systems before the full breadth of due process was applicable to those systems. After the passage of time litigating the constitutional validity of such convictions may prove impossible. A 2.5% increase in coverage cannot justify the possibility that ancient convictions may not have been convictions based on actual guilt.

5. Clarification of Application

- A. Eliminate double effect of career offender treatment and statutory enhancement.

B. Insure that career offenders receive acceptance of responsibility.

C/D. Train officers to eliminate error in miscounting excluded convictions.

E. Clarify 4A1.3 applicability to career offenders.

D. Clarify 4A1.2 re: YCA convictions.

CRITIQUE

Previous report totally eliminating mandatory minimums would solve double coverage. Absent adopting double coverage should be eliminated. Increased training is favored by Practitioners Advisory Group. 4A1.3 should apply to career offenders and YCA should not be counted.

AMENDMENTS TO SENTENCING GUIDELINES

The Decay Factor

Option 1:

No change in Guidelines.

Reason for No Amendment: The addition of another 2.5% of offenders¹ as career offenders is statistically insufficient to offset the recognition that convictions obtained more than the required number of years prior to the instant offense may not be reliable enough to be used to justify an instant sentence at or near the statutory maximum.

¹If the decay factor were eliminated for career offenders, the Commission estimates that 2.5% of offenders would qualify for career status.

AMENDMENTS TO SENTENCING GUIDELINES

Career Offenders

Option 1:

The Sentencing Commission shall amend §4B1.2 as follows:

§4B1.2. Definitions of Terms Used in Section 4B1.1

- (1) The term "crime of violence" means any offense ~~denominated as a felony~~ under federal or state law ~~which is punishable by imprisonment for a term exceeding one year that~~ ~~two years which~~ --
 - (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
 - (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.
- (2) The term "controlled substance offense" means an offense ~~denominated as a felony~~ under a federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Reason for Amendment: Because jurisdictions provide for a wide variety of maximum penalties for assaultive behaviors which include minor assaults that should not be counted as predicate career offenses, the above restrictions have been added. Also, requiring that the jurisdiction of conviction treat the prior violent or drug offense as a felony insures that the behavior which led to the conviction was viewed as serious by the jurisdiction of conviction and insures that the procedures utilized in obtaining this conviction comports with contemporary standards of due process. These considerations outweigh the disparity inherent in

utilizing events which occur outside of the guidelines setting as part of the guidelines calculus, especially in the context of determining when an offender qualifies for punishment at or near the maximum.

- (3) The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c), and the offender had been arrested, tried, or pled guilty, convicted, and sentenced on the first such offense before the commission of the second or subsequent such offense and the current offense occurred after the offender had been arrested, tried or pled guilty, convicted and sentenced on the second such offense. The date that a defendant sustained a conviction shall be the date the judgment of conviction was entered.

Reason for Amendment: The purpose of career offender status is to severely punish those who are likely to repeat serious criminal behavior. Three instances of criminality separated by prosecution presents a sufficient predilection of recidivism to justify severe sentencing. The requirement that these offenses occur in strict sequence after each predicate offense results in a sentence insures that the predicate sentence be given an opportunity to deter subsequent criminal activity and prevents double counting of spree offenses which were not consolidated for sentencing.

AMENDMENTS TO SENTENCING GUIDELINES

Creation of Category VII

Option 1:

No change in Guidelines.

Reason for No Amendment: There exists no current empirical justification for creating a Criminal History Category VII. Those offenders whose sentencing range under Category VI is not sufficiently severe should be considered for departure.

Option 2:

The policy statement contained in 4A1.3 should be amended as follows:

In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly under-represents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category IV criminal history to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for a Category VI criminal history is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a decision above the guideline range for a defendant with a Category VI criminal history may be warranted, but the court should be guided in determining the degree of departure by conducting an extrapolation from the sentencing ranges which actually exist in the sentencing table. For example an offense level 10 offender who has 16 criminal history points would have a sentencing range of 24-30 months. If such an offender qualified for the departure authorized by this section, the court should consider the basis for the departure and depart accordingly. The logical next range applicable by extrapolation from the sentencing table would be 30-37 months and under most circumstances a sentence within this range would be appropriate. However, the actual range selected by the court should depend upon the reasons which justify the departure which in appropriate circumstances may result in a

more severe sentence than suggested by mere extrapolation. However, this provision is not symmetrical. The lower limit of the range for a Category I criminal history is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for a Category I criminal history on the basis of the adequacy of criminal history cannot be appropriate.

AMENDMENTS TO SENTENCING GUIDELINES

Creation of Category 0

Option 1:

The Sentencing Commission shall create a Category 0. Qualification for Category 0 shall be determined by conducting the analysis called for in Guidelines §4A1.1 (a) through (f), and §4A1.2 (a) through (p). Category 0 offenders shall be offenders who have no criminal history points after the above analysis is conducted. New Category I offenders shall be offenders who have one criminal history point after the above analysis is conducted.

Category 0 shall contain the following sentencing ranges corresponding to offense levels:

SENTENCING TABLE
(in months of imprisonment)

Criminal History Category (Criminal History Points)

Offense Level	0 (0)
1	0 - 6
2	0 - 6
3	0 - 6
4	0 - 6
5	0 - 6
6	0 - 6
7	0 - 6
8	1 - 7
9	2 - 8
10	4 - 10
11	6 - 12
12	8 - 14
13	10 - 16
14	12 - 18
15	15 - 21
16	18 - 24
17	21 - 27
18	24 - 30
19	27 - 33
20	30 - 37
21	33 - 41
22	37 - 46
23	41 - 51
24	46 - 57
25	51 - 63
26	57 - 71
27	63 - 78
28	70 - 87
29	78 - 97
30	87 - 108
31	97 - 121
32	108 - 135
33	121 - 151
34	135 - 168
35	151 - 188
36	168 - 210
37	188 - 235
38	210 - 262
39	235 - 293
40	262 - 327
41	292 - 365
42	324 - 405
43	360 - Life

Reason for Amendment: Current Category I contains a majority of offenders prosecuted in Federal Court. The creation of Category 0 punishes less severely those offenders who have no countable criminal history points according to criteria applicable to all offenders in Chapter Four. Some statistical justification exists for separating Category 0 offenders from other offenders, by utilizing factors which are currently not used to determine criminal history, such as an offender's arrest history when such an arrest does not lead to conviction. However, because problems exist with utilizing such criteria and because the approach selected preserves the internal consistency of Chapter Four, Category 0 offenders are to be determined on the same basis as all other offenders.

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December 10, 1991

HAND DELIVERY

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

Re: Proposed Amendments to
Environmental Guidelines

Dear Judge Wilkins:

On behalf of the environmental guidelines subcommittee of the Practitioners' Advisory Group, I am enclosing our comments to the Staff Working Group's proposals of December 4, 1991 regarding amendments to the environmental sentencing guidelines. In short, we believe there currently is insufficient information available to justify amending the present environmental guidelines and, accordingly, we urge the Commission to defer publication of the proposed amendments.

We appreciate the opportunity to provide the Commission with our observations regarding this important matter. The members of our subcommittee responsible for drafting the attached comments include Steve Cowen, Jim Becker, Lloyd Guerri, and myself. Should you or any of your fellow Commissioners have any questions or comments, please do not hesitate to contact me or any of our subcommittee members.

Very truly yours,



Justin A. Thornton

Enclosure
JAT/wab

MEMORANDUM

December 10, 1991

TO: Chairman Wilkins
Commissioners

FROM: Practitioners Advisory Group

RE: Environmental Working Group's Proposed Amendments to
§§ 2Q1.1, 2Q1.2, and 2Q1.3

We understand from the Commission's staff that the Environmental Working Group is submitting for Commission consideration proposed amendments to the individual guidelines for environmental offenses, in particular §§ 2Q1.2 and 2Q1.3. The Practitioners' Advisory Group was not involved in the working group's formulation of the proposed amendments, and only recently has received the proposal. Our review of the proposal, therefore, has been undertaken in a short time frame. Nevertheless, it is apparent from our review that the proposed amendments are highly problematical, and we strongly urge the Commission to defer publication of the proposal for comment.

We have several concerns. First, the amendment of these particular sections is based on woefully insufficient data. We respectfully submit that to avoid confusion over the implementation of Commission guidelines and to maintain public confidence in the integrity of the guidelines, it is imperative that the Commission avoid substantive amendments of its guidelines except when there is a compelling need to do so based on sufficient experience. It disserves the interests of justice

to amend guidelines when there is little experience with the existing guidelines and accordingly little empirical evidence of implementation problems. Amendments that constitute a significant shift in structure or emphasis from the original guidelines should be adopted only when experience with the guidelines clearly demonstrates that amendment is necessary. Amendments founded on theoretical concerns or limited experience will undermine confidence in the guidelines and raise doubts about the objectivity of the guideline amendment process.

Our reading of the proposed changes indicates that they would not constitute minor technical adjustments, but instead would work substantive changes in the guidelines, often resulting in sharp increases in potential sentences. Yet, there is no sound experience base for making these changes. Since the promulgation of the original guidelines in 1987, there have been only 48 cases involving the two sections for which substantive amendments are proposed, §§ 2Q1.2 and 2Q1.3. There was only one case involving sentencing under § 2Q1.1 [Preliminary Report to the Commission: Environmental Working Group, November 6, 1991.] The Commission simply lacks a sufficient experience base with environmental sentencing to conclude that there is a need to substantively amend guidelines adopted only four years ago.

Just last year, the Department of Justice and Environmental Protection Agency in a joint letter formally advised the Commission that there was insufficient experience with the guidelines to merit amendment. These agencies stated

that the guidelines were "fundamentally sound," and were not badly in need of revision. The agencies wrote:

"[T]he existing guidelines received a good deal of very close attention from you and the other Commissioners when they were initially developed in 1986. The result was a set of provisions which were fundamentally sound. Certainly our work with the guidelines so far have revealed no glaring errors or provisions badly in need of revision." [Letter dated December 24, 1990, from James M. Strock, Assistant Administrator, Office of Enforcement, Environmental Protection Agency and Richard B. Stewart, Assistant Attorney General, Environment and Natural Resources Division.]

The working group report does not indicate that there has been a superseding letter from these Federal enforcement agencies, nor does it explain what has transpired in the ten months since the joint EPA/DOJ letter that justifies reevaluating the soundness of the guidelines.

Our second concern is that the proposal's goal of removing the modest degree of flexibility in the current guidelines will result in arbitrary sentencing. Environmental offenses may be the most difficult of crimes to pigeonhole into discrete categories. An individual can be convicted of environmental offenses not only for knowing or reckless conduct, but often for merely negligent conduct. The actual impact on the environment can be of almost infinite variety, from inconsequential to disastrous, and the applicable statutes and regulations provide a wide range of non-criminal sanctions and remedies for the conduct covered by the guidelines. For these reasons, this is a singularly difficult area in which to "tighten up" guidelines in a rational manner.

For example, the proposed guidelines attempt to quantify degree of injury or risk, but the level increases are arbitrary. A risk of "adverse health effects" to 10 persons would result in a one level increase, while the same risk to 100 persons would result in a three level increase. Proposed § 2Q1.2(b)(4)(A). While it may be desirable to avoid the cliffs caused by the current guidelines for "substantial likelihood of death or serious bodily injury," the Commission does not have an experience base from which to make the gradations proposed by the working group. It does not significantly advance the sound application of the guidelines to replace cliffs with arbitrarily angled slopes. Without a sufficient empirical basis for the gradations proposed, it is preferable to permit a sentencing judge the flexibility to determine whether this special offense characteristic applies, based on the court's familiarity with the full details of a particular incident.

Another example of the proposal's arbitrariness is the two level increase "[i]f the offense created a substantial likelihood of substantial damage to wildlife, plants, or other natural resources." Proposed § 2Q1.2(b)(5)(A). Given the elasticity of this particular concept, there may be few environmental violations which would not fall into this category. Presumably this general threat of harm to the environment has already been taken into account in the base offense levels originally adopted by the Commission.

Perhaps the most glaring example of arbitrariness is the proposal's "reduction" in the case of negligence. Proposed

§ 2Q1.2(b)(7). This proposal, according to the working group memorandum of December 4, 1991, "specifies a relatively constant 55-60% reduction in cases that involve negligent misconduct, rather than knowing or reckless misconduct." The proposal would also eliminate the current Application Note No. 4, which states that the guidelines assume knowing conduct, and that in cases involving negligent conduct, a downward departure may be warranted. The 49 cases available for study cannot possibly contain sufficient data from which the Commission could conclude that a specific percentage reduction is appropriate for the negligent offender, much less exactly what that percentage should be. Great injustices could result from adopting this guideline, with negligent offenders receiving substantial but unwarranted prison time. It is preferable for the Commission to leave in place the Application Note authorizing a downward departure, rather than adopt an approach which arbitrarily discounts sentences.

While we have not had the opportunity to fully study the proposal, it is apparent that this proposal is an attempted overhaul of the current guidelines, not a minor change. The Commission does not have adequate data from the 49 guideline cases to engage in such an overhaul. The proposal would create more problems than it would solve in an area of enormous complexity. Because no compelling need for amendment has been demonstrated, nor can it be on such a limited record, we urge the Commission not to go forward with the proposal.

If the Commission nevertheless determines to publish the working group proposal, the Practitioners Advisory Group respectfully requests that the Commission also publish the working group's analysis of the 49 cases examined, together with the attached questions seeking public comment on the proposed amendments.

1. Is the Commission's data base, consisting of approximately 49 cases in which district courts have applied the existing environmental guidelines to individual offenders, an adequate foundation upon which to amend the existing guidelines?
2. Should the base offense levels for misdemeanor environmental offenses be set separately, taking into account the statutory maximum prison term of one year for misdemeanors? Or should there be some form of downward adjustment or departure from felony offense levels where the conduct involved (such as "negligence" violations) only rises to the level of a misdemeanor?
3. Should there be some form of downward adjustment in offense level or departure where the conduct involved is only "reckless?" What about for conduct which, although "knowing" for purposes of certain environmental offenses, is lacking a specific intention to violate environmental regulatory offenses?
4. Are the costs of cleanup, evacuation, or disruption of a public utility a meaningful measure of environmental harm such that the offense level should increase as the above costs increase?
5. Is it feasible to have stepped increases in the base offense level for offenses that result in injury to human health or life or in a substantial likelihood of such injury? If so, how will such injury or the likelihood of such injury be measured?

