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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
PROBATION OFFICE

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Memorandum to: United States Sentencing Commission
1331 Pennsylvania Avenue N.W., Suite 1400
Washington, D.C. 20005

Subject: 1992 Proposed Amendments

The following pages are comments regarding the 1992 proposed amendments. The clarifying amendments are helpful, when they satisfy their own definition; however, the number of amendments alone can result in overload to those who must apply the guidelines. The last set of guidelines are not yet thoroughly absorbed by staff, and it is abundantly clear that criminal history score calculations are not being uniformly applied from district to district. Working toward a better product is understandable, but there must be an effort to minimize these amendments. The ex post facto problems are becoming a "nightmare" in some situations, and varying approaches of dealing with the issue do not aid the reduction of disparity in sentencing.

Nancy Reims

Nancy Reims, Deputy Chief
United States Probation Officer

Expanded Availability of Non-Prison Sentencing Options
Amendment 29

Options 1, 2, 3, and 5 are recommended. Options 4 and 6 are not recommended in order to avoid the expansion of straight probation for those with both higher offense levels and criminal history categories.

These increased options do not compromise the structure of the guidelines as originally drafted. They merely provide for more sentencing options within a given range, recognizing that particularly in the lower ranges there are many differences between offenders, in the context of the crime committed, which can best be addressed by separate options rather than more or less time in custody.

The offense-by offense approach risks too many sentencing distinctions that are essentially based upon offender characteristics (e.g., white collar offenders).

Alternatives to traditional incarceration should involve some restriction of liberty (e.g., home detention). To equate imprisonment with community service or even intensive supervision is a purely theoretical comparison; for an alternative to serve the purposes of sentencing as delineated at 18 USC 3553, it needs to be perceived by the offender as reasonably comparable to imprisonment.

Departures Based On Offender Characteristics

Part(B) - Age combined with other factors can be a very mitigating factor that is recognized by all parties in the sentencing process, particularly a young age combined with an extreme lack of sophistication. In many cases where these offender characteristics are combined the overall behavior is more similar to the acts of a juvenile delinquent.

Part(C) - Allowing for departures on the basis of factors such as "lack of youthful guidance" or "history of family violence", opens a pandora's box for the vast majority of offenders with significant criminal records. Poor parenting as well as emotional and physical abuse are common experiences among those who engage in ongoing criminal conduct. Cases with this kind of history are the "heartland" of bank robbers and violent offenders not the exception; should they benefit from a downward departure when the first time offender with a reasonably normal upbringing does not?

Part(D) - If advanced age in conjunction with the listed criteria was a basis for departure, in effect, the older white collar offender would be the beneficiary, and their sentences are not that high as it is. Advanced age alone should not be a basis for

departure.

Departures Based on Inadequacy of the Criminal History Score
Amendment 26

Option 2 is more practical and avoids the necessity of explaining the structure of the sentencing table to arrive at a Category VII.

Part(B) - Judicial Conference recommendation 6 would be a helpful clarification.

Part(C) - There are some cases that technically and linguistically satisfy the definition of career offender, but truly differ dramatically from the heartland of career offenders. To preclude any means of legitimately departing would only lead to manipulation of the guidelines.

Acceptance of Responsibility

Option 3 would serve to reward guilty pleas and make a distinction between those who admit to the bare bones of a crime and those who completely acknowledge and demonstrate full responsibility for all of their criminal conduct.

Relevant Conduct

All of the proposed amendments to clarify this guideline would be helpful.

Role in the Offense

Amendment 16, Parts (A) and (B) - Clarification helpful.

Amendment 17, Part (A) - Changes regarding number of participants for higher aggravating role and including undercover officer as a participant are not recommended. There are too many substantive amendments as it is; it is time to limit them, including only those that are most crucial.

Amendment 17, Part (B) - Clarification helpful.

Amendment 18, Part (A) - Keep the interpolation to allow room for resolution.

The concern as to whether the adjustments for mitigating role are sufficient, primarily, and almost exclusively, occurs in drug cases. Some functions in drug activity are more minimal than others (e.g., lookout, driver, tag-along), but it is too nebulous and subjective to determine the adjustment on the basis of comparing a defendant to others who typically participate in similar criminal conduct. The criteria given in the commentary relating to minimal

role is good, but could be expanded with more examples. The adjustment should apply when the criteria (defining function) is satisfied, but only when the defendant has been held responsible for the appropriate amount of drugs (reasonably foreseeable, etc.). If an adjustment is given only because the individual was held responsible for more drugs than he actually trafficked, without regard to function, then the source of drugs who may well be removed from the majority of overt acts of dealing could conceivably get a reduction for role.

The caps proposed in option 1 seem the most comprehensive, and it is reasonable to gear them according to type of substance because this is a factor for which even a minimal participant should be held accountable.

Redefinition of Career Offender 4B1.1
Amendment 27

Part (A) - The guideline ranges for career offender are sufficiently punitive even without using the enhanced statutory maximum.

Part (B) - This amendment seems fair and reasonable.

Part (C) - Makes sense.

Part (D) - Such identification would be helpful and reduce disparity; the definition of crime of violence leaves much room for dispute, especially when the determination has to be made as to what constitutes "...otherwise involves conduct that presents a serious potential risk of physical injury to another" - what about Grand Theft Person or Possession of Unregistered Firearm (26 USC 5861)?

Part (E) - The entire criminal history calculation is becoming far too complicated - to the extent that uniformity of application is highly jeopardized. The process might be simplified if consolidation for trial or sentencing did not translate into "related case", only "same occasion" and "common scheme or plan". Counts within the same indictment could be treated separately if there was an intervening arrest between counts. Separate indictments would be treated as separate convictions unless there was no intervening arrest and they were a string of the same type of criminal conduct, hence joinable under Rule 8(a).

Part (F) - If guidelines require sentencing on the predicate priors for career offender classification, there could be three separate criminal acts with convictions, but one prior sentencing might purposely be delayed to avoid career offender status. In the example given of rape and robbery in the same criminal activity, wouldn't they be treated as only one prior conviction anyway if they occurred on the same occasion?

Plea Bargaining Policies; Use of Acquittals

Part (B) - This amendment is necessary to resolve the inter-circuit conflict.

Part (C) - The conflict needs to be resolved. Regardless of the difference in standards of proof, there would be a stronger sense of fairness if the acquitted conduct was not considered, thereby increasing compliance.

Amendment 36, Part (W) - More specific and thus clearer.

Amendment 36, Part (X) - Essential amendment - otherwise there will be virtually no uniformity in guideline application between circuits when there are decisions such as U.S. v Fine in the Ninth Circuit.

Amendment 20 - Option 2 seems the better course. It would conform with the changes in 2D1.6, and allow for the consideration of the truly peripheral participant who is subject to the guideline.

Amendments 4, Part (A), 9, 36, Part (G), and Part (P) - Recommended.