

Statement of

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on behalf of

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My name is Henriette D. Hoffman and I am head of the Criminal Appeals Bureau of the Federal Defender Services Unit of The Legal Aid Society in New York. The Society's federal defender services unit provides representation for indigent federal defendants in the Southern and Eastern Districts of New York and in the Court of Appeals for the Second Circuit. I appear today to present the views of the Federal Public and Community Defenders.

There are presently 45 Federal Public and Community Defender Organizations in the United States. Federal Public and Community Defender Organizations operate under the authority of 18 U.S.C. § 3006A and exist to provide criminal defense and related services in federal court to persons financially unable to afford counsel. We appear before magistrates, United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

Federal Public and Community Defenders represent the vast majority of defendants in federal court, providing legal representation to indigent criminal defendants in nearly 50 judicial districts, including all judicial districts with major urban areas. We represent persons charged with frequently-prosecuted federal crimes, like drug distribution, and with infrequently-prosecuted federal crimes, like sexual abuse. We represent persons charged with white-collar crimes, like bank fraud, and persons charged with street crimes, like first degree murder. Federal Public and Community Defenders have, in short, a great deal of experience with the guidelines. Based upon that experience, we are pleased to offer our comments on the proposed

amendments to the Federal Sentencing Guidelines Manual that the Commission has published in the Federal Register.

**Relevant Conduct
(Amendment 1)**

Amendment 1(A) would revise the relevant conduct rule of § 1B1.3(a)(1) to deal more specifically with jointly-undertaken criminal activity. The amendment would modify and move existing commentary into the guideline, where it more appropriately belongs. The amendment also would add new commentary clarifying the applicability of § 1B1.3(a)(1) to jointly-undertaken criminal activity. We support all of these changes.

Amendment 1(B) would add a new application note explaining the terms "common scheme or plan" and "same course of conduct," which are used in the relevant conduct rule of § 1B1.3(a)(2). We find the explanation to be helpful in understanding and differentiating the terms, and we support the amendment.

**Cooperation Agreements
(Amendment 2)**

Amendment 2(A)

Amendment 2(A) would revise application note 1 to indicate that a sentencing court can consider information disclosed by a defendant under a cooperation agreement when determining whether (and to what extent) to depart in response to a government motion under § 5K1.1. We oppose this amendment because it defeats the purpose of this guideline, which is to encourage defendants to cooperate with the government. A defendant who cooperates with the government, and provides information that is otherwise unknown to

the government, should be able to rely that the disclosure of that information will not result in a sentence that is longer than if the defendant had kept quiet.

Amendment 2(B)

Amendment 2(B) would revise § 1B1.8(a) to authorize cooperation agreements where the defendant's obligation is to provide information about the defendant's own unlawful activities. We support the change, which can only work to the benefit of both parties and the court.

Cooperation agreements in which the defendant is to provide information about his or her own activities will occur infrequently, and only when such an agreement is beneficial to the government. The government would be interested in such information only if the government believes that the defendant's information is very important and that there is no other practical way of getting the information in a timely manner. A defendant, however, is unlikely to disclose such information without an assurance that the information disclosed will not adversely affect the disposition of the case. We believe that the proposed change will accommodate the public interest in obtaining such information.

**Juvenile Delinquents
(Amendment 3)**

Amendment 3 proposes a new policy statement dealing with persons sentenced as juvenile delinquents. Juvenile cases arise infrequently in the federal system. They primarily involve native American children in Indian country, but occasionally involve

children of military personnel living on base. We are not aware of any substantial complaints from the native American community or the military community about how juveniles are treated in federal court.

If a juvenile is involved in a serious federal offense, that juvenile is treated as an adult and is subject to the guidelines. This is consistent with what the criminal justice system traditionally has done -- treat juveniles less harshly than adults, unless there is a finding of aggravating circumstances. The proposed policy statement would junk that approach.

The proposed policy statement, in effect, calls for the imposition of a guideline sentence,¹ and recommends (in proposed subsection (c)) that the sentencing court consider a sentence below the guideline range "to the extent that a juvenile delinquent's age and youthfulness, and lesser culpability associated with such age and youthfulness, distinguish the juvenile delinquent from an otherwise similarly situated adult defendant." Thus, the proposed policy statement would call for a juvenile who is treated as a juvenile to receive the same sentence as an adult. There may be reasons, peculiar to the federal system, for abandoning the traditional approach, but nothing in the "Reason for Amendment" suggests what those reasons are.

¹Although proposed subsection (a) of the new policy statement states that "the sentencing guidelines do not apply" to such persons, that proposed subsection also states that "the guidelines can provide an appropriate starting point for considering a sentence" for a juvenile delinquent.

Given the few juvenile cases that come before federal courts, the apparent lack of substantial complaints about the present system, and the radical proposal to abandon an approach that the criminal justice system over the years has found to be effective and consistent with public welfare, we recommend that the Commission study the matter further and not promulgate Amendment 3 at this time.

**Criminal Sexual Abuse
(Amendment 4)**

Amendment 4(A)

Amendment 4(A) would add cross-reference subsections to § 2A3.2 (criminal sexual abuse of a minor (statutory rape) or attempts to commit such acts) and § 2A3.4 (abusive sexual contact or attempt to commit abusive sexual contact). The proposal responds to "a review of cases sentenced under these guidelines [which] indicates that a significant proportion of cases sentenced under § 2A3.2 and § 2A3.4 clearly involved conduct that would more appropriately be covered under an offense guideline applicable to more serious sexual abuse cases."² We believe that the proposal is premature and that further study of the cases is necessary.

The vast majority of federal sex offense prosecutions involve native American defendants. Using data from the Administrative Office of the United States Courts, the Federal Public Defender for the District of New Mexico found, for example, that in the period

²The review was conducted by the child sex offense working group, see P. Montgomery & M. Selick, Child Sex Offense Working Group Report (n.d.).

July 1, 1989 to June 30, 1990, 86% of all defendants prosecuted in federal court for rape, sex abuse, or child abuse were native Americans. Changes in the sexual abuse guidelines, therefore, will affect primarily native Americans.

Although there is a child sex offense working group report available, nothing in it indicates the extent to which cases were sentenced under § 2A3.2 and § 2A3.4 as the result of plea agreements. There are sound reasons why prosecutors will agree to a plea to a lesser offense, such as lack of medical evidence to support a claim of penetration or a complainant who, for whatever reason, does not want the prosecution to go forward.

Because the use of cross-references will increase the offense level, amendment 4(A) undoubtedly will result in fewer pleas, or in pleas to offenses covered by other guidelines in chapter 2, part A, subpart 2. We recommend that the Commission explore the matter further before acting.

Amendment 4(B)

Amendment 4(B) would make changes concerning official victims to three guidelines in chapter 2, part A, subpart 2. We support the amendment.

Theft and Fraud (Amendments 5 and 6)

Amendments 5 and 6 propose changes in the theft and fraud guidelines.

Amendment 5 -- Theft and fraud loss tables

Amendment 5 would revise the loss tables for the larceny and

fraud guidelines, and eliminate the enhancements in those guidelines for more than minimal planning. We agree with the Commission that the more than minimal planning enhancement "has proven difficult to apply consistently in practice", and we support its deletion.

It is difficult to evaluate the various alternative loss tables set forth in Amendment 5. We do not know the considerations that led the Commission to establish the levels in the current tables, and we do not know the considerations behind each of the alternatives. It appears to us that the biggest problem with the loss tables is the proliferation of levels at low amounts -- i.e., the range in amounts at the lower end of the tables is too small. The result is that a relatively small loss yields too great an increase in the offense level. Of all the options set forth, we favor alternative table 1.