PCR-43192

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December 10, 1991

REPLY TO: Alexandria

VIA FACSIMILE

Hon. William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Judge Wilkins:

As chair of a committee of the Practitioner's Advisory Group (PAG) which reviewed the efforts of the Staff Working Group on Alternatives, I am writing both to commend Paul Martin and the other members of the Working Group and to enthusiastically endorse the recommendations contained in his December 4, 1991 memorandum. I believe that Option #6 (which functionally incorporates Options #1, 4 and 5) should be included in the initial Federal Register publication for comment and should be adopted by the Commission as a formal amendment to the Guidelines.

Having said the above, permit me to note that I believe it important for the Commission to likewise include Option #2 and Option #3 in its initial Federal Register publication. As I suspect you will be hearing from other members of the PAG, I believe that the Commission should be as expansive as possible in its initial request for review and comments. Since these two items have already been reduced to option form, their inclusion would appear to easy to facilitate.

I believe that it is also important to include Option #7 in the Federal Register publication. In that regard, however, I believe that that general solicitation of comments must be expanded to secure input on a number of related issues.

In that regard, I direct your attention to the Working Group's October 23, 1991 Preliminary Report. Included therein was a discussion of the fact that the current sentencing options/alternatives demonstrated a "surprising degree of nonuse."

While this "nonuse" might be attributable to some confusion in the language of the guidelines or a lack of training or the fact that Presentence Reports (because of the guidance contained in the instruction manuals and monographs published to assist Probation Officers) might not fully spell out what alternatives are available, I believe that the Commission must share the statistics developed by the Working Group and must solicit comments about this matter. Even if the Commission eventually decided not to amend any of the related provisions, this "nonuse" must be addressed and the Commission should secure suggestions on how to remedy this problem.

Furthermore, that Preliminary Report makes reference both to the Alternatives to Imprisonment Project chaired by Commissioner Corrothers and to recommendations provided by the Judicial Conference of the United States. Each of those efforts included more dramatic recommendations regarding the availability of sentencing options at the low end of the guidelines and each included an expansion of the pool of offenders eligible for such alternatives. I believe that those recommendations should be captured in some way and comments as to their implementation should be solicited.

For instance, there are recommendations regarding the redrawing of Zone B and zone C on the current sentencing table to permit probation with confinement condition for sentencing ranges up to 18-24 months in Criminal History Categories I-III and split sentences at ranges up to 24-30 months. Also, there is a discussion of the creation of a new Zone D. And there has been discussion of what is called a "First Offender Adjustment." Even if the Commission were to decide not to reduce such matters to a formal option about which to secure comment, some reference to these matters should be shared with the public and general comment about them should be solicited.

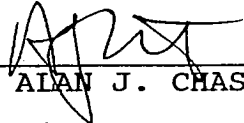
I thank you for this opportunity to review the drafts and to offer comments about how the Commission should respond to the Working Group's recommendations. And I trust that my remarks will be shared with the other Commissioners and staff prior to the December 12, 1991 meeting.

Finally, while this correspondence is being forwarded as part of my duties with the PAG, please understand that I wear a number of hats in my relationship with the Commission. As you know, I have been asked by the ABA's Sentencing Committee to serve as a liaison with this Working Group and, as Chairman of the National Association of Criminal Defense Lawyers's Post-Conviction

Committee, I have been asked to interact generally on all guideline revision efforts. Permit me to note that my comments herein should be additionally viewed as representing my opinions in both of those capacities.

Sincerely,
LAW OFFICES OF ALAN ELLIS, P.C.

By


ALAN J. CHASET

AJC/dmb

CC: Samuel J. Buffone, Esq.
Fred Bennett, Esq.

PCRI-44/92

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December 10, 1991

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20003

Re: December 12, 1991 Commission Meeting

Dear Chairman Wilkins:

The next scheduled meeting of the United States Sentencing Commission is for Thursday, December 12, 1991 at 9:30 a.m.

On behalf of the Practitioners' Advisory Group, the Chairman, Samuel J. Buffone, Esquire, has asked that I communicate with the Commission in connection with some proposed Guideline amendments that the Practitioners' Advisory Group would like to have circulated for Commission consideration at its December 12, 1991, meeting. Mr. Buffone will be out of town on Thursday, December 12, 1991, and he has delegated to me the responsibility of communicating with you.

I also have served as Chair of the Practitioners' Advisory Group Subcommittee on Role in the Offense - Drug Cases. I have received the December 4, 1991, memorandum from the Drug Working Group setting forth proposed amendments for publication in the Federal Register. On behalf of the Practitioners' Advisory Group I urge that all of the amendment options of the Drug Working Group be published in the Federal Register so as to give the Courts, prosecutors and defense attorneys around the country as broad as possible options to choose from when comments are asked for by the Commission.

In addition to the proposed amendments for publication in the Federal Register by the Drug Working Group I am enclosing herewith two (2) proposed amendments to the Commentary to Sections 3B1.1 and 3B1.2 (see attached Exhibits "A" and "B"). The Practitioners' Advisory Group would like to have these proposed Guideline changes published.

OFFICE OF THE FEDERAL PUBLIC DEFENDER

December 10, 1991

The Honorable William W. Wilkins, Jr.

Page 2

The Practitioners' Advisory Group also would like to have published as a proposal for comment a proposed amendment to policy statement Section 5K1.1, Substantial Assistance to Authorities (Exhibit "C" - two pages). This is a very controversial area and the Commission should be soliciting comment on the issue of whether there are certain cases in which a downward departure for cooperation should be allowed even without a Government motion. I note that on December 9, 1991, the Supreme Court granted certiorari in United States v. Wade, 986 F.2d 169 (4th Cir. 1991), which raises this very issue.

The Practitioners' Advisory Group would also like the Commission to reconsider an amendment to Section 6B1.2, Standards for Acceptance of Plea Agreements (Commentary). The proposed Commentary language was defeated in a four-three vote by the Commission in September, 1991, but that was at a time when the Commission was working on technical changes to the Commentary to be sent to Congress in connection with the 1991 amendments. I have attached hereto as Exhibit "D" the proposed Commentary language. This Commentary language is supported by both the Practitioners' Advisory Group and the Federal Defenders.

In regards to proposed amendments to Sections 2Q1.1, 2Q1.2 and 2Q1.3 (individual Guidelines for environmental offenses), the Practitioners' Advisory Group has previously forwarded to you a memorandum on or about December 6, 1991, in which the Practitioners' Advisory Group urges the Commission not to go forward with any amendments in this area. The Practitioners' Advisory Group met on Monday, December 9, 1991, and we strongly urge the Commission to defer publication of the proposal for comment on individual Guidelines for environmental offenses.

Finally, in the area of proposed amendments, I am enclosing herewith a proposed amendment to Section 1B1.8 - Use of Certain Information which is supported by the Practitioners' Advisory Group. This proposed amendment is attached as Exhibit "E".

There are two other matters that were discussed at the December 9, 1991 meeting of the Practitioners' Advisory Group. It was unanimously agreed that whatever proposed amendments and request for comment are published in the Federal Register, the Commission needs to "gear up" very soon on a Prison Impact statement. As you know, the Prison Impact statement prepared on the

OFFICE OF THE FEDERAL PUBLIC DEFENDER

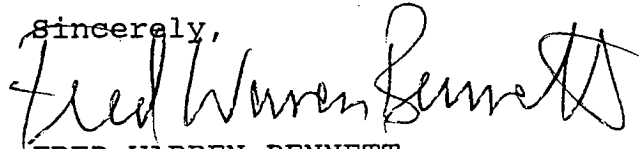
December 10, 1991
The Honorable William W. Wilkins, Jr.
Page 3

last amendment go around came very late in the day. Also, in connection with whatever is finally to be published in the Federal Register, the Practitioners' Advisory Group would strongly urge that the public and other interested parties be told that Working Group reports are available for review in connection with those proposed amendments or requests for comment that have Working Group reports on file with the Commission.

Thank you for your attention to this letter and I would respectfully request that this letter and Exhibits "A" - "E" be circulated to the other Commissioners for Commission consideration at its December 12, 1991, meeting.

With warmest personal regards, I am

Sincerely,

A handwritten signature in cursive script, reading "Fred Warren Bennett". The signature is written in dark ink and is positioned above the typed name.

FRED WARREN BENNETT
Federal Public Defender

FWB:cm
enc.

COMMENTARY

Application Notes:

1. Subsection (a) applies to a defendant who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.
2. It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marijuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.
3. In addition to a downward adjustment for a minimal participant, a downward departure may be warranted on the ground that minimal participation exists to a degree not contemplated by the guidelines. For example, a downward departure in addition to a downward adjustment for a minimal participant may be warranted in a case where the offense level as applied to a defendant has been extraordinarily magnified by a circumstance that bears little relation to the defendant's role in the offense.

New Application Note 3 (Underlined Material) to the Commentary to Section 3B1.2 is supported by the reasoning of the Second Circuit in United States v. Restrepo, 936 F.2d 661, 666-668 (2nd Cir. 1991).

FWB/fw

Exhibit "A"

COMMENTARY

Application Notes:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.
2. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.
3. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.
4. This guideline, which provides for an upward adjustment when a defendant is an organizer, leader, manager or supervisor in criminal activity, applies only when the offense is committed by more than one criminally responsible person. Thus, this guideline cannot apply unless: (a) the defendant is either an organizer, leader, manager or supervisor in criminal activity; and (b) said criminal activity involved at least the defendant and one other criminally involved person.

New Application Note Four (underlined material) to the Commentary to Section 3B1.1 is supported by the reasoning of the 9th Circuit in United States v. Anderson, 942 F.2d 606, 614-617 (9th Cir. 1991).

FWB:fw

Exhibit "B"

Proposal for Comment

The Commission solicits comment on following proposed amendment to policy statement §5K1.1, Substantial Assistance to Authorities:

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

Upon a finding that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

- (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
 - (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
 - (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
 - (3) the nature and extent of the defendant's assistance;
 - (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
 - (5) the timeliness of the defendant's assistance.
- (b) Substantial weight should be given to the government's evaluation of the extent and value of the defendant's assistance, particularly when the extent and value of the assistance are difficult to ascertain.
- (c) A departure below a statutorily required minimum sentence may be made only upon the motion of the government. 18 U.S.C. § 3553(e).

Commentary

Application Notes:

1. *Because of the nature of this factor, it is expected that the consideration of a downward departure will generally be based upon the motion of the government. As provided in subsection (b), substantial weight should be given to the government's evaluation of the extent and value of the defendant's assistance, particularly when the extent and value of such assistance are difficult to ascertain.*

Exhibit "C"

2. *The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's recognition and affirmative acceptance of personal responsibility for his own criminal conduct.*

§6B1.2. Standards for Acceptance of Plea Agreements (Policy Statement)

* * *

Commentary

* * *

The Commission encourages the government, in plea discussions, to disclose to the defendant facts and circumstances of the offense and offender characteristics, known to the government, that are relevant to application of the sentencing guidelines.

PRACTITIONERS' ADVISORY GROUP

**Recommended Amendment to Section 1B1.8.
Use of Certain Information**

Amended §1B1.8(a) to read as follows:

Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others or the defendant, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used in against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

Amend "Application Notes":

1. This provision does not authorize the government to withhold information from the court but provides that self-incriminating information obtained under a cooperation agreement is not to be used to determine the defendant's guideline range. Under this provision, for example, if a defendant is arrested in possession of a kilogram of cocaine and, pursuant to an agreement to provide information concerning the unlawful activities of co-conspirators or himself, admits that he assisted in the importation of an additional three kilograms of cocaine, a fact not previously known to the government, this admission would not be used to increase his applicable guideline range, except to the extent provided in the agreement. Although this guideline, consistent with the general structure of these guidelines, affects only the determination of the guideline range, the policy of the Commission is that where a defendant as a result of a cooperation agreement with the government to assist in the investigation or prosecution of other offenders or to disclose additional unlawful conduct of himself/herself reveals information that implicates him in unlawful conduct not already known to the government, such defendant should not be subject to an increased sentence by virtue of that cooperation where the government agreed that

Exhibit "E"

the information revealed would not be used for such purpose.

Reasons for Amendment:

§1B1.8 does not permit the government to agree not to use self-incriminating information against a defendant who wishes to plead and cooperate unless the cooperation consists of "providing information concerning unlawful activities of other." As a result, if a defendant has no such information, he/she has no incentive to plead guilty and cooperate other than to obtain the two level reduction for acceptance of responsibility. Although the two level reduction is always desirable, it may not produce a sufficient incentive to plead if, for example, a fraud exceeds one million dollars. Yet the Government may be fully satisfied with the guideline sentence resulting from the fraud it can prove and wish (1) to avoid a lengthy trial, (2) to learn from the defendant, for example, about how he/she was able to perpetrate the fraud, and (3) to learn of other unlawful conduct at the time unknown to it. In other words, if the Government makes the decision that it is satisfied with the guideline result, there is no reason to preclude a defendant who wishes to cooperate by disclosing his/her other unlawful conduct and the methods utilized, at the time unknown to the government, even if others are not implicated by his/her testimony.

Members of the Practitioners Advisory Group have had Assistant United States Attorneys express their frustration about not being able to accept a plea to a substantial offense, with an agreement not to use further self-incriminating information against the defendant.

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November 26, 1991

SENTENCING COMMENTARIES

In stating that failure to follow certain commentary "could constitute an incorrect application of the guidelines," the Commission simply means that in seeking to understand the meaning of the guidelines courts likely will look to the commentary for guidance as an indication of the intent of those who wrote them. In such instances, the courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter.

Historical Note: Effective November 1, 1987.

§1B1.3. Use of Certain Information

- (a) Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.
- (b) The provisions of subsection (a) shall not be applied to restrict the use of information:
 - (1) known to the government prior to entering into the cooperation agreement;
 - (2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender);
 - (3) in a prosecution for perjury or giving a false statement; or
 - (4) in the event there is a breach of the cooperation agreement by the defendant.

Commentary

Application Notes:

1. This provision does not authorize the government to withhold information from the court but provides that self-incriminating information obtained under a cooperation agreement is not to be used to determine the defendant's guideline range. Under this provision, for example, if a defendant is arrested in possession of a kilogram of cocaine and, pursuant to an agreement to provide information concerning the unlawful activities of co-conspirators, admits that he assisted in the importation of an additional three kilograms of cocaine, a fact not previously known to the government, this admission would not be used to increase his applicable guideline range, except to the extent provided in the agreement. Although this guideline, consistent with the general structure of these guidelines, affects only the determination of the guideline range, the policy of the Commission is that where a defendant as a result of a cooperation agreement with the government to assist in the investigation or prosecution of other offenders reveals information that implicates him in unlawful conduct not already known to the government, such defendant should not be subject to an increased sentence by virtue of that cooperation where the government agreed that the information revealed would not be used for such purpose.

SENTENCING GUIDELINES

2. Subsection (b)(2) prohibits any cooperation agreement from restricting the use of information as to the existence of prior convictions and sentences in determining adjustments under §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender). The Probation Service generally will secure information relevant to the defendant's criminal history independent of information the defendant provides as part of his cooperation agreement.
3. On occasion the defendant will provide incriminating information to the government during plea negotiation sessions before a cooperation agreement has been reached. In the event no agreement is reached, use of such information is governed by the provisions of Rule 11 of the Federal Rules of Criminal Procedure and Rule 410 of the Rules of Evidence.
4. As with the statutory provisions governing use immunity, 18 U.S.C. § 6002, this guideline does not apply to information used against the defendant in a prosecution for perjury, giving a false statement, or in the event the defendant otherwise fails to comply with the cooperation agreement.

Historical Note: Effective June 15, 1988 (see Appendix C, amendment 5). Amended effective November 1, 1990 (see Appendix C, amendment 308).

§1B1.9. Class B or C Misdemeanors and Infractions

The sentencing guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction.

Commentary

Application Notes:

1. Notwithstanding any other provision of the guidelines, the court may impose any sentence authorized by statute for each count that is a Class B or C misdemeanor or an infraction. A Class B misdemeanor is any offense for which the maximum authorized term of imprisonment is more than thirty days but not more than six months; a Class C misdemeanor is any offense for which the maximum authorized term of imprisonment is more than five days but not more than thirty days; an infraction is any offense for which the maximum authorized term of imprisonment is not more than five days.
2. The guidelines for sentencing on multiple counts do not apply to counts that are Class B or C misdemeanors or infractions. Sentences for such offenses may be consecutive to or concurrent with sentences imposed on other counts. In imposing sentence, the court should, however, consider the relationship between the Class B or C misdemeanor or infraction and any other offenses of which the defendant is convicted.

Background: For the sake of judicial economy, the Commission has exempted all Class B and C misdemeanors and infractions from the coverage of the guidelines.

Historical Note: Effective June 15, 1988 (see Appendix C, amendment 6). Amended effective November 1, 1989 (see Appendix C, amendment 81).

DIMURO, GINSBERG & LIEBERMAN, P.C.

ATTORNEYS AND COUNSELORS AT LAW

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December 9, 1991

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

Re: Draft Options for Amending Guideline 3E1.1
Acceptance of Responsibility

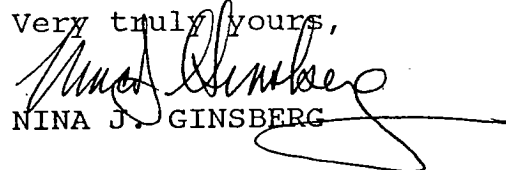
Dear Chairman Wilkins:

I am writing as chair of the Practitioners' Advisory Group subcommittee on Acceptance of Responsibility. This subcommittee has been involved with the Commission's Working Group on Acceptance of Responsibility largely by providing examples of inconsistent applications of the guideline and of defense concerns relating to scope of conduct for which a defendant must accept responsibility.

The subcommittee has reviewed the working group report and draft options for amending Guideline 3E1.1 which were provided last week. It is our opinion that the various draft options represent a significant attempt to address the most serious application problems and that all of the options should be published.

The various options do not contain minor clarifications. They present modifications to the current guideline which contain significant differences from each other and from the guideline as it is now written. In particular, the fifth amendment issues analyzed in the working group report have been vigorously debated in the courts and among counsel. The report accurately reflects the confusion and disagreement surrounding the scope of conduct for which a defendant must accept responsibility. In the face of this controversy, and viewing the evidence of disparate application of the guideline in the various districts, the Practitioners' Advisory Group strongly urges the Commission to solicit public response prior to eliminating any of the proposed options.

Very truly yours,


NINA J. GINSBERG

cc: Commissioners
PAG Members

UNITED STATES DISTRICT COURT
OFFICE OF THE PROBATION OFFICER
WESTERN DISTRICT OF VIRGINIA

G. WRAY WARE
CHIEF PROBATION OFFICER

REPLY TO DIVISION OFFICE:

RICHARD H. POFF FEDERAL BUILDING
P. O. BOX 1563
ROANOKE 24007

VIA FAX AND U.S. MAIL

November 26, 1991

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

ATTENTION: Public Information Office

RE: Comment on § 2D1.1, Application
Note 10

Dear Sirs:

Following a review of the November 1, 1991 amendments promulgated by the United States Sentencing Commission, I noticed an inconsistency in § 2D1.1, specifically Application Note 10. The recent amendment requires conversion of drugs to marihuana equivalents as a means for combining differing controlled substances to obtain a single offense level. However, conversion of small quantities of certain common drugs to marihuana equivalents often does not reach the floor of Level 12 [§ 2D1.1(c)(16)], established for minimal amounts of substances including heroin, cocaine, cocaine base, PCP, methamphetamine, LSD, or fentanyl.

For example, an offender is convicted of selling one gram of cocaine and three ounces of marijuana. Application Note 6 states that where there are multiple drug types, the quantities of drugs are to be added using the tables for conversions. Accordingly, Application Note 10 refers to The Drug Equivalency Tables for combining different controlled substances and directs that the marihuana equivalents of the drugs be added to obtain the combined offense level for the total listed in the Drug Quantity Table. In this case, the cocaine converts to 200 grams of marihuana, and the three ounce marihuana weight is .085 kilogram for a total drug weight of .285 kilogram. The Drug Quantity Table lists at least 250 grams but less than one kilogram of marihuana as a Level 8 offense [§ 2D1.1(c)(18)] instead of the floor of Level 12 for the cocaine. Prior conversions to heroin equivalents when combining drugs allowed for the floor level for minimal amounts of certain substances, but the new amendment does not. Pursuant to the new amendment, it would require more than 12 grams of cocaine converted to marihuana to reach the quantity of marihuana listed at Level 12 (2.5 to 5 kilograms).

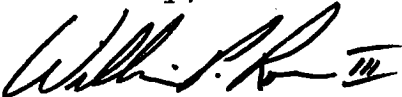
United States Sentencing Commission
Re: § 2D1.1, Application Note 10
Page Two

I suspect the new amendment intended to maintain the floor level of 12 for small quantities of the common substances because when the example was processed through the updated ASSYST program, the offense level was listed as Level 12, but no explanation was provided for this application.

This is the first instance where I have detected contradictory instructions in the commentary sections of the guidelines and believe the issue needs to be addressed to avoid confusion and disparity. I think Application Note 10 should explicitly note the floor of Level 12 for minimal amounts of heroin, cocaine, cocaine base, PCP, methamphetamine, LSD, or fentanyl, although the substances are converted to marijuana equivalents in combining different types of drugs.

Thank you for your consideration of this suggestion. Should you have any questions or find that I have failed to properly interpret the new amendment, please contact me at your convenience.

Sincerely,



William P. Ross III, Supervising
U.S. Probation Officer

WPR/ajw

cc: CUSPO Ware
Divisional offices, WD/VA

PCRT-54/92

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
PROBATION AND PRETRIAL SERVICES OFFICE

NORMAN E. MUGLESTON
CHIEF PROBATION/PRETRIAL
SERVICES OFFICER

FEDERAL BUILDING
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December 13, 1991

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U.S. Sentencing Commission
Public Information Office
1331 Pennsylvania Avenue N.W.
Suite 1400
Washington, D.C. 20004

RE: U.S. Sentencing Guidelines

Dear Public Information Office:

As a Probation Officer writing Presentence Reports, I have a suggestion for restructuring U.S.S.G. §5C1.1(c) and §5C1.1(d) which I now find confusing. My idea is to present the guidelines in tables as follows:

§5C1.1(c) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is at least one but not more than six months, the minimum term may be satisfied by:

(1) a sentence of imprisonment or;

(2) a sentence of probation that includes a condition or combination of conditions that substitute:

- (A) intermittent confinement or;
- (B) community confinement or;
- (C) home detention

for imprisonment according to the schedule in §5C1.1(e) or;

(3) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes:

- (A) community confinement or;
- (B) home detention

according to the schedule in §5C1.1(e) but in no event less than one month is satisfied by imprisonment.

§5C1.1(d) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than six months but not more than ten months, the minimum term may be satisfied by:

(1) a sentence of imprisonment or;

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes:

(A) community confinement or;

(B) home detention

according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.

Thank you for considering my suggestion.

Sincerely,



Eric D. Odegard

U. S. Probation Officer

Thomas R. Brett
Judge

United States District Court
Northern District of Oklahoma
333 West Fourth, Room 4-508
United States Courthouse
Tulsa, Oklahoma 74103

February 11, 1992

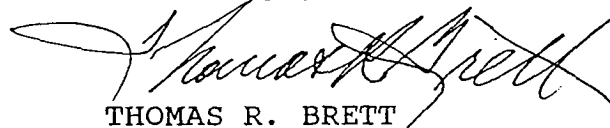
The Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D.C. 20004

Dear Chairman Judge Wilkins:

Thank you for your prompt response of February 7, 1992, to my letter of January 30, 1992. Three amendments I suggest to the Sentencing Guidelines, if repeal across the board is not possible, are as follows:

- (1) Within the trial court's discretion, any first felony offense having a value of less than \$100,000.00 may be eligible for probation if the facts and circumstances, including restitution, justify such a sentence;
- (2) The old Fed.R.Crim.P. 35 permitting a court to alter a sentence within 120 days should be reinstituted; and
- (3) A 5K1.1 reduction or departure by the court, due to defendant's cooperation, should be within the court's discretion for good cause stated and not be limited to the prosecutor's recommendation.

Sincerely yours,


THOMAS R. BRETT

A PROPOSAL FOR AMENDING THE UNITED STATES
SENTENCING GUIDELINES

Submitted by

The Project for Older Prisoners (POPS)
Professor Jonathan Turley, Director

The Project for Older Prisoners of George Washington University's National Law Center respectfully requests an opportunity to appear before the United States Sentencing Commission ("Commission") at its scheduled February 25, 1992, public meeting. On January 2, 1992, the United States Sentencing Commission invited public comment on proposed amendments to the federal sentencing guidelines, pursuant to 28 U.S.C. 994 (a), (o), (p), (x). The Commission asked for comment on "any aspect of the sentencing guidelines, policy statements and commentary, whether or not the subject of a proposed amendment." 57 Fed. Reg. 90 (1992). Among the issues for comment set forth in the Federal Register, the Commission listed a series of changes relating to the application of age as a relevant offender characteristic.¹ The Commission further invited comment on lower

¹ Notice of Proposed Amendments, 57 Fed. Reg. 90 (1992). Among the issues for comment was:

[D] Issue for Comment: The Commission requests comment on whether Chapter Five, parts H and K, should be amended to authorize a downward departure where a court finds that the defendant's advanced age (e.g., age 60 or older) has reduced the defendant's risk of recidivism, provided that the defendant (1) serves a substantial portion of his sentence, (2) is not a major drug trafficker, and (3) has no current or past history of violent offenses. Comment is also requested on how such a departure, if authorized, might be structured to provide for consistency in application.

sentencing procedures for cases of "extraordinary physical impairment."² The following proposals focus on the applicability of age and geriatric illness to the guidelines and policy statements of the Commission. Following a short statement of institutional identification, the proposal will discuss a range of options for the Commission in light of a growing scarcity of federal prison resources and the rapidly rising older prison population.

I. INSTITUTIONAL IDENTIFICATION

The Project for Older Prisoners (POPS) is a nationally recognized pro bono organization focusing on issues related to older and geriatric offenders. Founded by Professor Jonathan Turley in 1988 in New Orleans, POPS was developed to address a growing national problem: the aging of America's prison population. The number of older offenders has been rising exponentially in the United States due to longer sentencing and elimination of parole and pardon opportunities. In 1987, a

² Notice of Proposed Amendments, 57 Fed. Reg. 90 (1992). Among the listed potential amendments is a new policy statement:

**Section 5K2.17. Extraordinary Physical Impairment
(Policy Statement).**

If a defendant suffers from an extraordinary physical impairment, a sentence below the applicable guideline range may be warranted; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

conservative estimate of the number of prisoners over the age 55 was 20,000. By the year 2000, there will be over 125,000 older prisoners in this country. These prisoners occupy badly needed cell space and will on average cost much more to maintain than a younger prisoner.

Since its formation, POPS has become a national leader in developing new policies and legislation pertaining to the incarceration of older prisoners. With offices in New Orleans, Louisiana, and Washington, D.C., POPS works with prisons and legislators to adapt prison policies and facilities to better deal with the costs and needs of this emerging population. Among these policy changes are preventative medical care and alternative forms of incarceration. With the use of volunteer law students, POPS also evaluates particular prisoners to determine their likely recidivism. If a prisoner is statistically low risk, POPS locates housing and support for the prisoner before moving the case forward for a pardon or parole hearing.

POPS is composed primarily of law students working under Professor Turley's direct supervision. After learning of a particular prisoner, Professor Turley will usually interview the prisoner by telephone or in person. If the prisoner is a good candidate for release, a student is assigned to the prisoner to complete an extensive background report to help determine the prisoner's recidivist potential. This background material tracks recognized recidivist studies by focusing on high predictors like

age, chemical dependencies and criminal pattern. POPS has garnered a great deal of bipartisan political support precisely because the organization does not argue for the general release of older prisoners. POPS is highly conservative in actual recommendations for release and will often recommend for an alternative form of incarceration such as electronic bracelets or prison nursing homes, over actual release. Therefore, developing alternative forms of incarceration has been an emphasis in POPS legislation.

POPS comes before the Commission as a recognized leader on prison geriatric policy. After working with legislators and parole boards in various states, POPS hopes to assist the Commission in exploring the possible relevance of age and recidivism to the federal guidelines. As an organization centered on risk-assessment and the maximization of prison resources, POPS is closely aligned with the statutory purposes behind the creation of the Commission under 28 U.S.C. § 991(b) (1) (B)-(C) (1986). It is in that spirit that POPS offers the following assessment of the importance of age to the federal sentencing and prison system.