Amendment 6 -- Financial institution enhancement

Amendment 6 proposes to add an enhancement to the theft, bank and commercial bribery, and fraud guidelines that would increase the offense level four levels "if the offense affected a financial institution." This proposal is based upon a Justice Department recommendation and reflects the Justice Department's view that "Congress has sent what is clearly a strong signal that individuals whose criminal conduct jeopardizes the integrity of our nation's banking system should receive harsh sentences, including lengthy periods of incarceration."

We disagree with the Justice Department's unstated premise -- every increase in a statutory maximum requires an increase in the offense levels of the applicable offense guideline. A statutory maximum sets an appropriately severe punishment for the most aggravated form of the offense. An increase in the maximum means that Congress believes that the most aggravated form of the offense should be treated more severely, but does not necessarily mean that Congress believes that the heartland form of the offense should be treated more severely.

We also disagree with the Justice Department's recommended enhancement, which would apply anytime a financial institution was "affected," whether the loss to the financial institution was \$10,000 or \$10,000,000. It seems clear that an individual who embezzles \$10,000 from a bank does not "jeopardize[] the integrity of our nation's banking system." Congress, in enacting the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and the financial institutions provisions of the Crime Control Act of 1990, clearly was concerned with high level officials -- such as chief executives and controlling investors -- who caused substantial losses to the institutions that they directed or controlled.³ Congressional attention was not directed at low- and

³For example, Congress directed the Commission to "promulgate guidelines, or amend existing guidelines, to provide for a substantial period of incarceration for a violation of, or a conspiracy to violate, section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of title 18, United States Code, that substantially jeopardizes the safety and soundness of a federally insured financial institution." Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 961(m), 103 Stat. 501 (emphasis added). To comply with that

mid-level officials whose crimes involved relatively modest sums of money. Those persons are insured of spending some time in prison because financial institution offenses have 30 year maximums, and probation is precluded for such offenses.⁴

Drug Offenses
(Amendments 7 and 20)

Amendment 7 -- Offense levels and drug quantities

Amendment 7 is a request for comment upon a Justice Department proposal, brought forward late in this cycle's amendment process, "regarding the removal or modification of the current limitations on offense levels for the distribution of Schedule III, IV, and V controlled substances, anabolic steroids, and Schedule I and II depressants, so that violations involving large quantities of these substances would result in higher offense levels."

The Justice Department has offered no evidence to suggest that there is any problem with the present guideline, which allows the sentencing court to depart upward for quantities significantly greater than the highest quantity accounted for in the Drug Quantity Table. We believe that it would be worthwhile for the Commission to study the feasibility and desirability of the Justice

directive, the Commission added what is now subsection (b)((7)(A) of § 2B1.1. U.S.S.G. App. C, amend. 317.

Similarly, Congress in 1990 directed the Commission to act to make sure that the guidelines ensured that a defendant convicted of any of the above offenses receive an offense level under chapter 2 of not less than 24 "if the defendant derives more than \$1,000,000 in gross receipts from the offense." Crime Control Act of 1990, Pub. L. No. 101-647, § 2507, 104 Stat. 4862 (§ 2507 is captioned "Increased Penalties in Major Bank Crime Cases").

⁴See 18 U.S.C. §§ 3561(a)(1), 3581(b).

Department's proposal. The maximum penalty for Schedule V controlled substances under 21 U.S.C. § 841(b)(3), for example, is one year (two years if the defendant has at least one other drug trafficking offense), so the need to increase the offense levels for Schedule V controlled substances is questionable.

Amendment 20 -- § 2D1.8

Amendment 20 sets forth three options for dealing with renting or managing a drug establishment (an offense under 21 U.S.C. § 856). Option 1 would delete § 2D1.8 and amend the Statutory Provisions Note to § 2D1.1 to indicate that that guideline covers offenses under 21 U.S.C. § 856.⁵ Option 2 would amend § 2D1.8 to call for the use of (1) the offense level from § 2D1.1 applicable to the underlying drug offense, or (2) if the defendant's role was only to rent or allow use of the premises, four levels less than the offense level from § 2D1.1 but in no event more than 16. Option 3 would amend § 2D1.8 to require the use of the offense level from § 2D1.1 or 16, whichever is greater.

The present guideline can operate unfairly. A defendant whose house is involved with large quantities of drugs is treated the same as a defendant whose house is involved with only small quantities. At the same time, it should be recognized that the section 856 offense is often used for plea agreement purposes and that all of the proposed changes, to differing extents, would inhibit such plea agreements. Plea agreements do not benefit only

⁵Presumably, the Statutory Index in Appendix A would also be amended at the entry for 21 U.S.C. § 856 to indicate that offenses under that provision are covered by § 2D1.1.

the defendant. Plea agreements work to the government's advantage -- to reward a cooperating defendant, or to ensure punishment when the government's evidence is weak, for example -- so it would seem advantageous to retain the plea agreement utility of the guideline.

Option 1 would effectively remove any plea agreement utility for 21 U.S.C. § 856. Option 3 continues the unfairness to defendants when small drug quantities are involved. We support option 2, which reduces the unfairness without completely rendering 21 U.S.C. § 856 useless for plea agreement purposes.

**Tax Offenses
(Amendment 14)**

Amendment 14 would amend the income tax guidelines to require a minimum offense level of 17 for tax violations that involve, or are related to, drug law violations. We oppose the amendment, which is based upon a Justice Department recommendation brought forward late in this cycle's amendment process.

The amendment seems to be an attempt to make the guideline a real offense guideline, but, unfortunately, goes beyond real offense and produces strange results. For example, a defendant commits a level 14 drug offense and evades the tax on the income from that offense. If the defendant is convicted of the drug offense, the defendant's offense level would be 14. If the defendant is convicted of tax evasion, however, the offense level would be at least 17. Thus, the punishment for the tax offense is greater than the punishment for the "real" offense.

**International Terrorism
(Amendment 15)**

Amendment 15 would add a new guideline to Chapter 3, Part A, that calls for a three-level increase if the offense was a felony "that involved, or was intended to promote international terrorism." The amendment is based upon a Justice Department recommendation brought forward late in the amendment process this cycle.

We oppose the amendment because there is no evidence that § 5K2.15 fails to deal adequately with such a circumstance. If Amendment 15 is promulgated, however, then § 5K2.15 would have to be deleted because there would no longer be a statutory basis for a departure.

**Role in the Offense
(Amendments 16(B), 17, 18, and 19)**

Amendment 19 -- § 2D1.1

In our view, the guidelines result in inappropriately high offense levels for persons who are minimal or minor participants in most offenses. The large number of drug cases, however, makes the role problem most acute with respect to drug offenses. The most direct way for the Commission to address the matter is set forth in option 1, and we support that proposal.

Option 1 would amend § 2D1.1 to provide a role adjustment based upon the type of controlled substance involved. Option 2 is similar but calls for a single reduction without regard to the controlled substance involved. Option 3 would provide a role adjustment but only for minimal role, and like option 2 calls for

a single reduction without regard to the controlled substance involved.

We see no reason to treat drug offenses differently from other offenses by eliminating the minor role adjustment in drug cases. We therefore oppose option 3.

Options 1 and 2 differ only in that option 1 bases the extent of the reduction on the type of controlled substance involved in the offense. We prefer option 1, which is more consistent with the way in which the offense level is determined under § 2D1.1.

Option 1 contains alternative ceilings on the offense level when there is a mitigating role adjustment. We favor an offense level of 16 in subdivision (3)(A), 20 in subdivision (3)(B), 22 in subdivision (4)(A), and 26 in subdivision (4)(B). The higher alternatives in those subdivisions appear to be driven by concern about defendants subject to mandatory minimums. An offense level of 26 for proposed subdivision (3)(A) would insure that the bottom of the guideline range is at least 60 months for a Category I offender who is a minimal participant. The higher levels in the other subdivisions follow from the offense level in proposed subdivision (3)(A).