II. THE GRAYING OF THE FEDERAL PRISON POPULATION

As the Commission is aware, the federal prison population has been undergoing the most significant growth phase in its

entire history.³ In 1986, there were 33,132 offenders confined in federal prisons.⁴ By the end of 1990, the number of offenders in federal institutions increased to 59,123. This number is expected to grow to 100,000 by 1995, and to 127,000 by the turn of the century.⁵ In 1990, the federal prison population increased by 10.7 percent, adding an additional 6,355 prisoners to an already overcrowded system.⁶

It is common knowledge that the average age in the country is rising and, as a consequence, public health care and support are being stretched to extreme limits. What is less commonly known is that the nation's prison population is experiencing an even greater demographic shift upward in terms of age. Older prisoners comprised only 11.3 percent of the federal prison population in 1986⁷, a number which increased to 26 percent of the federal prison population by 1989. A projected one-third of

³ Moritsugu, Kenneth, Assistant Surgeon General and Medical Director, Federal Bureau of Prisons. Inmates Chronological Age vs. Physical Age. Forum on Issues in Correction, Record of the proceeding, "Long Term Confinement and the Aging Inmate Population", Page 41, December 7, 1990.

⁴ Statistical Report for the Fiscal Year 1986. U.S. Department of Justice, Federal Bureau of Prisons.

⁵ Quinlan, J. Michael, Director of the Federal Bureau of Prisons. Forum on Issues in Corrections. December 7, 1990.

⁶ Cohen, Robyn L. Prisoners in 1990, Bureau of Justice Statistics Bulletin, May, 1991.

⁷ Statistical Report for the Fiscal Year 1986. U.S. Department of Justice, Federal Bureau of Prisons.

the prison population will be 50 or older by the year 2010.⁸ Overall, the number of prisoners in the federal system over the age of 50 has doubled in 5 years, increasing from 3,349 in 1986 to over 7,000 in 1991. It is estimated that approximately 17,000 federal prisoners will be over the age of 50 age by the year 2000.⁹

The stark reality of the graying of the federal prison population is that increasing resources must be expended to adequately care for the unique needs of older prisoners. The primary expense for incarcerating the older population has been rising medical and maintenance costs. Such costs for older prisoners are three times the cost for younger prisoners.¹⁰ In 1986, the cost to maintain an older inmate in federal prison was estimated at an average of \$39,486 a year.¹¹ In 1990, the average cost for the medical care and maintenance of inmates over the age of 50 was between \$50,000 and \$60,000 a year in some states.¹² Since 1980, individual inmate medical costs have

⁸ Moritsugu, Kenneth, Assistant Surgeon General and Medical Director, Federal Bureau of Prisons. Inmates Chronological Age vs. Physical Age. December 7, 1990.

⁹ Id.

¹⁰ Zorn, Eric. "Natural life" a crime itself, Chicago Tribune, Chicagoland; Pg 1; Zone: C, January 30, 1992.

¹¹ Benning, Victoria. Elderly Inmates Pack Prisons; Cause Concern about Cost, Care, Gannett News Service, May 17, 1990.

¹² Foster, Mary. Prisons' Costly Dilemma: Caring for elderly prisoners; Punishment: Younger, more dangerous men are released while aging inmates sentenced to life without parole cost the system millions, Los Angeles Times, Part A; Page 2; Column 1, May 6, 1990.

doubled, while in the same time period, prison budgets allocated towards health care have increased only three percent.¹³

Under the pressure of both expanding prison populations and rising health care costs, the American prison hospital system is barely able to keep pace with required and essential services. In 1990, ninety percent of the country's 600 prison hospitals were not certified as meeting the standards established by the institutional medical profession. Prison hospitals are forced to care for inmates in facilities that are scarcely adequate to serve half the number of current prisoners. On average, prisons are operating at sixty percent above capacity while the prison hospitals are operating with only sixty percent of the rated staff.¹⁴

Designed for young, healthy, dangerous prisoners, most federal facilities lack any specialized support for a geriatric population and thereby fuel higher medical and maintenance costs of preventable geriatric illnesses. To properly care for older inmates, the ideal geriatric unit would need to provide many costly services to the older inmate such as special diet and nutrition monitoring; special exercises for bone deterioration; modified work schedules; monitoring of special health problems; modification of the physical environment to facilitate walkers, wheelchairs, and other physical aids; and for some inmates,

¹³ Jonathan Turley, "Why Prison Health Care is a Crime", Chi. Trib., March 19, 1991.

¹⁴ Id.

constant bed care and intensive medical supervision.¹⁵

Medical diagnosis and treatment also become more difficult for older prisoners, as the elderly are more likely to suffer side-effects from medicine and to be poor candidates for surgery.¹⁶ Due to the fact that current prison medical and nursing staff have only a limited knowledge of the special needs of the elderly prisoner, inappropriate diagnosis and treatment efforts have a profound impact on expenditures as well as a noted increase in civil actions.¹⁷

Aging results in a myriad of changing physical, physiological, and mental needs of the inmate. As the inmate ages, his ability to produce antibodies to fight disease declines dramatically, his overall muscular strength is diminished, his kidney filtering capacity is reduced, and his blood pressure increases. These predictable physiological consequences of aging create difficult medical demands for the existing understaffed, underfunded system. These costs are exacerbated by increased accidents due to declining eyesight, arthritis, reduced coordination and balance, medicative disorientation, poor

¹⁵ Kratcoski, Peter C., "Federal Bureau of Prisons Programming for Older Inmates", Federal Probation, June 1989.

¹⁶ Lipson, Steven, M.D., M.P.H., Medical Concerns for the Elderly, Forum on Issues in Corrections, Record of the Proceedings, Long Term Confinement and the Aging Inmate Population, December 7, 1990, Page 120.

¹⁷ Id.

physical conditioning and mental depression.¹⁸

As the population and institutional costs of older offenders rise exponentially, the federal system will find it increasingly difficult, if not dangerous, to ignore this unique segment of its prison population. This is not to suggest the need for some categorical release policy for high cost older prisoners but rather a recognition of the peculiar offender characteristics presented by this insular group. Age is clearly significant but not determinative for sentencing. Only a balancing of age with recidivism can guarantee all of the institutional objectives expressed in the statutory mandate of the Commission. Few of these objectives, however, can be guaranteed for the future without a more comprehensive approach to the graying of the federal prison population.

III. PROPOSALS FOR CHANGES TO THE UNITED STATES SENTENCING GUIDELINES AND PRACTICES RELATING TO OLDER OR GERIATRIC OFFENDERS

A. Redefining the Relevance of Age and Recidivism under Chapter Five, Parts H and K.

In its Guidelines Manual, the Sentencing Commission

¹⁸ Moritsugu, Kenneth, Assistant Surgeon General and Medical Director, Federal Bureau of Prisons. Inmates Chronological Age vs. Physical Age. Forum on Issues in Correction, Record of the proceeding, "Long Term Confinement and the Aging Inmate Population," Page 42, December 7, 1990.

commented that

Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.

United States Sentencing Commission, Guidelines Manual, § 5H1.1 (Nov. 1991). This policy statement suggests that age alone is not a satisfactory basis for a downward sentence. Indeed, the fact that a prisoner is elderly does not provide absolute assurances that he or she is no longer a threat. When considered with other factors, however, age is a valuable predictor of recidivism: generally as age rises recidivism falls. To the detriment of the system, the policy guidelines do not adequately allow for recidivism to be factored into the sentencing decision. Presently, age may be considered as a reason to depart from the sentencing guidelines only when the offender is elderly and infirm and where another form of punishment might be used. A more equitable sentencing system and a more effective use of prison space would be accomplished if a downward departure from the sentencing guidelines were permitted when the offender is "elderly or infirm or where a form of punishment might be equally efficient and less costly than incarceration." By amending section 5H1.1 in this manner and establishing clear guidelines, sentencing judges would be given the discretion to use age in their sentencing decisions subject to strict recidivist standards. An older offender would not be sentenced to less than

the statutory requirement unless he or she satisfied all of the risk assessment guidelines.

An alternative section which could be amended to reach these objectives is Part K of Chapter Five of the guidelines. That section describes various circumstances which might suggest to a sentencing court that a departure from the sentencing guidelines is warranted. Section 5K1.1 allows for a downward departure where the defendant has provided substantial assistance in the investigation or prosecution of another. Other grounds for a downward departure include circumstances where the victim's conduct provoked the offense;¹⁹ where the defendant committed the offense to avoid a perceived greater harm;²⁰ where the defendant committed the offense because of coercion, blackmail or duress;²¹ or where the defendant committed the offense while suffering from reduced mental capacity.²² Like diminished capacity, old age and low recidivism risk are personal characteristics of the defendant which warrant consideration at sentencing. An amendment could be crafted to state that, "if the defendant is elderly and has been determined to be at low risk for recidivism, the court may decrease the sentence below the applicable guideline range." This amendment would be in line with the underlying policies of

¹⁹ United States Sentencing Comm'n, Guidelines Manual, § 5K2.10 (Nov. 1991) (hereinafter [Guidelines]).

²⁰ Guidelines § 5K2.11.

²¹ Guidelines § 5K2.12.

²² Guidelines § 5K2.13.

Part K and allow for situations in which a reduced sentence better serves justice and the needs of the community.

Amending the guidelines to enable judges to consider the age of the offender would satisfy the policy requirements articulated in the Sentencing Reform Act. (See 18 U.S.C. §§ 3551-3673 (1990) and 28 U.S.C. §§ 991-998 (1990).) The possibility that age might impact sentences was recognized in the enabling statute creating the United States Sentencing Commission. In establishing categories of defendants as well as policy statements, the Commission was directed to consider whether any factor listed had "any relevance to the nature, extent, place or service, or other incidents [sic] of an appropriate sentence." Heading the list of factors to be considered was "age." (28 U.S.C. § 994(d)(1) (1990).) While the Commission chose not to establish a "category of defendants" to be given special sentencing consideration solely on the basis of age, the importance of age as one factor which might impact sentences has been manifest from the beginning, and the guidelines should be amended to allow age to be taken into account as it relates to recidivism.

Further policy guidelines are suggested in 28 U.S.C. § 991, which states that the purpose of the United States Sentencing Commission is to develop sentencing policies and practices which avoid

unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and [which]

reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.

28 U.S.C. §§ 991(b)(1)(B)-(C) (1986). Amending either Part H or Part K of Chapter Five to allow courts to consider early release for older, low-risk offenders is in line with the mandate against sentencing disparities. Under either proposed amendment, the older prisoner who has a low risk for recidivism but who is not physically ill will be treated similarly to the older, infirm prisoner who has committed the same crime. As the guidelines presently stand, the former would be ineligible for early release or alternative confinement, while the latter might have his sentence reduced. See, United States v. Doe, 921 F.2d 340 (1st Cir. 1990) (360 month sentence on a 54 year old man upheld despite the fact that, because of defendant's age, the sentence amounted to life imprisonment, because, at the time of sentencing, the defendant was neither elderly nor infirm).

The present guidelines also fail to reflect fully "the advancement in knowledge of human behavior as it relates to the criminal justice system," because they do not reflect the considerable data showing that older prisoners have a lower rate of recidivism. In this sense, the current guidelines do not adequately "take into account the nature and capacity of the penal, correctional, and other facilities and services available," nor do they "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." 28 U.S.C. § 994(g) (1990). An amendment to the

federal sentencing guidelines which allows age to be used as an indicator of recidivism will enable sentencing judges to give due weight to more of the policy considerations reflected in the Federal Sentencing Act by allowing them to take advantage of alternate forms of incarceration such as less restrictive facilities and home monitoring. Such alternative forms of incarceration are particularly effective for securing older prisoners.

Furthermore, the enabling statute indicates a preference for judicial discretion at the time of sentencing. Section 3553 allows a judge to consider not only the existence of aggravating and mitigating circumstances, but also mandates consideration of "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1); "the need for the sentence imposed to protect the public from further crimes of the defendant," 18 U.S.C. § 3553(a)(2)(C); the need "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," 18 U.S.C. § 3553(a)(2)(D); and "the kinds of sentences available." 18 U.S.C. § 3553(a)(3). Amending section 5H1.1 or Part K to provide judges with more opportunities to impose alternative sentences for older prisoners complies with clear relevance of offender characteristics when making sentencing decisions under the federal law. The Courts of Appeals have recognized the discretion granted to sentencing judges and upheld their authority to grant downward departures from the sentencing

guidelines. See, e.g., United States v. Ruklick, 919 F.2d 95 (8th Cir. 1990) (reversed and remanded where district court erroneously underestimated its authority to consider a downward departure based on defendant's diminished capacity); United States v. Lara, 905 F.2d 599 (2nd Cir. 1990) (district court acted within its discretion in departing downward based upon defendant's personal characteristics that made him particularly vulnerable to in-prison victimization).

Full consideration of age as an offender characteristic is further supported by § 3577, which states that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." This concept is echoed in § 3552, which allows the court to order a study of the defendant if it desires more information than is otherwise available in order to determine the sentence. That the guidelines require courts to consider all relevant information prior to sentencing suggests that discretion at this stage of the proceedings is acceptable and, so long as it is used judiciously, may contribute to more balanced and equitable sentencing.

Permitting a judge to consider an offender's age without the burden of establishing infirmity will not enlarge the courts' discretion to the point of creating sentencing disparities. Infirmity of the offender and availability of alternative methods of punishment would still remain important in the determination

of a downward sentence, but they would not be determinative on the issue of recidivism. The offender's age will simply be used as a means to initiate a recidivism analysis. The discretion of the court in sentencing decisions, therefore, will not be so great as to conflict with the policies of the guidelines. Furthermore, § 3553(b)(2) would naturally continue to apply to any departure from the guidelines, requiring the court to articulate the specific reason for the imposition of the lesser sentence. A simple statement by the court saying, in effect, "the offender is old therefore he will not commit any more crimes," will not suffice as a satisfactory rationale under the proposed amendment anymore than it does now. An example of the importance of articulating the reasons for a downward departure from the sentencing guidelines can be seen in United States v. Carey, 895 F.2d 318 (7th Cir. 1990). In Carey, the court of appeals vacated a judgment by the district court which departed downward from the applicable sentencing range. The lower court stated that "the combination of the defendant's age (62) and the fact that he has had several operations as a result of a brain tumor are significant enough to allow the Court some flexibility in a downward departure." Id. at 324. The court of appeals held that "without more particularized findings and analysis we cannot conclude that the district court's reliance on Carey's age and physical condition in departing from the applicable sentencing range was reasonable." Id. An amendment to 5H1.1 or to Part K will not alter the requirement that a judge who departs from the

sentencing guidelines on the basis of age will have to clearly articulate his or her reasons for so doing.

Because age is one of the most reliable predictors of recidivism, its relevance in sentencing decisions cannot be overlooked. By amending section 5H1.1 or Part K to enable judges to consider old age independent of infirmity, the Commission can maximize resources by making use of less expensive, alternative forms of punishment. It will also provide more space in already overcrowded prisons for offenders likely to have a high rate of recidivism. Finally, sentencing disparities would be minimal, as age would be used as only one factor in a recidivism analysis, and judges sentencing decisions would remain subject to stringent scrutiny.

B. REDEFINING THE MEANING OF "EXTRAORDINARY AND COMPELLING"

UNDER 18 U.S.C. § 3582(C)(1)(A)

While the focus of the listed issues for comments centered on amended parts H and K of Chapter 5, age can also be considered at a post-sentence reduction stage with a new policy statement from the Commission. Under the guidelines,

the court may not modify a term of imprisonment once it has been imposed except that -

(1) in any case -

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(1)(A) (1990). A direct amendment could be drafted to allow a prisoner's advanced age and low risk of recidivism to constitute "extraordinary and compelling reasons" for a sentencing reduction.²³ Alternatively, rather than amend § 3582(c)(1)(A) directly, the Commission could, under § 994(a)(2)(C)²⁴ and § 994(t),²⁵ issue a policy statement declaring a combination of old age and a low likelihood of recidivism to be an "extraordinary and compelling" reason to

²³ An amendment of 18 U.S.C. § 3582(c)(1)(A) could take several forms, including the addition of a clause qualifying "extraordinary and compelling" to include cases of old age when coupled with low risk assessments. Another approach might be to add a separate subsection to 18 U.S.C. § 3582(c)(1) which states that the court may reduce the term of imprisonment "if it finds that an older or geriatric offender's age and low recidivist predictor warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." While POPS is prepared to pursue such amendments, the current proposals will focus instead on a policy statement change that redefines "extraordinary and compelling."

²⁴ This section provides in part:

- (a) The Commission shall promulgate and distribute to all courts ...-
- (2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of-
- (C) the sentence modification provision set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18.

²⁵ The provision provides in part:

- (t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18 shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.

modify a term of imprisonment. It is expected that such a policy statement would include strict guidelines and commentary on the interpretation of "extraordinary and compelling," thereby limiting the discretion of the courts.

Before a court may modify a term of imprisonment under § 3582(c)(1)(A), it must first consider those factors listed in § 3553(a), which apply to the imposition of a sentence. This suggests that the court has a certain degree of discretion, even when modifying a term of imprisonment, to consider factors such as the personal characteristics of the defendant. Low recidivism, which is indicated in part by a prisoner's advanced age, should be considered a characteristic relevant to the early release of an older prisoner under § 3553(a)(1). It is particularly relevant to an overcrowded system burdened by high cost, low risk prisoners.

A new interpretation of § 3582(c)(1)(A) would also advance public safety, a policy underlying § 3553(c). Reducing a term of imprisonment on the basis of the prisoner's old age and low likelihood of recidivism is intended to ensure that only the least dangerous offenders are released at a time of limited resources. Furthermore, because a modification of a term of imprisonment might include placing low risk prisoners in alternative forms of incarceration, such as home confinement, the ultimate effect is to protect the public at the lowest cost, furthering the goals of the sentencing guidelines. The use of alternative means of punishment also satisfies the requirement of

§ 3553(a)(3), that courts consider the kinds of sentences available. Although a form of punishment other than imprisonment might not have been applicable at the time of sentencing, the offender's advanced age might bring added significance to that provision after a person has been incarcerated for a number of years.

Section 3553(a)(1)(D) states that when imposing a sentence, the court should consider that medical care is to be provided in the "most effective manner." Allowing for a reduction for some elderly offenders is the most direct means by which to satisfy this goal. Because elderly prisoners are most likely to suffer from health problems, removing them from conventional incarceration can dramatically reduce medical costs by placing older prisoners in settings equipped and experienced to deal with and prevent geriatric illness.

Finally, section 3553(a)(2)(A) provides that potential offenders be deterred from criminal conduct. The possibility of a reduced sentence for older prisoners will not detract from this important policy. Because prisoners will only have their terms reduced if they are both elderly and have a low risk of recidivism, sentences will be reduced only after the propensity or ability to commit a repeat offense has passed. Furthermore, a shortened term of imprisonment does not necessarily mean freedom. The possibility of home confinement, confinement to a prison nursing home, or a form of supervised release is still very real. Moreover, an amendment to section 3582 or the applicable policy

statements in no way suggests that all, or even a majority of older prisoners will go free. Only a few older prisoners who meet strict recidivist guidelines will be eligible for a reduction in the term of imprisonment, and only when courts act within the strict policy guidelines set down by this Commission.

CONCLUSION

The suggested proposals outlined above are direct measures that the Commission can take to develop a policy for older offenders. The relationship of old age and recidivism is well-documented and widely recognized. This body of knowledge will be essential to the federal system as it struggles with a rising population of older prisoners. Under its statutory mandate, the Commission is uniquely qualified to respond to the changing demographics of the prison population and to incorporate new ideas on the most efficient use of prison resources.

POPS stands ready to assist the Commission in exploring possible modifications to the federal sentencing laws, guidelines or policy statements considering the relevance of age and recidivism. Accordingly, POPS would be amenable to a joint short-term study with the Commission on the federal system and the aging prison population. In addition to the proposals discussed, this study could include an evaluation of a possible pilot program of electronic monitoring for older offenders that would reduce maintenance costs and relieve overcrowded

conditions. Such a study could also explore a possible guideline for risk-based releases for prisons under serious or chronic overcrowding conditions. While the federal system has utilized "rental cells" from state jurisdictions and has moved prisoners long distances to available cells, this practice has created a bidding practice for cell space that at least one federal judge has attempted to halt. *Williams v. McKeithen*, 1990 WL 265971 (M.D. La.; July 20, 1990) (No. Civ. A. 71-98-B) rev'd, 939 F.2d 1100 (5th Cir. 1991). The sentencing guidelines can create a "safety valve" for chronic conditions that would permit a selective release under 18 U.S.C. § 3582(c) or other provisions. While their application to older offenders is novel, these ideas are not new and can be found in various forms among the state systems. The viability of such approaches to the federal system should be of great interest and certainly merits greater attention by the Commission and this organization.

POPS appreciates this opportunity to address the Commission and looks forward to a full exchange of ideas on older offenders at the public hearing on February 25, 1992.



AMERICAN BAR ASSOCIATION

1400 H STREET, N.W. WASHINGTON, D.C. 20004-4242

STATEMENT OF
STEVEN SALKY, CHAIRPERSON
U.S. SENTENCING GUIDELINES COMMITTEE
CRIMINAL JUSTICE SECTION

ON BEHALF OF THE
AMERICAN BAR ASSOCIATION

BEFORE THE
U.S. SENTENCING COMMISSION

CONCERNING THE PROPOSED
1992 AMENDMENTS TO THE SENTENCING GUIDELINES

WASHINGTON, D.C.
FEBRUARY 25, 1992

Mr. Chairman and members of the Commission:

My name is Steven Salky. I appear today to testify on behalf of the 380,000 members of the American Bar Association in my capacity as Chairperson of the ABA's Committee on the United States Sentencing Guidelines. Our Committee, part of the Section of Criminal Justice, is made up of a cross-section of interested parties, including private defense attorneys, public defenders, Assistant United States Attorneys, attorneys from the Justice Department, academicians, and judges. I am pleased to have this opportunity to convey the ABA's views with respect to the proposed 1992 amendments to the federal sentencing guidelines.

As you know, we have testified before the Commission on numerous occasions concerning the process by which the Commission promulgates guideline amendments. Our position is informed to a significant extent by our Criminal Justice Standards, and in particular the Sentencing Standards (which, by the way, are undergoing revision). The Standards envision a guidelines process much like that contemplated by the Sentencing Reform Act -- whereby an administrative agency with particular expertise in the operation of the criminal justice system, and removed from the political process, can study and refine guidelines that serve the basic purposes of criminal sentencing: deterrence, incapacitation, just punishment, and rehabilitation. Thus, we have praised the Commission when its process has been deliberative and has been based upon a careful assessment of the need for guideline revisions,

including an evaluation of available empirical data. Likewise, we have not hesitated to criticize the Commission when its processes have been characterized by undue haste and the absence of a meaningful analysis of the reasons for amending particular guidelines.

The process by which many of this year's proposed amendments have been developed has much to praise. The Commission decided last year that particular matters deserved careful study and thereafter assigned various working groups to research the operation of the guidelines in these priority areas. We commend the Commission for establishing these working groups to study the acceptance of responsibility guideline, the criminal history guidelines, the drug offense guidelines, and other areas. Regardless of whether or not we agree with the conclusions reached by the working groups, we believe the Commission acts wisely when it amends the guidelines on the basis of staff recommendations, especially where the staff has analyzed the available data to determine the actual problems in guideline application. We very much appreciate having had the opportunity to provide input to several of the working groups and were particularly impressed by the quality of several of these reports.

The value of the working group process for generating amendments can be seen by reviewing The Acceptance of Responsibility Working Group Report. According to its report, the working group analyzed the raw data generated from the

case files submitted to the Commission after each guidelines sentencing and conducted an in-depth analysis of the files containing atypical cases. The working group further analyzed published opinions of the courts, reviewed available literature, and considered the input of defense practitioners, judges, probation officers and others. Only after considering the implications drawn from the raw data and only after considering the manner in which a guideline was used in the plea bargaining and sentencing processes, did the group draft proposed amendments. We believe this type of deliberative study is what Congress had in mind when it created the Commission. Thus, any amendment to Section 3E1.1 can now be based on current practice data and social science research.

To commend the Commission for establishing working groups to study an area before it considers amending guidelines is not to suggest that the Commission should never amend a guideline without a working group report. However, there should be a presumption against any substantive amendment that is not accompanied by some research and analysis that clearly justifies an alteration. We note that several proposed amendments would increase offense levels or provide greater enhancements for certain offenses without any justification and without any reference to any staff report. We suggest shelving any such proposals, regardless of the proponent, until the matter is studied by the Commission.

Before leaving the matter of "process," let me renew the suggestion that one of my predecessors, Sam Buffone, has raised with you in the past: the Commission should promulgate internal regulations to govern the guideline amendment process. The Commission is an expert administrative agency regulating a complex area of our society. Most federal agencies have adopted regulations governing their rulemaking activity. The Sentencing Reform Act envisions the same for this agency. For the Commission not to adopt a set of regulations for its rulemaking function is not only to leave its decisionmaking process open to legal challenge, but to limit its credibility within the criminal justice community.

The Commission's process for amending guidelines has shown progress as regards the public comment period. In 1990, we expressed our dismay at the very short comment period. This year, the Commission published its proposed amendments in early January, thus allowing interested parties such as the ABA approximately 45 days before the public hearing and 60 days before the end of the comment period in which to review and develop comments on the significance and desirability of the proposals. We continue to recommend that the Commission allow at least 90 days between publication and the end of the comment period. While the ABA had access to working group reports and monitored the development of certain amendments, not all interested parties had this luxury. In light of the importance of many of the proposed amendments, a 90 day

comment period will help involve others in the amendment process and further develop institutional credibility for the Commission.

Our praise for the process of guideline amendments should not overshadow our continued criticism of the fact that the amendments, either individually or as a package, do not include any assessment of prison impact. The Sentencing Reform Act explicitly requires the Commission to continually assess the impact of the Guidelines on the existing capacity of penal, correctional, and other facilities and services. The Sentencing Reform Act further requires that any guideline be formulated to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons. The projections in your 1991 Annual Report and the projections in your recently released Report on the Operation of the Guidelines System and Short Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining indicate significant increases in the use of incarcerative sentences and in the average length of prison sentences well into the future. The Commission, however, continues to ignore its responsibility to evaluate the potential impact of any amendment on prison populations. We cannot comprehend why the Commission continues to ignore its statutory duties in light of the crisis in prison overcrowding. In our view, every working group report ought to contain a prison impact analysis. While the effect on the

rate of imprisonment may not be a basis to accept or reject a proposed amendment, it cannot continue to be ignored.

Lest my remarks be viewed as simply those of another disgruntled defense attorney, let me quote to you the words of Andrew L. Sonner, the Chairperson of the ABA Section of Criminal Justice, whose Report to the Members was published in the Winter, 1992, edition of the magazine Criminal Justice. Mr. Sonner, the highly respected States Attorney for Montgomery County, Maryland, commented on the remarks of experienced state and local prosecutors who have called for the development of new approaches to dealing with guilty criminals other than imprisonment. He said,

"[T]here is a great deal of evidence to support their position. The costs of construction and maintenance of new jails drains precious resources from vital social programs that many believe prevent more crime than punishment does. . . . Most experts argue that there is no perceptible correlation between getting tough by imposing long sentences and reduced crime rates."

The ABA believes these comments apply equally to the federal system and point to the absurdity of regulating sentencing practices without any consideration of the effect on rates and length of imprisonment.

We are also concerned about the proposed amendments as a whole for another reason. While there are clearly areas within the guidelines for improvement, we are concerned that the Commission not over-amend the guidelines. One of the conclusions of the Report on Disparity referred to earlier is

that most private defense attorneys do not have an adequate understanding of the guidelines. One of the reasons is clearly the fact that each year the practitioner is faced not only with mastering the original set of guidelines, but with mastering an ever greater number of amendments. This does not mean the Commission should not react to real problems in guideline application. When I turn to our comments on specific proposals, you will note that we endorse many of the proposed clarifications and changes. The point we want to make, however, is that the Commission should avoid the tendency inherent in any highly regulated scheme (such as the Sentencing Guidelines) constantly to revise, simply for the sake of amending.

I have appended to this testimony our specific comments on the proposed amendments. While I will limit my remarks to just a few proposals, let me be up front about several concerns which inform those comments:

o First, several of the proposed amendments will increase the use of and length of incarceration. While this may or may not be warranted in a particular case, many proposed amendments contain no justification for this result and, indeed, appear to be based on the normative view of the proponent that more incarceration is always good. For instance, proposed amendment 6 would increase by four levels any offense graded under 2F1.1 that "affected a financial institution." While the purpose may be to punish officers convicted

of savings and loan fraud, the amendment would increase sentences for a much broader range of conduct, for which there does not appear any justification. If the argument is that fraud offense levels -- which were amended in 1989 -- are too low in the case of a significant class of offenders, the proponent has not put forth any evidence to support this claim. Consistent with the ABA Standards, we believe a heavy burden rests on the proponent of any amendment that seeks to further increase offense levels. Thus, we generally oppose any amendment that will increase punishment, but does not articulate some evidence, empirical or otherwise, to establish that the increase will enhance deterrence or the other purposes of sentencing.

o Second, several amendments appear to move specific guidelines away from "modified real offense" to "pure real offense" sentencing. Amendment no. 4, part A, Amendment no. 9, Amendment 20, Option 1 and 3, Amendment 36, Part (G) and (P) all appear to eliminate any reference for purposes of sentencing to the charge of conviction. When the initial guidelines were promulgated, the Commission acknowledged the tension between real offense and charge offense sentencing and explained that it had resolved that tension by constructing a carefully balanced compromise between the two systems. In brief, those convicted of offenses involving more "fungible" items like money and drugs would be subject to real offense sentencing to minimize the dangers of prosecutorial manipula-

tion of sentencing. On the other hand, offenders convicted of offenses involving very discrete acts, like robbery and burglary, would be subject to charge offense sentencing. This balance between real offense and charge offense sentencing constitutes one of the bedrock policy choices of the initial guidelines. Several of our comments reflect our concern that on an ad hoc basis, the Commission is moving from its carefully considered "line" between real offense and charge offense sentencing without detailed public explanation based on available data.