It is unnecessary to provide specially for a defendant subject to a mandatory minimum because, as § 5G1.2(b) recognizes, the guidelines cannot override a statutory mandate. Thus, if the applicable range for a minimal or minor participant subject to a five year mandatory minimum is less than 60 months, the guideline sentence is 60 months. The effect of making a choice based upon

concern for defendants subject to a mandatory minimum is to raise the offense level of defendants not subject to a mandatory minimum. Choosing level 16 for proposed subdivision (3)(A) enables a court to impose an appropriate sentence upon a defendant not subject to a mandatory minimum, while not preventing the court from imposing the mandatory minimum on defendants subject to the mandatory minimum.

Amendment 16(B) -- §§ 3B1.1 and 3B1.2

Amendment 16(B) would revise the commentary to §§ 3B1.1 and 3B1.2 to indicate that a defendant, who is otherwise entitled to a reduction for minor or minimal role but who supervised a limited number of participants of equal or lesser role, should not receive an aggravating role enhancement. The commentary would indicate that defendant's supervisory activity should be accounted for in determining whether the defendant should receive a reduction for minor or minimal role. We support the amendment as consistent with appropriate guideline-application principles.

Amendment 17(A) -- §§ 3B1.1 and 3B1.4

Amendment 17(A) would delete § 3B1.4 and revise § 3B1.1 and the accompanying commentary. The amendment would clarify the text of § 3B1.1 and modify the definition of "participant" in application note 1 to state that undercover law enforcement personnel can be participants. The latter change reverses case law that the Commission expressly embraced last year.⁶

⁶United States v. Carroll, 893 F.2d 1502 (6th Cir. 1990). See U.S.S.G. App. C, amend. 414. See also United States v. Bierley, 922 F.2d 1061, 1065 (3d Cir. 1990); United States v. Fells, 920

We support the clarifying changes to the text of § 3B1.1 and oppose the amendment to application note 1. Including undercover law enforcement personnel as participants is inappropriate. The threat to society from a criminal enterprise penetrated by law enforcement is significantly less than the threat from a criminal enterprise that has not been so penetrated. In the former instance, law enforcement can act at any time to thwart the criminal enterprise from reaching its objectives, while in the latter instance law enforcement is virtually powerless until after the enterprise undertakes to accomplish its objectives. Sentencing policy should reflect the lesser threat.

Including undercover law enforcement personnel as participants enables law enforcement personnel to manipulate the guidelines to drive up the offense level artificially.⁷ Guideline manipulation is a real problem, especially because federal law enforcement personnel are now being trained in guideline application and know, for example, that the quantity of drugs involved in a drug offense

F.2d 1179, 1182 (4th Cir. 1990), cert. denied, 111 S.Ct. 2831 (1991); United States v. Scott, 757 F. Supp. 972, 977-78 (E.D. Wis. 1991).

⁷Amendment 17(A) recognizes that there is a risk of manipulation by amending the commentary to § 3B1.1 to indicate that "if an undercover agent were recruited to assist in transporting marihuana and that agent recruited three other undercover agents, only the first undercover agent would be counted as a participant." It is difficult to square that statement with another statement that Amendment 17(A) would add to the commentary -- "a participant ordinarily includes any person who plays the role of a participant, even if such person is not actually criminally responsible for the offense". The "Reason for Amendment" does not set forth a reason for counting the initial undercover officer but not any other undercover officer that the first recruits into the criminal activity.

is the main determinant of the offense level. The courts are beginning to address the problem,⁸ but we believe that the Commission should not increase the opportunity for guideline manipulation.

Amendment 17(B) -- § 3B1.1

Amendment 17(B) would revise the commentary to § 3B1.1 to state expressly that the aggravating role adjustment applies only when the offense is committed by more than one participant. We support the amendment, which states what should be self-evident -- if you are going to organize, lead, manage, or supervise, there has to be someone who is organized, led, managed, or supervised.

Amendment 18(A) -- § 3B1.2

Amendment 18(A) would revise the text of and commentary to § 3B1.2. We support the amendment to the text of the guideline, which would delete an instruction to decrease the offense level by three levels "in cases falling between (a) [minimal participant] and (b) [minor participant]." Subsections (a) and (b) define contiguous sets, so there is no between into which to fall.

We support revising the commentary to § 3B1.2, although we find much of what is proposed to be unnecessary or inappropriate. We believe that the mitigating role adjustment should be based upon the defendant's conduct during the offense and any relevant conduct -- not upon how the defendant's conduct compares to the conduct of

⁸See *United States v. Lenfesty*, 923 F.2d 1293, 1300 (8th Cir. 1991); *United States v. Richardson*, 925 F.2d 112, 117-18 (5th Cir.), cert. denied, 111 S.Ct. 2868 (1991); *United States v. Salmon*, 948 F.2d 776 (D.C. Cir. 1991).

the participants in an abstract "typical" offense. As proposed application note 6 indicates, the sentencing court must be able to assess the totality of the facts and circumstances, and no single factor should be dispositive.

We support proposed application note 1, which states that the mitigating role adjustment is applicable only if there is more than one participant in the criminal activity. That proposition follows from the relative nature of the test.

We believe that proposed application note 2, which would make specified factors determinative, is inappropriate. To begin with, possession of a dangerous weapon undoubtedly will increase the defendant's offense level, so using that factor to preclude a mitigating role adjustment is akin to double counting. There is no question that possession of a weapon and the other factors set forth in proposed application note 2 are appropriate considerations, but we do not believe that those factors should be dispositive.

We believe that the first option in proposed application note 3 (defendant is "plainly among the least culpable of the participants in the criminal activity") sets forth the appropriate test to determine if the defendant is entitled to a minimal role adjustment. We recommend deletion of all other bracketed language in the first paragraph of proposed application note 3.

The second paragraph of proposed application note 3 lists factors that must be present if the defendant is to qualify for a minor role adjustment. Even if the Commission were to decide to

make certain factors dispositive, the factors enumerated in proposed application note 3 should not be in that category. The requirement that the defendant have "no proprietary interest in the criminal activity," for example, would exclude a courier whose pay is a small portion of the drugs transported. The temporal factor -- the defendant "participated in the criminal activity . . . [[for no more than a short period of time]]" -- besides being vague (how long is "a short period of time"?), could exclude a minimal or minor participant simply because the criminal activity took too long to play itself out.

We believe, as noted above, that it is inappropriate to make any factor dispositive. We therefore suggest that the third paragraph simply list some factors that the sentencing court should consider in determining whether a defendant qualifies for an adjustment under § 3B1.2. If proposed application note 3 is so modified, proposed application note 4 would also have to be modified.

We support the first option in proposed application note 5 ("significantly less culpable than a defendant who carried out the same criminal activity without assistance") as the test to determine if the defendant is entitled to a minor role adjustment. We also support proposed application note 6 but recommend deletion of the last clause of the final sentence ("and the quantity of controlled substances with which the defendant was personally involved"). The test should be what the defendant did in relation

to the other participants, so the concern should not be with quantity but with percentage of the total quantity.

Finally, we support proposed application note 7, which indicates that for a controlled substance trafficking offense, the criminal activity for purposes of determining the defendant's role is the overall drug trafficking and "not merely the transportation of the controlled substance from one place to another." This standard is consistent with the Commission's relevant conduct approach to determining the offense level and sets forth the appropriate context in which to measure the relative role of the defendant.

Amendment 18(B) -- § 3B1.2

Amendment 18(B) would add new commentary to § 3B1.2, stating that the sentencing court can depart downward on the basis that "minimal participation exists to a degree not contemplated by the guidelines." We support the amendment, which simply points out authority that the sentencing court already has.

Under 18 U.S.C. § 3553(b), a sentencing court can depart if there is a factor present in the case that is of a kind, or is present to a degree, not adequately accounted for in the guidelines. Thus, a sentencing court has authority to depart downward for a defendant who has received an adjustment for minimal participation if the court concludes that the four-level reduction

called for by the adjustment does not adequately account for the insignificant role of the defendant.⁹

**Reckless Endangerment During Flight
(Amendment 21)**

Amendment 21 but requests comment on whether the § 3C1.2 should be revised to incorporate a base offense level and enhancements "for physical injury, serious physical injury, or if death results."¹⁰ We oppose the amendment because there is no evidence of a need to amend § 3C1.2.

**Multiple Counts
(Amendment 22)**

Amendment 22 requests comment on the present structure of the multiple count rules. The amendment is based upon a Justice Department recommendation brought forward late in this cycle's amendment process.

There is no evidence that the present rules bring about inappropriate results. The examples cited by the Justice Department are not specific enough to enable meaningful evaluation, but it would appear that the applicable guideline range would, in each example, provide the sentencing court with the flexibility to account for the conduct that the Justice Department asserts is being overlooked.

⁹See United States v. Restrepo, 936 F.2d. 661, 666-68 (2d Cir. 1991).

¹⁰Presumably the terms "physical injury" and "serious physical injury" would be replaced by the defined terms "bodily injury" and "serious bodily injury." See U.S.S.G. § 1B1.1, comment. (n.1(b), (j)).

This amendment illustrates a problem with coming forward with a proposal late in the amendment cycle. The issue upon which comment is sought is unfocussed and vague. Had the matter been brought forward earlier in the process, Commission staff could have reviewed it, given it the serious study it deserves, and produced concrete proposals that we and others could respond to in a meaningful way.

We find it almost impossible to respond to the request for comment because of the breadth of the issue. If the issue is narrow, the range of possibilities would be limited, and we could focus our comments on the paramount concerns. Where the issue is broad, however, there is a multitude of possibilities, making it almost impossible for us to focus on the major concerns. We recommend that the Commission pass over this amendment and seek comments on proposed amendments or more specifically-defined issues.

Acceptance of Responsibility (Amendment 23)

Amendment 23 sets forth four options for revising the acceptance of responsibility guideline, § 3E1.1, which directs the sentencing court to reduce the defendant's offense level by two levels "if the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." Commentary indicates that the defendant must accept responsibility for "the offense and related conduct", and the guideline itself indicates that the court can apply the guideline

whether the defendant pleaded guilty or nolo contendere or was convicted on a plea of not guilty.

Option 1 would amend § 3E1.1 to provide that the defendant must accept responsibility for the offense of conviction and relevant conduct. Option 2 would amend § 3E1.1 to increase the adjustment for acceptance of responsibility to three levels where the offense level "determined above" is 30 or more. Option 3 would amend § 3E1.1 to provide a two-level reduction if the defendant pleads guilty or truthfully admits involvement in the offense of conviction before adjudication of guilty. In addition, option 3 would amend § 3E1.1 to authorize a reduction of an additional level if the defendant takes additional steps, such as voluntarily paying restitution before adjudication of guilt. Option 4 would amend § 3E1.1 to provide a three-level reduction if the defendant "clearly demonstrates a recognition and affirmative acceptance of responsibility for his offense in a timely manner;" a two-level reduction if the defendant pleads guilty before the government opens its case; and a one-level reduction if the defendant pleads guilty after the government opens its case.

We believe that the acceptance of responsibility guideline should be revised. The data presented in the report of the acceptance of responsibility working group indicates that 12% of the defendants who plead guilty fail to receive a reduction for acceptance of responsibility.¹¹ In our view, that percentage is

¹¹S. Winarsky, D. Debold, R. McNeil, Acceptance of Responsibility Working Group Report 5 (Oct. 16, 1991).

far too high. What greater acceptance of responsibility is there than voluntarily to submit oneself to punishment? Only in extremely rare instances should a defendant who pleads guilty be denied acceptance of responsibility.

The two-level adjustment currently authorized by the guideline, in our judgment, is inadequate and does not insure a real reduction in sentence (because of the overlapping ranges in offense levels). A greater adjustment for acceptance of responsibility will not only insure a certain, though small, reduction in sentence, but will also reduce pressure to reach plea agreements that hide facts or are otherwise of a kind that the Commission would like to discourage.

We oppose option 1. Commentary to the guideline presently indicates that the defendant must accept responsibility for the offense of conviction and "related conduct." If the term "related conduct" is interpreted to be merely a variant of the term "relevant conduct," option 1 would do no more than restate the present rule. If the term "related conduct" is interpreted to be broader than "relevant conduct" -- a matter that the Commission has not addressed in the commentary -- then option 1 would narrow the present rule.

We believe that the appropriate standard is offense of conviction. That is, after all, what the defendant has been convicted of and is being sentenced for. We recommend that the Commission, in whatever amendment it may promulgate, include

language indicating that the defendant must accept responsibility for the offense of conviction.

We believe that the Commission should adopt a modified version of option 2. Option 2 as proposed would amend the guideline to provide a two-tier approach -- a two-level reduction below offense level 30, and a three-level reduction above offense level 30. We agree with the two-tier approach, but believe that the second tier should begin at a lower offense level. Offense level 30, for a category I offender, authorizes a guideline sentence of at least seven years and three months. We believe that the second tier should begin when the guideline range authorizes a sentence in excess of five years.

We also support a modified version of option 3. Option 3 provides for a two-level reduction if the defendant pleads guilty or nolo contendere before the opening of the government's case at trial or truthfully admits involvement in the offense of conviction before adjudication of guilt while going to trial to preserve issues not related to factual guilt (proposed subdivision (a)); a one-level reduction for full acceptance of responsibility accompanied by timely affirmative steps (proposed subdivision (b)); and a three-level reduction for pleading or truthfully admitting accompanied by timely affirmative steps (proposed subdivision (c)).

The difficulty with proposed subdivision (c) is that for probably the great majority of defendants, pleading guilty is the only thing they can do to manifest acceptance of responsibility. Indigent defendants cannot make timely restitution, and in drug

cases, the fruits and instrumentalities of the crime generally are seized at the time of the arrest. We believe that the factors for obtaining the additional level are more appropriately considered in determining whether the defendant has accepted responsibility, the theory behind proposed subdivision (b). Thus, we would increase the reduction called for by proposed subdivisions (a) and (b).

Proposed subdivision (b) lists factors that presently are set forth in the commentary to the guideline. We see no need to move those considerations to the text of the guideline.

In sum, we suggest that § 3E1.1 be amended to read as follows:

- "(a) If the defendant --
 - (1) is convicted upon a plea of guilty or nolo contendere that is entered before the completion of the government's case-in-chief, or
 - (2) otherwise affirmatively accepts personal responsibility for the offense of conviction,
 reduce the offense level as set forth in subsection (b) of this guideline.
- "(b) The acceptance of responsibility reduction is 3 levels if the defendant's adjusted offense level is not greater than 23, and 4 levels otherwise.

Criminal History Score
(Amendments 24, 25, and 26)

The Commission has published three amendments (24, 25, and 26) to modify the guidelines pertaining to calculating the defendant's criminal history score. Any modification of these guidelines, in our judgment, should be related to what the criminal history score measures.

The criminal history score is not intended to, and does not, measure simply the extent of a defendant's criminal record.

Rather, the criminal history score is intended primarily to measure the likelihood of future criminal conduct.¹² Thus, certain prior convictions are not counted in determining the criminal history score -- stale convictions, foreign, tribal, and certain military convictions, and convictions for certain petty offenses -- and all sentences for more than 13 months receive three points, whether the conviction was for theft of a car or murder.