Let me turn to our comments on proposed amendments. They are listed below in the order in which they appear in the Federal Register, but I will limit my remarks today to those proposals that we strongly endorse (numbers 1(A) and 1(B); 23; 29; and 34).

1A and 1B. These amendments represent valuable clarifications of the critically important relevant conduct standard. In our judgment, the amendment makes it clear that the relevant conduct is not meant to be limitless - instead, courts must carefully evaluate the extent to which each defendant should be held accountable for the acts and omissions of others. This amendment helps clarify that defendants in all types of offenses are to be punished only for criminal acts and harms which were "in furtherance" of jointly undertaken activity and which were "reasonably foreseeable". Likewise, the terms "common scheme or plan" and "same course of conduct" are not without limits. The amendment gives judges some flexibility to tailor the offense level to the total amount of drugs or money for which each defendant should be held culpable, instead of sentencing all co-defendants to the same period. While some members of the ABA may have some minor language suggestions, the amendment is an admirable attempt to guide the courts in their interpretation of these terms. An important aspect of this is that the Commission should indicate that the purpose of the amendment to be

clarification of the guideline and commentary. This should avoid judicial rulings that this is a substantive change that does not apply before the effective date.

2B. This is a useful amendment for several reasons. First, it will allow a defendant to clear his/her conscience, something the criminal justice system should encourage. Second, it will allow the government to solve many additional cases, as it will encourage defendants to admit to all their prior criminal conduct. For example, assume that a defendant has committed four bank robberies, but only one is known to the government. This amendment will encourage the defendant to report his involvement in the other three, allowing the government to close these cases. Because the guideline requires the government to agree that the self-incriminating information will not be used, it is difficult to perceive how this guideline amendment could be abused by defendants.

3. The ABA standards envision an entirely different model of sentencing juveniles from that used for adults. Indeed, the system is recognized as being so different that there are 24 corporate volumes of juvenile justice standards. The ABA believes that juveniles have very different needs than adults and that they should be treated differently. The emphasis should be, in large part, on treatment and rehabilitation -- issues that are not recognized in the guidelines. Further, the juvenile justice system must take into account a wide variety of individual characteristics. Again, this is contrary to the guidelines system. We oppose any introduction of sentencing guidelines into that system, especially without an extensive study of the effects this would have on the system.

4(A). This amendment moves the guideline in sexual abuse cases to a pure real offense guideline and is objectionable for the reasons we have already explained in our general testimony. Moreover, by this amendment, consent -- a classic issue for the jury in a criminal case -- is now left for adjudication at sentencing. This merely lowers the standards of proof and represents a dangerous precedent.

5. We agree that the "more than minimal planning" enhancement has not been applied consistently. We note that if the Commission promulgates this amendment, it may want to eliminate "more than minimal planning" from the other guidelines that are often cross-referenced. In addition, the elimination of "more than minimal planning" from these guidelines would avoid double-counting.

Additional Issues For Comment. All distinctions in offense levels based on the amount of loss are arbitrary at best. Given the arbitrariness of the distinctions in dollar

loss, we favor placing less emphasis on "loss" as a sentencing factor. Thus, Table 3 is the best of the proposed alternatives in our view.

6. We can find no justification for this amendment. What empirical basis is there for increasing the offense levels for these offenses? If the intent is to punish more severely the officers and/or directors of savings and loans who have been proven to have looted their institutions, the language is much too broad. Many offenses not committed by the "S and L bandits" can be said to "affect a financial institution." This is an example of a proposed amendment that appears to be motivated simply by the normative views of its proponent that the punishment is too lenient; there has not been any attempt made to demonstrate that the existing guidelines are ineffectual in accomplishing the purposes of sentencing in these cases.

7. Given the extent to which drug quantities are subject to inflation simply by virtue of statements made by the undercover agent, it is dangerous to simply increase the offense levels by the amount of drugs involved. There must be a better way to characterize those persons who have a significant role in larger drug operations and, at the same time, avoid casting a net that increases offense levels for persons who play a peripheral role in the drug operation. Again, this proposal increases sentences without any apparent reliance on the Commission's own study of the operation of the drug offense guidelines.

9. Option 1 moves this guideline to real offense sentencing without any explanation or support. While the current guideline contains a limited cross-reference, the amendment results in a complete elimination of the need for this guideline in the first instance. While there may be a sound rationale, there is no explanation for this and promulgating this amendment would be inappropriate.

11. Why is the Commission eliminating "more than minimal planning" in the fraud and larceny guideline because it has proven difficult to apply consistently and adding "more than minimal planning" here?

12. The ABA believes that this amendment needs to be reconsidered in its entirety. The proposed amendment will create further inconsistencies in sentencings for currency transaction reporting violations (31 U.S.C. § 5313, § 5322), importing and exporting of monetary instrument violations (31 U.S.C. § 5316, § 5322), and violations of the IRS cash reporting rules (26 U.S.C. § 6050I; 26 U.S.C. § 7203, § 7206(I)). As currently drafted, the failure to file a Form 8300, or the filing of a false Form 8300 will be treated as part of §

2S1.4, with a base offense level of 9. A failure to file a currency transaction report would have been a base level of 5 under § 2S1.3, and the filing of a fraudulent currency transaction report would have been a base level of 13 pursuant to § 2S1.3. Structuring transactions for purposes of avoiding the IRS cash reporting rules or the currency transaction reporting rule would be treated as a level 13 pursuant to § 2S1.3, but the structuring of an importing and exporting currency transaction would have been a base level 9 pursuant to § 2S1.3. The ABA can discern no rational difference for the differing treatments by and among these statutory provisions.

13. As initially proposed in 1987, the tax guidelines substantially increased the prison time for offenders convicted of criminal tax offenses. These guidelines were amended in 1989 and increased in prison terms again. Due to the delay in prosecuting tax crimes, offenses for the 1987 and 1988 years involving the first set of guidelines are just now emerging from investigation, while the second set of guidelines will not be construed or analyzed for at least another one to two years (when offenses relating to the 1989 year are first brought). Until the Commission has time to analyze empirical data resulting from the initial sets of tax guidelines, the ABA recommends that no new and drastic amendments to the tax guidelines occur. In particular, these guidelines raise issues of proportionality by treating misdemeanor and felony offenses on identical levels. They also create "rebuttable presumptions" which subject the guidelines to constitutional attack or otherwise may be ill-advised. We recommend that a working group be established to coordinate amendments to the tax and the money laundering guidelines during the next guideline cycle.

14. This is an amendment which again illustrates our concern that the Commission is moving in an ad hoc manner toward pure real offense sentencing. If this amendment is promulgated by the Commission, the government could charge and convict a defendant of tax evasion and, by simply introducing evidence at sentencing concerning drug involvement, set the minimum guideline sentence at level 17 -- a much higher level than might apply to the offense of conviction. The Commission has gone on record, based upon a convincing report, as being opposed to mandatory minimum sentences promulgated by Congress. To establish a mandatory minimum guideline sentence seems equally ill-advised, especially where the mandatory minimum guideline is based on conduct proven by a mere preponderance of evidence instead of beyond a reasonable doubt.

15. Given the presumably small number of cases to which this adjustment will apply, is this proposed amendment not better left to the court's authority to depart? Chapter Five already contains a suggestion for an upward departure for

terrorism. Furthermore, this amendment is inconsistent with the general intent of Chapter 3 adjustments, which are meant to apply across all offenses. This proposal is the type of over-amending that we commented upon earlier.

18(A). We do not understand the justification for eliminating the three-level adjustments. As for the amendments to the Commentary, this is one of the few amendments for which the format obscures the proposal. However, to the extent we understand what is being proposed, we are concerned that the amendment tries to specify every circumstance possible for mitigating role and limits the application in non-drug cases to too many factors. We resist the idea that to qualify for a minimal role adjustment, a defendant must prove all five factors listed in Note 3. We would prefer leaving the courts some discretion in the area of applying Chapter 3 role adjustments. (We note that these amendments are for the most part directed to drug cases. Might not it be better to propose these amendments to Section 2B1.1?)

Issues for comment:

(1) The assessment of mitigating role should be in the context of the typical defendant. A mandate of the Sentencing Reform Act was to eliminate unwarranted disparity in all federal courts, not simply disparity between co-defendants.

(2) As for function-based role adjustments, we have long favored substantial adjustments based upon a defendant's role. We do not believe, however, that function labels should be determinative. Rather than always applying a reduction or always denying a reduction on the basis of a defendant's function, we favor specifying factors that a court should consider when determining whether to give a defendant a mitigating role adjustment.

(3) We agree with the concept, but not the example. Why is someone who merely transports (a welfare mother who gets paid \$200 for delivering a suitcase) not entitled to a minimal role adjustment?

18(B). The court always had the power to depart on this basis. However, this language is helpful insofar as it makes clear that where the amount of money or drugs involved bears little relation to the defendant's role, a departure is warranted. We would suggest the Commission substitute "is" for "may be."

19. The ABA has previously endorsed the concept of capping the offense levels for minor and minimal participants in quantity based guidelines such as 2D1.1. As before, we

again decline to comment on the issue of the appropriate offense level cap.

Issues for comment:

1(a). The same offense level caps should not apply to minimal and minor role offenders. Rather, the caps should be lower for minimal role, in accordance with the present definitions.

1(b). The Congress has already made distinctions between illegal substances for purposes of sentencing by adopting schedules for all illegal substances. Why not determine offense level caps by schedule?

2. The cap should limit the offense level, not the sentence, consistent with the operation of the guidelines generally. Were it otherwise, how would a court apply other adjustments such as "acceptance?" Moreover, if stated in months, the same sentence cap would apply regardless of criminal history. This produces an unwise result.

3. The "cap" concept counters the impact of quantity. The role adjustments generally are not tied to quantity. For both reasons, the cap should not be tied to quantity.

4. Mandatory minimums sentencing statutes "trump" the guidelines in any event. The caps should be set without reference to mandatories. The caps should, however, not apply if 2D1.1 (a)(1) or (a)(2) apply.

20. Option 2 is the option most likely to result in treating similarly situated offenders similarly. It recognizes that violations of the statute can involve different amounts of different substances and that the role of the defendant may be very different.

21. Issue for Comment. We have no basis to know whether or not Section 3C1.2 adequately accounts for the full range of behavior to which it is applicable. For this very reason, how can anyone endorse the options presented? Indeed, as we have noted earlier, we suggest that the Commission review the data and review determine how courts have applied the guideline before it engages in amending it.

22. Again, is there evidence that the guideline is creating anomalous results? In the absence of such evidence, there is grave danger in amending this guideline. In the first place, it is already complex and beyond the understanding of many practitioners. Second, by each amendment, the Commission creates an issue regarding the application of ex

post facto principles to the application of the amended guideline. Absent sufficient evidence, the Commission should not over-amend.

23. Accepting responsibility for the offense of conviction ought to be worth two levels and there is much in the working group report that supports the need for a "bright line" rule. However, we endorse the concept incorporated into several proposed options that the acceptance reduction not be limited to two levels. The amount of further reduction should not depend on only one factor, such as the severity of offense level. Rather, we can envision a guideline that would allow courts to grant an additional level (or levels) reduction depending on multiple factors, which may include the offense level involved, the acceptance of responsibility for all relevant conduct, other demonstrations of acceptance. In other words, the acceptance of responsibility guideline should "guarantee" every defendant who pleads guilty before trial a two level reduction, but authorize larger deductions where the court is satisfied that other signs of genuine remorse was present. Our approach represents a combination of Options 3 and 4 of the proposed options.

26A. Structured departures for criminal history scores greater than Category VI are appropriate. Commission guidance is useful because the disparity created by departures at this level can be significant. Option 2 appears to be appropriate.

26B. The clarification appears to be appropriate for the reasons stated in the 1990 Recommendations of the Judicial Conference of the United States.

26C. A departure by definition is based upon a finding by the court that the guidelines are inapplicable. While downward departures may be rare in those cases in which the Career Offender or Armed Career Criminal guidelines apply, we do not think it is wise for the Commission to rewrite the Sentencing Reform Act on the court's departure authority.

28A. A zero category would have the tendency to favor white-collar offenders. Similarly, there is potential for abuse in such a category: is a prior arrest of a peaceful demonstrator a basis to deny zero category treatment? Instead of a zero category, should not the Commission simply expand the categories of offenders for whom alternatives to incarceration are available?

28B. We are in favor of structured departures, instead of a new category VII. However, this proposal is not supported by the data collected by the working group and should be shelved for that reason alone.

29. Making sentencing options available to a greater number of defendants is the single most important issue before the Commission. There is currently very little flexibility in the sentencing options available at the lower end of the guidelines table. The table presumes the imposition of a sentence of imprisonment for almost all but the most minor offenders. The current table is clearly sending many more first offenders to prison than was the case prior to the adoption of the guidelines.

Importantly, the initial guidelines table failed to follow the clear statutory directive of the Sentencing Reform Act. That Act, specifically 24 U.S.C. § 994(j), provided that the guidelines should reflect the general appropriateness of imposing a sentence other than imprisonment in cases where the defendant is a first offender who has not been convicted of a crime of violence or otherwise serious offense. Far from compromising the structure of the guidelines, adopting the amendment options proposed will do much to bring the guideline back into sync with this Congressional directive.

In particular, we urge the adoption of Option 2, Option 3, and Option 5. These options should be adopted without limitation as to their application by offense. While white collar offenders may benefit more than blue collar offenders by these amendments, most offenders will still serve some limited period of imprisonment even under these amendments.

The Report on Alternatives to Incarceration provides compelling evidence that the guidelines have resulted in the overuse of imprisonment.

As for the additional issues for comment:

31. We have previously criticized the Commission's promulgation of the "cost of imprisonment" fine and urge its elimination.