Similarly, criminal history points are assigned for other than prior convictions. Two points are added if the defendant committed the offense while "under any criminal justice sentence," and two points are added if the defendant committed the offense less than two years after release from imprisonment exceeding 60 days.¹³

The criminal history score is based primarily upon the United States Parole Commission's salient factor score.¹⁴ The Sentencing Commission, when it adopted the initial set of guidelines, believed that the criminal history score would be predictive of future criminal behavior,¹⁵ and Commission data indicates that the

¹²See U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 41-44 (June 18, 1987).

¹³Only one point is added for the latter factor if two points are added for the former.

¹⁴U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 43 (June 18, 1987).

¹⁵Id. ("the high correlation between the two instruments [criminal history score and the U.S. Parole Commission's salient factor score] suggests that the criminal history score will have significant predictive power").

Commission was correct in its belief.¹⁶

The rule that two points are added if the defendant committed the offense less than two years after release from imprisonment of 60 days or more is largely unrelated to the severity of the offense for which the defendant was serving the sentence. Unless the offense is minor (i.e., the defendant was sentenced to a term of less than 60 days imprisonment), two points are added whether the sentence was for tax evasion, for burglary, or for murder. This rule is based upon the premise that someone who commits an offense after recently undergoing punishment is more likely to offend again upon release.

The part of the definition of related cases that looks to whether the cases were consolidated for trial or sentencing also focusses upon the punishment experience. Cases that are consolidated will result in a single punishment. For purposes of prediction, if the previous sentence is imprisonment for 60 days or more, it does not matter whether the sentence is for one offense or three offenses consolidated for sentencing.

Amendment 24 -- § 4A1.1

Amendment 24 would revise § 4A1.1 to narrow the related case doctrine. We oppose the amendment.

Under present § 4A1.2(a)(2), the sentencing court must, for purposes of determining the defendant's criminal history score,

¹⁶See U.S. Sentencing Comm'n Staff Working Document, Recidivism of Federal Offenders: Preliminary Report 3 (Dec. 1990) ("the criminal history categories used in establishing the federal sentencing guideline ranges do, in fact, predict future criminal behavior").

treat as one sentence "prior sentences imposed in related cases." Application note 3 to § 4A1.2 indicates that "cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." There is an exception to treating related cases as one. Under § 4A1.1(f), which took effect only last November 1, the sentencing court adds one point for each prior sentence for a crime of violence that did not receive any points under § 4A1.1(a), (b), or (c) because of the related case doctrine, unless the cases were considered related because the offenses occurred on the same occasion.

Even though subdivision (f) has been in effect less than four months, the Justice Department, late in this cycle's amendment process, recommended revising that provision. Amendment 24, which is based upon the Justice Department's recommendation, would expand § 4A1.1(f) to require the court to add one point for each prior sentence, or set of consolidated sentences, counted under § 4A1.1(a) for which the defendant actually served at least five years of imprisonment before initial release.

The Justice Department has presented no data indicating that the present rule results in sentences that are inadequate, probably because subdivision (f) is so new, and no data to indicate that its recommendation will improve the predictive power of the criminal history score. Absent any showing of need for the change, we oppose the amendment.

Amendment 25(A) -- § 4A1.2

Amendment 25(A) sets forth two options for modifying subdivisions (f) and (j) of § 4A1.2, the guideline that sets forth definitions and instructions for computing criminal history scores. We support option 2.

Subdivision (f) now provides that a disposition involving diversion from the criminal justice system without a finding of guilt is not counted in determining the criminal history score, but that a diversionary disposition involving a finding of guilt is counted (unless the diversion is from juvenile court). Subdivision (j) now provides that "sentences for expunged convictions are not counted" in determining the criminal history score. Application note 10 to § 4A1.2 indicates that while expunged convictions are not counted, convictions set aside or pardoned "for reasons unrelated to innocence or errors of law" are counted.

We believe that the present guideline works unfairly. A conviction that is "expunged" for a reason unrelated to the defendant's innocence or to a legal defect in the proceedings against the defendant, is not counted under the guideline. If, for such a reason, that conviction is "set aside" instead of "expunged," the conviction would be counted. Thus, the label used by a particular jurisdiction becomes dispositive, and because there are no uniform standards or terminology, the result can be disparate treatment of similarly situated defendants.

We believe that the Commission should eliminate this unfairness. We also believe, however, that the Commission should

minimize any intrusion upon state law policies. The federal government should not renege on a state's promise to wipe a defendant's record clean. We think that such an approach is not only required by sound principles of federalism, but also is compelled by fundamental notions of fairness.

Option 1 would revise subdivision (f) by deleting the reference to juvenile court and referring instead to offenses committed before the defendant's eighteenth birthday. Option 1 would amend subdivision (j) to require the court to count a sentence that has been set aside for reasons other than legal defect or innocence, unless the sentence was a juvenile sentence.

Option 2 would revise subdivision (f) to provide that a diversionary disposition (1) is counted if the instant offense was begun before the defendant had complied with all of the conditions of the diversionary disposition, or (2), as an alternative, is not counted at all. Option 2 sets forth three alternatives for amending the guideline to deal with an adult sentence that has been set aside for reasons other than legal defect or innocence -- (1) count the sentence if it contains a term of imprisonment of 60 days or more, (2) count the sentence if it contains a term of imprisonment of more than a year and a month, and (3) count the sentence if the defendant began the instant offense before the prior sentence was set aside. For juvenile sentences, option 2 provides two alternatives -- set aside sentences are not counted, or set aside sentences are not counted unless the instant offense was begun before the prior sentence was set aside.

In our judgment, option 2 provides a bright-line rule that brings greater fairness to the guideline. To give maximum deference to state-law policies, we support the second alternative for counting sentences set aside for reason other than innocence or legal defect (count the sentence if it contains a term of imprisonment of more than a year and a day). This will enable the counting of serious offenses where the conviction has been set aside or pardoned for reasons other than innocence or legal defect.

Amendment 25(B) -- § 4A1.2

Amendment 25(B) sets forth two options for amending § 4A1.2(e), which sets forth rules for determining whether a prior conviction is stale -- i.e., falls outside the applicable time period. The applicable time periods for adult offenses currently are 15 years for sentences of 13 months or more and 10 years for other offenses. We oppose both options.

Option 1 would retain the present periods but extend them by excluding any period of time when a defendant was continuously imprisoned (with options for specifying what that period of time should be). Option 2 would call for the same extension and also revise the applicable time period to be 12 years for all adult convictions.

There is no evidence that these proposals respond to a real problem. As we indicated above, the criminal history score is not intended merely to measure the extent of a defendant's criminal record but rather primarily to measure the likelihood of future

criminal conduct.¹⁷ There is no evidence to indicate that either option will enhance the predictive power of the criminal history score. Absent any showing of need for a change, we oppose the amendment.

Amendment 26 -- § 4A1.3

Amendment 26 proposes several revisions to the policy statement on criminal history departures (§ 4A1.3). That policy statement indicates that a departure may be appropriate if the defendant's criminal history category "does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes."

Amendment 26(A)

Amendment 26(A) sets forth two options for amending § 4A1.3 to address criminal-history based departures for defendants in criminal history category VI. Option 1 amends the policy statement to recommend that the sentencing court determine the extent of a criminal history departure from Category VI by extrapolation. Option 2 amends the policy statement to recommend that the sentencing court consider the nature of the prior offenses and, if a departure is warranted, that the court move down the sentencing table one level at a time to find the appropriate sentence.

Option 1 would result in a policy statement that is both vague and confusing. The policy statement as amended by option 1 would call for extrapolation but would not explain how the court is to

¹⁷See U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 41-44 (June 18, 1987).

extrapolate. The policy statement would also direct the court, with regard to cases involving "unusually serious criminal history, or unusually high numbers of criminal history points," to extrapolate and then depart farther. Such a direction makes no sense if the extrapolation technique is the way in which to determine the appropriate extent of a departure. Option 2 is better drafted than option 1 and would provide better guidance to sentencing courts.

Given the relatively low rate of departure from Category VI -- 2.4%¹⁸ -- we question the need for a revision. If the Commission wants to go forward, however, we recommend option 2.

Amendment 26(B)

Amendment 26(B) revises § 4A1.3 concerning the likelihood that the defendant will commit further crimes. We do not believe that the policy statement needs the extensive changes that Amendment 26(B) would make, and we do not believe that those changes will improve the policy statement. For example, proposed new subdivision (b) is captioned "Type of Risk," which suggests that the considerations in that subdivision look to the future. The text of the subdivision, however, looks backward, not forward.

Amendment 26(C)

Amendment 26(C) adds language to the policy statement stating that a criminal-history departure is "not warranted" for the career offender and armed career criminal guidelines. The amendment,

¹⁸See n.31 infra.

which would overturn caselaw,¹⁹ is based upon a Justice Department recommendation brought forward late in this cycle's amendment process.

We oppose the amendment because the new language is misleading and inaccurate. The sentencing court's authority to depart is statutory. The Commission cannot, as a matter of law, preclude a departure if there is a factor in the case that the Commission did not adequately consider when formulating the guidelines. Thus, if the court is applying § 4B1.1 and determines that criminal history category VI overstates the seriousness of the defendant's criminal history, the court has the legal authority to depart.

The legislative history of the career offender guideline indicates that Congress did not want to foreclose departures. The career offender mandate to the Commission in 28 U.S.C. § 994(h) began as a mandate to the sentencing court.²⁰ A mandate to the sentencing court, at that time, would have completely precluded a departure, and today would preclude a departure unless the government moves under 18 U.S.C. § 3553(e) for a departure because the defendant has substantially assisted authorities. Congress instead specifically decided to utilize the guidelines, knowing full well that a sentencing court could depart if there was a factor in the case that the guidelines did not adequately account for.

¹⁹See *United States v. Brown*, 903 F.2d 540, 545 (8th Cir. 1990).

²⁰See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983); 128 Cong. Rec. S-12870 (daily ed. Sept. 30, 1982).

Departures from the career offender guideline are due to the breadth of that guideline. The likelihood of such departures will be reduced to the extent that the Commission acts to narrow the career offender guideline.

**Career Offenders
(Amendment 27)**

Congress in the Sentencing Reform Act of 1984 directed the Commission to insure that career offenders receive a sentence "at or near the maximum term authorized for categories of defendants."²¹ The Commission has interpreted this phrase to require the guidelines to provide a sentence at or near the statutory maximum.²²

The severe penalties called for by the career offender guideline should be reserved only for those offenders with the most serious criminal records or else unwarranted disparity is created. The present career offender guideline, unfortunately, applies to

²¹28 U.S.C. § 994(h) (enacted by Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 2021).

²²U.S.S.G. § 4B1.1, comment. (backg'd). This interpretation, however, makes the phrase "for categories of defendants" a nullity. An Eighth Circuit case, moreover, suggests that the Commission's interpretation is not correct. See United States v. R.L.C., 915, F.2d 320 (8th Cir. 1990), cert. granted, 111 S.Ct. 2850 (1991). The R.L.C. case involves an interpretation of the phrase "maximum term that would be authorized if the juvenile had been tried and convicted as an adult" in 18 U.S.C. § 5037(c)(1)(B). The Eighth Circuit rejected the government's argument that the phrase refers to the maximum prescribed by statute for the offense committed, holding instead that the phrase means the maximum term that the juvenile could have received under the guidelines had the juvenile been sentenced as an adult.

too many defendants to do an adequate job of selecting the most serious offenders for the most severe punishment.

The definition of "crime of violence" is so broad that the term includes offenses that are not serious enough to warrant application of the most severe penalties. For example, the offense of sending a threatening communication generally involves a mentally unstable defendant who poses very little risk of actual harm. That offense, however, is a "crime of violence" for purposes of the career offender guideline.²³

The Commission, in amendment 27, has published several proposals to revise the career offender guideline.

Amendment 27(A) -- § 4B1.1

Amendment 27(A) sets forth two options to amend the commentary to § 4B1.1 to clarify the meaning of the term "offense statutory maximum." We support option 1.

Option 1 would amend application note 1 to indicate that the term refers to the maximum prison term before enhancement by a sentencing enhancement statute applied because the defendant has a prior conviction. Option 2 would amend that application note to indicate that the term refers to the maximum prison term after enhancement by such a statute.

We oppose option 2 because it will drive up offense levels and produce even higher guideline ranges than at present. There is no evidence to suggest that present levels of punishment under the

²³See *United States v. Poff*, 926 F.2d 588 (7th Cir. 1991) (18 U.S.C. § 871); *United States v. Left Hand Bull*, 901 F.2d 647 (8th Cir. 1990) (18 U.S.C. § 876).

career offender guideline are inadequate. Option 2, moreover, results in a double enhancement that is neither fair nor consistent with the structure of the guidelines. To use the same prior convictions to enhance the statutory maximum and to increase substantially both the offense level and the criminal history category, is a form of double counting.

Amendment 27(B) -- § 4B1.2

Amendment 27(B) would revise the definition of the term "prior felony conviction" in application note 3 to § 4B1.2. We support the amendment.

At present, application note 3 defines that term to mean a conviction for an offense punishable by imprisonment for more than one year. Amendment 27(B) would revise that definition to require that the offense be punishable by imprisonment for more than two years. The purpose of the amendment is to prevent less serious offenses from triggering the application of the career offender guideline.

We favor this amendment because the present definition can include (depending on the jurisdiction) an assault conviction stemming from a barroom altercation -- not of the same level of seriousness as armed robbery of a convenience store, for example. We also recommend that the definition require the offense to be punishable by imprisonment for more than five years in order to ensure that only to the most serious offenses will trigger application of the career offender guideline.

Amendment 27(C) -- § 4B1.2

Amendment 27(C) would revise § 4B1.2(3), which provides that the date when the judgment of conviction is entered is the date of conviction for purposes of the career offender guideline. Amendment 27(C) would overturn the result in a Fourth Circuit case²⁴ and revise § 4B1.2(3) to provide that the date of conviction is the date when the defendant's guilt is established. We oppose the amendment, which will only increase the likelihood that more people will go to prison for longer periods of time when we already have a prison system operating at 50% over capacity.

Neither a plea of guilty or nolo contendere, nor the jury's return of a guilty verdict, establishes the defendant's guilt as a matter of law. That occurs when the trial court enters a judgment of conviction. The plea can be withdrawn, for example, or the trial court may overturn the verdict because no reasonable jury could convict on the evidence that was presented. Until the judgment of conviction is entered, the trial court cannot impose sentence. We believe that the date when the defendant's legal status changes is the appropriate date to use.

Amendment 27(D) -- § 4B1.2

Amendment 27(D) asks for comments on whether "lesser" crimes of violence should receive special treatment under the career offender guideline. As noted above, Congress did not intend that "lesser" crimes of violence should lead to application of the career offender guideline. While adoption of Amendment 27(B) with

²⁴United States v. Bassil, 932 F.2d 342 (4th Cir. 1991).

our suggested revision will, to a considerable extent, minimize the problem, there are other approaches that the Commission can take to ensure that all lesser crimes of violence are excluded. For example, the Commission could amend § 4B1.2 to require that the defendant receive a term of imprisonment of more than a year and a month for the offense to qualify as a crime of violence. We would also recommend a similar requirement in the definition of "controlled substance offense".