33A. We endorse this proposal for the reasons stated in the 1990 recommendations of the Judicial Conference of the United States. The Senate Report to the Sentencing Reform Act contains substantial justification for this amendment.

33B. We endorse this proposal for the reasons stated in the 1990 recommendations of the Judicial Conference of the United States. The Senate Report to the Sentencing Reform Act contains substantial justification for this amendment.

33C. The Commission should worry less about providing guidance for departures and more about eliminating barriers to departures it has erected.

33D. For the reasons that amendment 33(B) is appropriate, this amendment is inappropriate.

34. We have long endorsed this amendment.

35A. This amendment is helpful, as far as it goes. The Commission should go further by either requiring the government to disclose this information prior to execution of the plea agreement or press for an amendment to Fed. R. Crim. P. 16 to accomplish this.

35B and C. It is appropriate that conduct dismissed as part of a plea agreement may nevertheless be considered at sentencing. This is consistent with the modified real offense system originally developed by the Commission. However, acquitted conduct should be disregarded for all purposes as a matter of fairness or the appearance of fairness.



PACE UNIVERSITY SCHOOL OF LAW
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February 13, 1992

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William Wilkins, Jr., Chairman
United States Sentencing Commission
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Attention: Guideline Comment

Dear Chairman Wilkins:

This letter comments on the Commission's proposal to amend Section 2Q1.2(b)(4), 57 Fed. Reg. 97, January 2, 1992. It supports the proposal but urges the Commission to undertake more substantial review of the guidelines for environmental offenses.

Proposed Amendment to Section 2Q1.2. The proposal is to clarify that an adjustment should not be made under Section 2Q1.2(b)(4) for offenses involving violations without or in violation of a permit, if an adjustment has already been made under Section 2Q1.2(b)(1) for violations involving a discharge, release or emission. The purpose of the proposal is to eliminate double counting of the same factor. There is double counting when an adjustment is made on account of the lack or violation of a permit in most offenses subject to this guideline, since most offenses prosecuted under it involve permit requirements.

Indeed, there is a good case for eliminating Section 2Q1.2(b)(4) altogether. Because most prosecutions for offenses covered by the guideline involve violations of requirements to secure a permit or of permit conditions, the real overlap is between the base offense and Section 2Q1.2(b)(4). Moreover, an offense flowing from the lack or violation of a permit is not necessarily more serious than an offense not involving a permit. The Clean Water Act, 33 U.S.C. §§1251 et seq., (CWA) for instance, forbids industrial discharges directly into our nation's water, except in compliance with a federal or state permit, but allows discharges indirectly into these waters without a permit, through publicly owned sewage treatment plants. Notwithstanding this permitting disparity, the CWA imposes similar technology based pollution treatment requirements on both direct and indirect

.../2

discharges. Section 2Q1.2(b)(4) would enhance a penalty for a minor violation of a direct discharge permit but not for a serious violation of indirect discharge requirements. Some, but not all, of the latter might receive compensating enhancements for disruption of a public utility (the public sewage treatment plant), under Section 2Q1.2(b)(3).

Similarly, the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq. (RCRA), at §6925(a), forbids disposal of hazardous wastes at a facility lacking a permit or in violation of a permit. Excluded from wastes governed by RCRA are polychlorinated biphenyls (PCBs), which are regulated under the Toxic Substances Control Act, 5 U.S.C. §§2601 et seq. (TSCA), at §2605(a). See the exclusion in RCRA for PCB disposal at §6925(a). Regulations under TSCA forbid disposal of PCBs at a facility lacking EPA approval or in violation of the terms of the approval, but do not require a permit, 40 CFR §§761.70(d) and .75(c). Thus offenses involving the disposal of chemical wastes will ordinarily be subject to the permit enhancement of §2Q1.2(b)(4), unless the chemical wastes are PCBs. This is anomalous because Congress regarded PCB disposal to be serious enough to treat it in a separate statute.

Finally, Section 2Q1.2(b)(4) should be deleted entirely or modified substantially because it is fatally ambiguous. For instance, what does "permit" mean? The TSCA/PCB problem described above might be alleviated if "permit" includes government approvals not specifically denominated as permits. Does it? The CWA/indirect discharge problem described above might be alleviated if "permit" includes a permit issued to the indirect discharger by the sewage treatment plant. Does it? If so, what if the sewage treatment plant regulates indirect dischargers by contract or ordinance rather than by permit? While the broad readings suggested could alleviate apparent gaps in the enhancement, they go too far. They would enhance the sentence for a federal offense if it happened to violate the terms of a municipal permit of a type not contemplated by the federal statute violated. These are but some of the ambiguities in the enhancement that need to be cured if it is retained at all. Incidentally, although Section 2Q1.2(b)(4) refers to transportation of hazardous substances without or in violation of a permit, no federal permit is required for transportation of any material under any of the statutes covered by §2Q1.2. RCRA comes closest, it establishes requirements for transporters of hazardous waste, but doesn't require them to secure permits, 42 U.S.C. §6923.

Comparable Amendment of Section 2Q1.3. If Section 2Q1.2 is amended as proposed, a comparable amendment should be made in 2Q1.3 for the same reasons. Indeed, if no comparable amendment is made, anomalous results would follow. Consider the case of two surface

water discharges next to each other, each discharging in violation of its respective permit but one discharging an extremely hazardous waste grossly in excess of its permit limits, and the other discharging an innocuous waste marginally in excess of its permit limits. Only the innocuous violation would receive an enhancement, to the end that the innocuous violation would receive a more serious sentence than the extremely hazardous violation.

Possible Increases in Base Levels. Base levels should not be changed, and certainly not increased, without a thorough overhaul of the guidelines. The basic problem with the guidelines is that they do not differentiate serious from innocuous violations. That is not to gainsay the efforts of the drafters of the guidelines, for to do so adequately is truly difficult. Virtually every violation of the environmental statutes can be prosecuted civilly or criminally. Determining whether a given violation should be pursued civilly or criminally may be easy in extreme cases, but requires good judgment in others. Since almost any violation of these statutes will result in incarceration under the guidelines, even for first offenders, the Commission should either substantially revise the specific offense characteristics and application notes to truly let the punishment fit the crime or allow judges greater discretion for downward adjustments.

Consider the case of the loving father who takes his young son to the shores of Chesapeake Bay and teaches him to skip stones on its placid waters. Unfortunately, he is apprehended by a zealous EPA agent and is ultimately charged with violating the CWA for discharging a pollutant (the rock, see CWA 502(6)) into the waters of the United States (Chesapeake Bay) from a point source (his hand, a "discrete conveyance" under §502(14)) without a permit. Worse, the rock contains copper, a hazardous pollutant under Superfund (40 CFR §302.4). If you don't think the hand will qualify as a point source, substitute a sling shot. In calculating the sentence, Section 2Q1.2 will be used because the substance discharged is hazardous. The base level is 8. There is a discharge under §2Q1.2(b)(1), leading to an enhancement of at least 4, and of 6 if the activity is repeated. It is without a permit, for another enhancement of 4 under 2Q1.2(b)(4). The father played an organizing role leading to violations by his son, for an enhancement of 4 under §3B1.1(a). Thus the resulting offense level is at least 20-22, calling for a sentence of 33 to 51 months. Even without the permit adjustment, the level would be 16-18, for a sentence of 21 to 33 months.

If the example seems farfetched, consider actions that have been considered violations of the CWA or RCRA in the absence of a permit: dropping dummy bombs on an ocean bombing range in routine Navy training (CWA), Weinberger v Romero-Barcelo, 456 U.S. 305 (1982); adding chlorine and alum to a drinking water reservoir by

water department employees to purify the water (CWA), Hudson River Fishermen's Ass'n. v City of New York, 751 F. Supp. 1088 (S.D.N.Y. 1991), affd. 940 F. 2d 649 (2nd Cir. 1991); shooting lead shot on a skeet shooting range (RCRA), Connecticut Coastal Fisherman's Association v Remington Arms Company, Inc., Slip Op. Civ. No. B 87-250 (EBB) (D. Conn., Sept. 11, 1991).

The activities in these cases would not be widely regarded as criminal behavior and, unless aggravated by other factors, do not warrant significant incarceration. Yet they are treated virtually the same under the guidelines as activities which cause considerable ecosystem damage and would be widely regarded as criminal behavior and do warrant significant incarceration. The reason is not far to seek.

The environmental statutes are complex and far reaching. They are typically over-inclusive to assure that no pollution sources are overlooked. They can be violated in technical ways or in substantive ways. Violations can be de minimis or serious. Congress has recognized the inappropriateness of applying the same sanction to all violations by providing a broad range of remedies and sanctions: notices of violation; administrative cease and desist orders; administratively assessed penalties; civil injunctions; civil penalties; contractor debarment; and criminal sanctions. The administering agencies have recognized the inappropriateness of applying the same sanction to all violations by developing policies to guide enforcement officials in applying appropriate sanctions for different types and levels of violation. The courts have recognized the legitimacy of decisions by administering agencies in applying these different sanctions or in not enforcing at all against some types of regulatory violations, according the agencies the presumption of prosecutorial discretion, see Heckler v Chaney, 470 U.S. 821 (1985). In a civil enforcement context, courts have repeatedly held that the de minimis nature of a violation of these statutes cannot be argued as a legal defense, but can be considered by courts as an equitable defense, when it comes time for the court to assess a penalty or fashion another remedy. No such safeguards against draconian enforcement exist when it comes to criminal enforcement of the same statutes for the same offenses. The administering agencies don't make the decisions on whether to prosecute offenses criminally, those decisions are made by criminal prosecutors. Those prosecutors may lack the perspective that the agencies have to sort out serious from trivial violations. As a result, an offense which an administering agency might regard as not warranting civil action or as warranting only a small administrative penalty could nevertheless be prosecuted criminally. The harsh consequences of this for less serious offenses could be ameliorated by imposing lesser criminal sanctions, such as probation. The guidelines preclude this for almost all violations of these statutes.

The proposed amendments are the first step toward making the sanctions imposed under the guidelines for environmental crimes more reflective of the nature of the underlying offenses. But they are only the first of many needed steps.

Very truly yours,



Jeffrey G. Miller
Professor of Law

JGM:acd

UNITED STATES DISTRICT COURT

District of Alaska

222 West 7th Avenue - No. 54

Anchorage, Alaska 99513-7545

H. Russel Holland
Chief Judge

January 17, 1992

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

Re: United States v. Floyd
945 F.2d 1096 (9th Cir. 1991)

Dear Judge Wilkins:

The above referenced case which appears in 945 F.2d 1096 (9th Cir. 1991) has, I am sure, already come to your attention. Hopefully there is something that the Sentencing Commission can do to avoid or ameliorate the consequences of this decision. Especially when considered with the prospect of mandatory minimum sentences, we have a form of disparity in sentencing that I personally view as far more pernicious than what existed before the institution of guideline sentencing. I have recently declined to apply Floyd to a case that had facts very, very similar to Floyd. I am hopeful that the decision will get appealed so that another panel of the Ninth Circuit will have an opportunity to look at this situation again. I have some concern, however, that no appeal will be taken and that even if it were that there are too many judges who do not like the guidelines and are only too willing to find any crack they can to avoid applying them. The big trouble with Floyd is that it turns the entire process on its head. Floyd will arguably be applicable as an exception to the guidelines in almost every case involving young defendants. I have no demographics on this; but I have a feeling that at least seventy-five percent of the young people whom I sentence suffer from a youthful lack of guidance in a very real way.

If I am right about this, the result of Floyd could be that the majority of young defendants will slip out from under the guidelines unless they have the misfortune of committing one offense with a mandatory sentence. Any judge with half a brain can mouth the right words to offer some reasons for restructuring the guideline computation once a departure is justified; and the net result is the same kind of subjective sentencing we had under the old law. I am still no big fan of guidelines sentencing; but if we're going to have it, we ought to do it correctly; and the Floyd decision will, I am afraid, create some very serious problems for those of us who are trying to abide by both the letter and the spirit of guidelines sentencing.

Honorable William W. Wilkins, Jr.

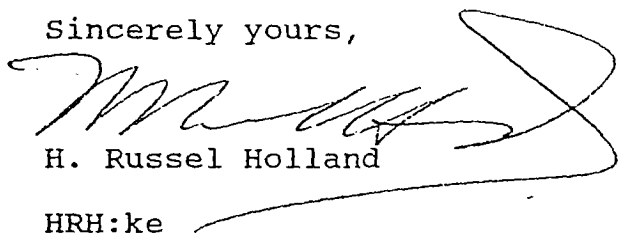
January 17, 1992

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In fact with Floyd in combination with guidelines sentencing and mandatory minimum sentences, we can have some absolutely awful disparity. The judge in Floyd gave a defendant with a terrible record a very substantial break on his guidelines sentence. Today I sentenced a young man who was "trashed" by his family much as Floyd was but who has a criminal history category of 1. I think he could be rehabilitated; but I have had to send him away for five years because he was caught with a pistol in his car while he was completing a drug deal. The defendant plead to the weapons charges and the drug charges (which involved a sufficient quantity of crack cocaine to result in a guideline sentence of more than five years for even a first offender) were dismissed. The irony of the situation--and this is where the three-way disparity problem between Floyd, the guidelines, and mandatory minimum sentences really comes into focus--is that if the defendant had been willing to gamble with a longer sentence, pleading to the drug charges and bargaining for a dismissal of the weapons charges, he might have been sentenced under Floyd to less time than the mandatory minimum sentence on the weapons charge.

Plainly, disparity in sentencing is still very much with us. I still believe that non-binding guidelines and the abolition of mandatory minimum sentences are the only rational solution. That resolution being unlikely, I certainly hope that something can be done about the Floyd decision.

Sincerely yours,



H. Russel Holland

HRH:ke

LEWIS D. FRAZIER
CHIEF PROBATION OFFICER

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Mr. William W. Wilkins, Jr., Chairman
U. S. Sentencing Commission
1331 Pennsylvania Avenue, Suite 1400
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Re: Proposed Amendments:
New Criminal History Category
Split Sentencing

Dear Chairman Wilkins:

This letter is to comment on a couple of the proposed amendments that appeared in the January 2, 1992, Federal Register, 57 Fed. Reg. 1, 90 (1992).

A new Criminal History Category of 0 would separate offenders with no known criminal history from other offenders that have at least one criminal history point. I suggest this new category be defined as an offender that does not have any convictions under guidelines 4A1.1(a), (b), or (c) or 4A1.2(c)(1) regardless of the applicable time period (except in the case of juvenile adjudications). A person in this category may then receive a reduction in the offense level by as much as two points, for example. This will allow the current Sentencing Table to remain intact while giving defendants who have no criminal history a reduction in their offense level and sentencing range.