Amendment 27(E) -- § 4B1.1

Amendment 27(E) seeks comments on whether the career offender guideline should be revised to provide that prior offenses that could have been consolidated for trial under Rule 8 of the Federal Rules of Criminal Procedure will be treated as one conviction. Rule 8(a) of the Federal Rules of Criminal Procedure permits the joinder of offenses that "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Such a change, by recognizing that the manner in which offenses are charged and tried should not control how those charges are treated for career offender guideline purposes, would help ensure that the career offender guideline is applied only to the most serious offenders. We believe that the change can be effectuated by adding the following new subdivision to § 4B1.2:

- (4) For purposes of this guideline, treat felony convictions not separated by an intervening arrest that result in concurrent, consecutive, or overlapping sentences as one prior felony conviction.

Amendment 27(F) -- § 4B1.2

Amendment 27(F) requests comments on whether the career offender guideline should be modified to require that all convictions occur sequentially -- i.e., that conduct resulting in conviction for the second prior offense occur after the conviction for the first prior offense. Career offender enhancements are premised upon the theory that a defendant has not learned from punishment and is therefore deserving of harsher punishment if subsequently convicted of another offense. That theory applies only when the prior offenses occur sequentially -- when the defendant commits the second offense after being punished for the first offense. Sentence enhancement statutes based upon prior convictions, therefore, have traditionally required that the convictions occur sequentially. We believe that the career offender guideline also should require sequential convictions.

**Alternatives
(Amendments 28(A) and 29)**

A major problem with the guidelines is that they produce overly-harsh punishment for offenders in Criminal History Category I. The Commission, perhaps in recognition of this, has published several amendments specifically intended to ameliorate the treatment of such defendants.

There is, we believe, an urgent and compelling need for action. The federal prison system is seriously overcrowded. Federal prisons are presently at 150% of capacity.²⁵ The costs of the over-incarceration of Category I defendants -- both in human and financial terms -- greatly exceed any benefits to the public. We hope that the Commission will act to help ameliorate the overcrowding of federal prisons.

We recognize that sentencing courts presently have alternatives to imprisonment, and like others we are disturbed that those alternatives are not being utilized more frequently.²⁶ We do not think, however, that this justifies inaction. We believe that the use of alternatives will increase with training and education programs for judges, probation officers, and defense attorneys.

Amendment 29 -- Chapter 5, Parts A, B, and C

Amendment 29 sets forth six options for ameliorating the treatment of offenders in Category I and with low offense levels. We support options 1, 2, and 5, and we support option 3 with modifications.

²⁵U.S. Dep't of Justice, Fed. Prison System, Monday Morning Highlights (Feb. 17, 1992).

²⁶The problem appears to be most acute in Zone B of the Sentencing Table, where some 53% of the defendants receive a sentence of imprisonment. P. Martin et al., Preliminary Report to the Commission: Staff Working Group on Alternatives App. A at Table 4 (Oct. 23, 1991). This is more than twice the percentage of defendants in Zone A who are sentenced to imprisonment (22.8%), see id. at Table 2. The percentage of defendants in Zone C who are sentenced to imprisonment is 75.4%, see id. at Table 6.

We believe that the Commission should act to increase the number of defendants in Zones A, B, and C of the Sentencing Table. The best way to accomplish that -- the way most compatible with the structure and format of the guidelines -- is by revising the ranges in the Sentencing Table.

Options 3 and 4 would expand Zone A by adding additional offense levels to Zone A. Option 3 expands Zone A to offense levels 7 and 8, Category I, and option 4 expands Zone A to offense level 7, Category I, offense level 6, Category II, and offense level 5, Category III. We believe that option 3 is preferable because it focusses on persons with the least serious criminal history scores, but we suggest that option 3 be modified to expand Zone A to offense level 9, Category I.

The expansion of Zone A should have an impact upon an appreciable number of persons. Commission data indicates that option 3 would have added an additional 1,075 cases to Zone A in fiscal year 1990 and that option 3 modified as we suggest would have added another 387 cases.²⁷ Commission data also indicates that none of the cases added by option 3 modified as we suggest would have been homicide, kidnapping, drug, robbery, sex offense, or firearms cases.²⁸

We believe that option 3 should be further modified to reduce the guideline ranges for Category I offenders at additional offense

²⁷P. Martin et al., Preliminary Report to the Commission: Staff Working Group on Alternatives App. A at Table 10.

²⁸Id. at Table 11.

levels and to address a disproportional increase ("cliff") problem. Under option 3, offense level 8, Category I, has a range of 0-6, and offense level 9, Category I, has a range of 4-10. The present Sentencing Table does not jump from range 0-6 to range 4-10. Under Categories I, II, and III, for example, the transition is range 0-6, range 1-7, range 2-8, range 4-10. We recommend modification of other offense levels to avoid the cliff problem. The following is our recommendation:

Offense Level	Present Range	Recommended Range
7	1-7	0-6
8	2-8	0-6
9	4-10	0-6
10	6-12	2-8
11	8-14	4-10
12	10-16	6-12
13	12-18	9-15
14	15-21	10-16
15	18-24	14-20
16	21-27	18-24
17	24-30	22-28
18	27-33	26-32

Options 2 and 5 would expand Zones B and C respectively. We support both proposals. Option 2 would expand Zone B by amending § 5B1.1 to authorize probation with a confinement condition if the bottom of the guideline range is 10 months or less. This would expand Zone B by two offense levels under Categories I through IV and one offense level under Categories V and VI. We support this change, which is technical in nature, because there is little practical difference between a sentence of probation with a confinement condition and a split sentence. Defendants who option 2 makes eligible for probation with a confinement condition are presently eligible for a split sentence.

Option 5, however, would make a substantive change by authorizing a split sentence if the bottom of the guideline range is 12 months or less. This change would expand Zone C by one offense level at each Criminal History Category. Under option 5, Zone C would end at offense level 13, Category I. If the Commission adopts option 3 as we recommend, Zone C would end at offense level 14, Category I. Commission data indicates that had option 5 been in effect in fiscal year 1990, an additional 248 cases would have been in Zone C under Category I.²⁹ Expanding Zone C will not pick up large numbers of cases where the Commission is likely to think that a split sentence is inappropriate.³⁰

Options 1 and 2 revise the prison component of the split sentence and probation with a condition of confinement, respectively. The options would reduce the prison component to one month. We support these changes.

Amendment 28(A) -- New Criminal History Category 0

Amendment 28(A) asks for comments on establishing a new Criminal History Category 0, and suggests that the category would cover defendants with no criminal record (as opposed to defendants

²⁹P. Martin et al., Preliminary Report to the Commission: Staff Working Group on Alternatives App. A at Table 10. Had both option 5 and our recommended version of option 3 been in place, another 493 cases would have been in Zone C. Id.

³⁰In fiscal year 1990, there were no homicide, kidnapping, or robbery cases in offense levels 8 through 14, under all criminal history categories. Id. at Table 11. There were 94 drug cases, 21 sex offense cases, and 98 firearms cases in those offense levels, under all criminal history categories, in fiscal year 1990. Id. There were 20, 171 cases sentenced in fiscal year 1990. Id. at Table 10.

with no criminal history points). Amendment 28(A) also seeks comments about how to provide reduced sentences for Category 0 defendants.

We do not see any value in trying to distinguish between defendants with no criminal record and those in Category I. Defendants in Category I have a minor record -- i.e., any conviction is either stale or for an offense that is not serious. The present criminal history categories, moreover, are principally based on empirical studies on the likelihood of recidivism, and there is no empirical evidence that the recidivism rate of defendants in Category I would be different from the recidivism rate of defendants with no criminal record.

**New Criminal History Category VII
(Amendment 28(B))**

Amendment 28(B) requests comments on whether a new Criminal History Category VII should be established and, if so, what range of criminal history points the category should encompass. We oppose a new Category VII.