At the other end of the grid, a number of defendants have criminal history points beyond the thirteen points needed to establish a criminal history category of VI. This table appears to be sufficient to handle those cases by sentencing at the top of the range or departing upward. To establish a new Criminal History Category of VII would unnecessarily upset the Sentencing Table that is already in place.

The split sentencing alternatives is a third point to consider. The cutoff for offenders eligible for split sentencing should have an offense level high enough that would catch a wide spectrum of offenses. A rule of thumb for eligibility may be for those offenders who have a minimum guideline range of up to 24 months and no criminal history as defined above.

Chairman Wilkins
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February 6, 1992

All three of these proposed changes would allow a possible "benefit" to those defendants who have no criminal history and have no substantial assistance to offer.

I hope these comments are of help to the Commission in considering the proposed amendments to the sentencing guidelines.

Respectfully submitted:


Christopher R. Buckman
U. S. Probation Officer

CRB:smc

cc: Honorable Vincent L. Broderick, c/o Research Division, Federal
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PREPARED STATEMENT OF FREDERIC N. SMALKIN,
UNITED STATES DISTRICT JUDGE, DISTRICT OF MARYLAND
RELATING TO PROPOSED 1992 AMENDMENTS TO THE SENTENCING GUIDELINES

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

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

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

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

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

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

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

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

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

Thank you for hearing me out today.

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

**WRITTEN TESTIMONY
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**SUBMITTED BY THE MEMBERS OF
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SENTENCING AND POST CONVICTION COMMITTEE**

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

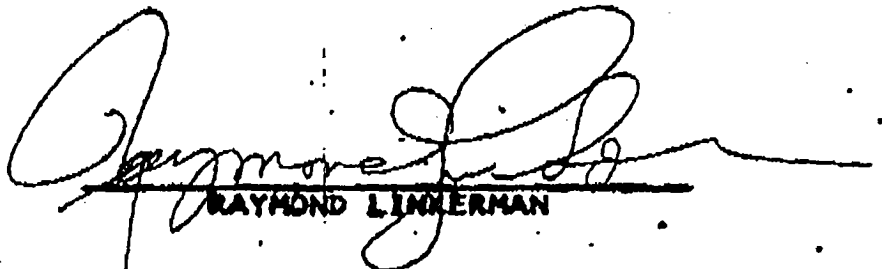
COURT REPORTER:

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
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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

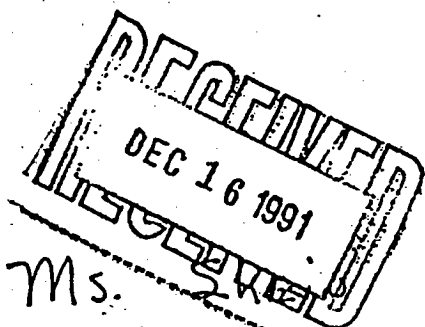
the discretion was mine. I think the Government has all the discretion now, and I could sit here and talk all afternoon about some of the other problems I have with the Sentencing Act, but that's not for me to decide. Congress has passed the statute imposing the ten year minimum for this offense, and 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
free



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.



**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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**COMMENTS REGARDING PROPOSED AMENDMENTS
TO SENTENCING GUIDELINES**

The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than one hundred attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including ten previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense attorneys. In the pages that follow, we address a number of proposed amendments of interest to our organization.

At the outset, we would like to thank the Sentencing Commission for the opportunity to present our views on the proposed amendments. We would also like to acknowledge our familiarity with and high regard for the work performed by the Judicial Conference, which recommended a number of the proposed amendments endorsed by our organization.

**Proposed Amendment 29: § 5C1.1 -
Imprisonment and Alternatives to Imprisonment**

We support this amendment, which consists of six options that, individually and in combination, redefine the "split sentence" and enlarge the number of defendants eligible for an increased number of alternatives to imprisonment.

In formulating its position on these options, the NYCDL sought the views of judges sitting in the Southern and Eastern Districts of New York. Twenty-one judges responded to questionnaires posing fifteen questions, which addressed the components of the six options regarding alternative sentencing. A great majority of the judges were in favor of the Commission (1) increasing the flexibility available to sentencing judges at the lower guideline ranges, particularly with regard to non-imprisonment options for less serious first offenders; (2) expanding the menu of options available to judges at sentencing to include additional alternatives to imprisonment; and (3) enlarging the pool of offenders eligible for alternatives.

As we stated during our appearance at the Commission's meeting on December 12, 1991, we strongly endorse Option 1 of the proposed amendment, which redefines the "split sentence" to require service of at least one month of incarceration rather than the current requirement of at least one-half of the minimum term. This option would implement Judicial Conference Recommendation 1 and is supported by the Staff Working Group. Such a change would enable sentencing judges to fashion sentences that more closely approximate the often used pre-Guideline "split sentence" alternative.

We likewise support Option 4, which amends the Guideline ranges to permit straight probation at three additional levels (currently 1-7 months in Criminal History Categories I-III). We see no reason why judges should not have this increased flexibility in sentencing first offenders.

We also support Option 5, which expands the availability of split sentences to Guideline ranges with a minimum of twelve months or less rather than the current range of ten months or less. This amendment would expand Zone C Guideline ranges to provide one additional level (six cells at 12-18 months) at which a split sentence is available. Judges should have this option available to them.

Accordingly, the NYCDL recommends that the Commission adopt Option 6, which incorporates Options 1, 4, and 5. We feel that this combination of options, which represents the consensus recommendation of the Staff Working Group, would not compromise the structure or purpose of the Guidelines and would give sentencing judges flexibility without inviting undue disparity in the sentences imposed.

The NYCDL also supports the adoption of additional programs that might be utilized by sentencing judges as alternative sentences to incarceration. In our survey, a majority of judges responded favorably to specific questions regarding the availability at sentencing of additional alternative programs such as "residential incarceration" (24

hour restriction to the residence), day reporting centers (reporting to a day facility with restriction to the residence at night), public service, or boot camp (shock incarceration). Programs such as these would expand the range of reasonable and appropriate alternatives to incarceration now available to sentencing judges.

Moreover, we believe that the alternatives to imprisonment should apply to all defendants at the offense levels specified. We urge the Commission to eschew an offense-by-offense approach that might, for example, exclude white collar offenders. Such an approach would hardly serve to provide certainty and fairness by avoiding unwarranted disparity -- goals that the Guidelines are purportedly designed to realize.

**Proposed Amendment 23: Chapter Three,
Part E - Acceptance of Responsibility**

Proposed Amendment 23 contains four alternative modifications of § 3E1.1, the Guideline that governs the "credit" (i.e., reduction in offense level) to be afforded a defendant who accepts responsibility. The NYCDL strongly endorses the two similar approaches embodied in Options 3 and 4, which contemplate varying degrees of reduction, depending upon the presence of different factors that demonstrate acceptance of responsibility. Option 2, which provides for a greater (i.e., three- rather than two-level) reduction if the offense level is 30 or above, is, in our view, not as

attractive as Options 3 and 4 but is preferable to the current version of § 3E1.1, which allows only a two-level reduction. Finally, we strongly oppose Option 1, which would deny any sentencing reduction under § 3E1.1 unless the defendant accepts responsibility for relevant conduct as well as for the offense of conviction.

As the Commission noted in the Background comments to § 3E1.1, "[t]he reduction of offense level provided by this section recognizes legitimate societal interests." Courts have long acknowledged that the first step along the road to rehabilitation involves a recognition and affirmative acceptance of personal responsibility, and that therefore a defendant who takes such a step may appropriately be rewarded with a lower sentence than one who has not accepted responsibility. Also underlying § 3E1.1 are important practical considerations: society has a legitimate interest in creating incentives to guilty pleas, without which our already overburdened criminal justice system could not function. Accordingly, our analysis of the proposed amendments to § 3E1.1 is premised on the notion that the Guideline should be drafted in such a way as to maximize these important societal interests.

Option 1, which denies any credit at all unless the defendant also accepts responsibility for relevant conduct, would undermine society's interest in encouraging guilty pleas. A defendant wishing to obtain a reduction may be

willing to admit to all the elements of the crime charged -- all that is required to constitute a legally sufficient guilty plea. However, the same defendant may be understandably reluctant to admit to all the relevant conduct alleged by the government; as noted by the Committee on Criminal Law and Probation Administration of the Judicial Conference of the United States, in order to accept responsibility for related conduct, a defendant might have to acknowledge wrongful conduct that would automatically raise his offense level and more than offset the two-level reduction under § 3E1.1. Report and Recommendations of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines (1991) (hereinafter "Judicial Conf. Rep."), Appendix p. 10. In these not unusual circumstances, the defendant would have little or no incentive to plead guilty. Thus, Option 1 would exacerbate the currently existing problem identified by the Judicial Conference: "The two-level reduction [in § 3E1.1] is seen by many judges as insufficient to encourage plea agreements particularly at higher offense levels." Judicial Conf. Rep., at App. 10.

Accordingly, we urge the Commission to reject Option 1. That is not to say that a defendant's willingness to accept responsibility for relevant conduct should be disregarded; rather, we believe that a defendant who not only pleads guilty, but also admits to his involvement in relevant

conduct, has demonstrated a degree of acceptance of responsibility that may warrant a reduction greater than two points.

This is the approach embodied in Options 3 and 4, which we urge the Commission to adopt in one form or another. Though structurally different, both options would afford an automatic two-level reduction to a defendant who enters a plea of guilty (or nolo contendere) prior to the opening of the government's case at trial. The certainty of this two-level reduction would enhance whatever incentive to plead guilty currently exists.

Equally important, Options 3 and 4 follow the suggestion of the Judicial Conference that the Guidelines "utiliz[e] a range of several offense levels for acceptance of responsibility to provide for more individual consideration of varying degrees and demonstrations of acceptance." Id. at App. 11. Specifically, Options 3 and 4 grant an additional one-level reduction for other forms of acceptance (such as voluntary restitution, surrender, or assistance to the authorities), and thereby enable a defendant to obtain a reduction of up to three levels. These proposals therefore "recognize and encourage affirmative actions demonstrating acceptance of responsibility other than entry of a plea of guilty." Id. We believe that § 3E1.1 ought to perform this function, and we therefore embrace the approach taken in

Options 3 and 4.¹ Notably, nearly every judge in the Southern and Eastern Districts of New York who responded to a questionnaire distributed by the NYCDL favored a sliding-scale approach to acceptance of responsibility.

With respect to Option 2, the only effective change would be to increase the § 3E1.1 reduction from two to three levels where the offense level is 30 or above. The Judicial Conference recommended that "greater adjustments be available for higher offense levels to encourage entries of pleas in cases where defendants, who in anticipation of long periods of incarceration may, without adequate incentive, go to trial." Judicial Conf. Rep. at App. 10-11. While we agree with the foregoing rationale, we prefer an amendment that provides a sliding scale based on the presence of different factors demonstrating acceptance of responsibility -- i.e., Options 3 and 4. Defendants with high offense levels, like all defendants, would be able to qualify for a three-level reduction in certain circumstances. If a greater incentive to plead guilty is needed at the higher levels, the Option 2 approach could be incorporated into Option 3 or 4 by

¹ Ideally, we would like to see a combination of the two options, which have slightly different features. Option 8 would provide for a one-level reduction where the defendant pleads guilty after the opening of the government's case at trial; without this provision, a defendant would have no incentive to change his plea once the government's case has opened. On the other hand, Option 6 provides a one-level reduction for a defendant who goes to trial and affirmatively demonstrates his acceptance of responsibility after verdict. We believe that each of these features provides useful incentives that should be incorporated into an amended § 3E1.1.

affording defendants at the higher levels an additional one-level reduction beyond the reduction they would otherwise receive.

**Amendment 34: § 5K1.1 -
Substantial Assistance to Authorities**

We wholeheartedly support this proposed amendment to § 5K1.1, which would eliminate the requirement of a government motion as a condition precedent to a downward departure based on the defendant's substantial assistance to the authorities. While we agree that the government's evaluation of the extent and value of the defendant's assistance is entitled to deference by the court, we do not believe that judicial consideration of the appropriateness of a downward departure for cooperation should be foreclosed unless the government consents -- the situation that in effect exists under the current version of § 5K1.1. For this reason, in connection with the 1991 amendment cycle, we supported a proposed amendment to the provision and urged the Commission, in a letter dated August 28, 1991, to revisit the issue in 1992.

As we have stated in our previous testimony and submissions, the requirement now embodied in § 5K1.1 enables the government in most cases to foreclose entirely the court's consideration of the appropriateness of a downward departure on the basis of a factor generally agreed to be highly pertinent to the sentencing decision: the defendant's

cooperation with the authorities. Although some judicial decisions have dispensed with the need for a government motion in the rare case in which the government is found to have acted in bad faith, this limited exception is, in our view, unduly narrow, in that it precludes the sentencing court from considering the propriety of a downward departure where the government unreasonably declines to make the requisite motion, but where no claim is made that the government acted in bad faith. Thus, as presently written and interpreted, § 5K1.1 invites defense challenges to the bona fides of the government, but leaves without any redress those defendants who seek to litigate only the reasonableness of the government's position. In our view, the interests of justice are not served by so circumscribing the court's authority to grant downward departures under § 5K1.1.

The proposed amendment would rectify this situation by eliminating the requirement of a government motion and replacing it with a requirement of a judicial finding that the defendant has provided substantial assistance. The proposed amendment also anticipates, and takes into account, the argument most often advanced in support of the government-motion requirement -- i.e., that "the government is in the best position to supply the court with an accurate report of the extent and effectiveness of the defendant's assistance" United States v. White, 869 F.2d 822, 829 (5th Cir. 1989). The proposed amendment expressly

acknowledges the special role of the government in making assessments of this nature: it elevates into the § 5K1.1 Policy Statement the admonition presently contained in the Commentary, directing the court to give "substantial weight . . . to the government's evaluation of the extent and value of the defendant's assistance" Moreover, proposed new Commentary specifically provides that a downward departure "generally" will be based on a government motion. Accordingly, even under the proposed amendment to § 5K1.1, the government's opinion as to the value of the defendant's cooperation would continue to be afforded substantial deference, and a sentencing court would presumably decline to grant a downward departure over the government's objection, unless the government took a plainly unreasonable position.

In short, as presently drafted, § 5K1.1 goes beyond merely affording the government a reasonable degree of deference, and instead enables the government to preclude judicial consideration of a downward departure absent a showing of bad faith. The NYCDL strongly embraces Proposed Amendment 34, which would drop the government motion requirement, except for departures below statutorily mandated minimum sentences.