We believe that there is no need to add a new criminal history category, and the Commission's data does not indicate any need. When sentencing defendants in criminal history category VI, courts currently depart upward under § 4A1.3 very infrequently. Although the most recent criminal history working group report does not indicate the departure rate from Category VI for criminal history reasons, a previous report of the working group indicates that the

rate is 2.4%.³¹ Adequacy of the criminal history category, moreover, seems to be only one of the reasons prompting the departure.³² The data, therefore, does not support a conclusion that there is a need for a new criminal history category.

Finally, adding a new Criminal History Category VII will not enhance the predictive power of the criminal history score. The criminal history categories are based primarily upon predicting the likelihood of future criminal conduct,³³ and a Commission staff report concludes that "the criminal history categories used in establishing the federal sentencing guideline ranges do, in fact,

³¹J. Meyer, Report on Criminal History Categories "0" and "VII", at 3 (Nov. 20, 1990). The report indicated that out of some 35,000 cases sentenced between January 19, 1989 and June 30, 1990, 2,141 fell within criminal history category VI. *Id.* The report also indicated that there were 13 departures in a representative sample of one-fourth of the 35,000 cases. *Id.* The report does not indicate the reasons for the departures, but assuming that all of them were for criminal history reason, extrapolation yields 52 as the total number of departures for the entire 35,000; 52 is 2.4% of 2,141.

The earlier report speculated that "it seems plausible to infer that some courts might have refrained from departing beyond category VI in the past because of the uncertainty of structuring a departure beyond the sentencing table". *Id.* at 8. No evidence (letters or calls from judges or probation officers, for example) was presented to support such speculation. It is more plausible to conclude from the data that courts are departing whenever they believe departure appropriate. There should be little uncertainty about structuring a departure from category VI; the only constraint upon a court's ability to depart from category VI is that the departure be reasonable.

³²*See* J. Meyer, Report on Criminal History Categories "0" and "VII", at 4 (Nov. 20, 1990) ("in most cases, inadequacy of Category VI penalties was cited as only one rationale for the departure") (discussing reported cases).

³³*See* U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 42 (June 18, 1987).

predict future criminal behavior."³⁴ There is no evidence that a new Category VII will enhance the predictive power of the criminal history score.

**Substantial Assistance to Authorities
(Amendment 34)**

Amendment 34 would revise § 5K1.1 to remove the requirement of a government motion and to add that the sentencing court should give "substantial weight" to the government's "evaluation of the extent and value of the defendant's assistance." In addition, amendment 34 adds commentary to § 5K1.1 stating that "it is expected that the consideration of a downward departure will generally be based upon the motion of the government." We support the amendment.

The sentencing court must, to comply with 18 U.S.C. § 3553(a), consider the defendant's "history and characteristics" when imposing sentence. Section 5K1.1, however, purports to limit the sentencing court's consideration of one aspect of the defendant's history and characteristics -- whether the defendant has assisted law enforcement authorities -- by requiring a government motion before the court can depart. While 18 U.S.C. § 3553(e) requires a government motion before the court can impose a sentence below a minimum term required by statute, 28 U.S.C. § 994(n) does not mandate such a requirement when the departure is below the guideline range but not below a statutory minimum. Indeed, as

³⁴Recidivism of Federal Offenders: Preliminary Report 3 (Dec. 1990).

Judge Clark as has pointed out

there appears to be no logical reason why the prerequisite nature of a government motion under § 3553(e) should be mechanically transposed onto departures from the guidelines authorized pursuant to 28 U.S.C.A. § 994(n). It is far more logical to interpret § 3553(e) as an exception to the general rule set out in § 994(n).³⁵

The government motion requirement risks unfairness. If there is a dispute between the government and the defendant as to the nature and extent of the defendant's cooperation, the government can foreclose the resolution of that dispute by a neutral third party -- the court -- by failing to make the necessary motion.

The available data suggests that the problem of fairness is more than theoretical. The § 5K1.1 departure rate nationwide is 7.5%,³⁶ but there is a great disparity among the circuits and among the districts. Thus, the § 5K1.1 departure rate is 2.4%, one-third the national average, in the District of Columbia Circuit.³⁷ The departure rate in the Third Circuit is 14.5%, six times the rate in the District of Columbia Circuit.³⁸ In a sample of ten districts selected by the Commission, the § 5K1.1 departure rate ranged from a low of 2.3% in the Western District of Texas to a high of 14.5% in the Eastern District of New York.

The Commission's study of mandatory minimum sentencing provisions, moreover, raises the possibility of racial

³⁵United States v. Chotas, 913 F.2d 897, 903 (11th Cir. 1990) (Clark, J. specially concurring in part and dissenting in part).

³⁶U.S. Sentencing Comm'n, Annual Report 1990, at 80 (Table U).

³⁷Id.

³⁸Id.

discrimination in applications for § 5K1.1 departures. The Commission's data suggests that racial discrimination infects prosecutorial decision-making with regard to mandatory minimums and substantial assistance departures.³⁹ If racial discrimination is manifested in decisions about mandatory minimums, racial discrimination is likely to be manifested in decisions about § 5K1.1 departures.

Section 5K1.1 is a policy statement and therefore not binding upon the sentencing court, but for the most part courts have chosen to follow the Commission's recommendation. They have attempted to ameliorate the chance of unfairness by indicating that a government motion may not be necessary if the prosecutor acts in bad faith.⁴⁰

A more direct way to deal with the concern for fairness is simply to recommend a departure if the defendant has substantially assisted authorities. Amendment 34 revises § 5K1.1 to state that the sentencing court should give substantial weight to the government's opinion about the extent and value of the defendant's assistance, something we would expect courts to do even in the

³⁹The substantial assistance departure rate for whites, where there was a five year mandatory minimum, was 19.9%. The rates for blacks and hispanics was 13.8% and 6.8%, respectively. Where the mandatory minimum was ten years, the substantial assistance departure rates were: whites, 25%; blacks, 18.3%; and hispanics, 11.8%. U.S. Sentencing Com'n, Mandatory Minimum Penalties in the Federal Criminal Justice System 81 (Tables 23A-23E, 24A-24E) (Aug. 1991).

⁴⁰ See *United States v. LaGuardia*, 902 F.2d 1010, 1017 (1st Cir. 1990); *United States v. Justice*, 877 F.2d 664, 668-69 (8th Cir.), cert. denied, 109 S.Ct. 3172 (1989); *United States v. White*, 869 F.2d 822, 828-29 (5th Cir.), cert. denied, 110 S.Ct. 374 (1989).

absence of that language. Section 5K1.1 as revised by amendment 34 will avoid needless litigation about whether the government is acting in bad faith and will focus the attention of the parties and the court upon the true issue -- did the defendant substantially assist law enforcement authorities.

**Miscellaneous
(Amendment 36)**

Amendment 36 would revise several guidelines and policy statements and accompanying commentary. We support the changes.

**Interpretation of References to Other Offense Guidelines
(Amendment 37)**

Amendment 37 asks for comments on whether § 1B1.5 or the commentary to that provision "should be amended to further clarify how the guidelines are to be applied when a Chapter Two offense guideline references another guideline." We find it difficult to respond in the absence of any concrete proposal or any indication of the nature of the clarification.

**Concurrent and Consecutive Sentences
(Amendment 38)**

Amendment 38 would amend § 5G1.3(b), which provides a rule for determining sentence when the rule of subdivision (a) of § 5G1.3 is inapplicable. The Federal Register indicates, in the "Reason for Amendment" section, that "the Commission has found a number of problems in implementation of the second prong of subsection

(f)."⁴¹ Neither the nature nor the extent of the problems is set forth.

The Commission extensively revised § 5G1.3 effective November 1 of last year. We are unaware of the problems referred to in the Federal Register and suggest that further study of the matter would be desirable.

⁴¹The reference to "subsection (f)" undoubtedly is a typographical error and should be to "subsection (b)."