

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
Probation Office**

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

RE: Proposed Amendments to the Sentencing Guidelines

Dear Judge Wilkins:

Thank you for the opportunity to comment on the proposed amendments to the Sentencing Guidelines.

We recognize that the guidelines represent an evolutionary process and as such, change is inevitable. Since their inception, however, we have been presented with ever more complex versions of the guidelines with each new amendment cycle. The November 1, 1991 edition, for example, contained several amendments that have proven, in practice, to be very difficult to implement. Examples include 2J1.7 (Commission of an Offense While on Release); 2P1.2(a)(3) [Possession of Contraband]; 2L1.2 Application Note #7 (Illegal Re-Entry); 2K2.1 (Unlawful Possession, Transportation of Firearms); 5G1.3 (Imposition of Sentence on a Defendant Subject to an Undischarged Term) and 4A1.1(f) [gives additional points for certain crimes not counted due to the "related cases" rule].

In Chapter I the Commission has articulated the problems attendant with an overly complex set of guidelines and wisely chose to carve out a "heartland" of guidelines intended to address typical cases. Nonetheless, the guidelines do take into account a wide range of human behavior and they are complicated. The question to be asked is this: "Are the guidelines becoming 'overly' complex?" We believe that many of the proposed amendments would, in fact, result in complex combinations that are increasingly impracticable. Indeed, the sheer number of substantive amendments forthcoming each year makes for an unworkable situation.

As we approach the fifth anniversary of the guidelines, the manual is now published in two volumes. The second volume, Appendix C, represents some 250 pages of text dealing only with amendments made to the guidelines over the past few years. Perhaps it is time to take a closer look at the amendment process and the impact this volume of amendments inevitably has on the trial court.

There should be at least an informal presumption on the part of the Commission that any amendment will now unduly complicate sentencing for the trial court. Then, perhaps, a "reasonable doubt" standard can be employed by the Commission to determine whether a proposed amendment should nonetheless be adopted: i.e. the Commission should "prove" that the necessity for the proposed amendment does, beyond a reasonable doubt, outweigh its complication to the sentencing process. I say this with tongue in cheek, but the point is, change should now be the exception and not the rule.

While some clarification of terms and intent may be warranted, a common sense interpretation of the guidelines should not be foreclosed by endless redefinition of words and phrases through amendments. Instead of a heartland, the Commission finds itself delineating each peak and valley, thereby introducing the very uncertainty and disparity the guidelines are intended to cure. In the comments below I have attempted to identify proposed amendments that appear to be unnecessarily complex and, in some cases, suggestions are made for alternative means for the Commission to achieve the desired result.

I. NON-PRISON SENTENCING OPTIONS

We support Option 6, which appropriately enlarges the sentencing alternatives available for the less serious offenders without significantly compromising the original structure of the guidelines. The existing "split sentence" option represents only 2 rows of cells (out of a possible 43) on the Sentencing Table. Option 6 offers some additional flexibility and is a proposal that would simplify a determination of the appropriate sentence in these cases.

We do, however, urge the Commission to reject complex formulas for equating "alternative" options with jail, as was proposed in a recent working group report. Such formulas do not appear to be necessary to fulfill the purposes of sentencing. Nor does it seem necessary for the Commission to specifically exclude certain offenses from consideration for alternative sentencing. Application Notes and Background Commentary provide the Commission with the opportunity to express their views on the appropriate use of alternative sanctions without unduly complicating the sentencing process. A good example of this is found in the current Application Notes to 5F1.1, 5F1.2 and 5F1.3.

II. DEPARTURES BASED ON INADEQUACY OF THE CRIMINAL HISTORY SCORE

Guidance in the form of Commentary may be welcome to assist the Court in arriving at appropriate incremental punishment when an upward departure for Criminal History Category VI offenders is deemed necessary. We support the approach suggested in Option 2. However, we recommend against implementation of Part C to Option 2 which would prohibit downward departures for Career Offenders. In the District of Oregon we have seen what we perceive to be an application of the Career Offender guideline for minor offenders that was never intended by the Commission. I have attached a presentence report which is an example of this.

III. ACCEPTANCE OF RESPONSIBILITY

We agree that some clarification is necessary and would support an amendment that makes it clear the defendant must only accept responsibility for the "offense of conviction". Reasonable people can disagree about what constitutes relevant conduct and a defendant should not have to wonder to what extent he/she must make admissions of guilt in order to be eligible for this adjustment.

We also agree that some additional adjustments for acceptance of responsibility at the higher offense levels are warranted but we caution against arbitrary and complicated exercises such as suggested in Options 2, 3 and 4. Commentary suggesting modest departures for higher offense levels is sufficient.

IV. RELEVANT CONDUCT

Clarification proposed in Amendment 1, Parts A and B appears necessary. As you note, this is a very difficult guideline and it is the crux of correct application of the Chapter Two and Three adjustments. The Commission must be confident that the proposed amendments will be sufficient. The repeated re-writing and redefining of this guideline only results in confusion. The Commission would be better advised to do nothing than to implement amendments that will again be "clarified" next year.

V. ROLE IN THE OFFENSE

We recommend that the Commission leave 3B1.1 and 3B1.2 and the Commentary as general as possible to allow the Court the flexibility necessary to construct an appropriate sentence for each individual defendant. Specifically, proposed Amendment 16, Part B appears to be unnecessary. Amendment 17 is appropriate for clarification. Amendment 18, Part A is a good example of a proposed change that reduces complexity and Part B is a good example of a way in which the Commission can provide guided departure language in the Commentary without unduly complicating sentencing.

The Commission asked for comment on five issues under consideration for role adjustments. We urge the Commission to reject each one. All of these proposals would greatly increase the complexity of any such adjustments for role and, in our view, each one is unnecessary to achieve the purposes of sentencing. In particular, Amendment 19 and each of the options therein may invite varied manipulations in the plea bargaining process. The real problem appears to be the inequity we all perceive when minor participants in a crime are subject to very lengthy prison sentences. Perhaps one option the Commission may consider to assist the Court in mitigating such sentences would be general guided departure language in the Commentary to 3B1.2.

VI. CAREER OFFENDER, 4B1.1

Regarding Amendment 27, Part A, we do not agree that clarification of "Offense Statutory Maximum" is needed. I confess, though, that you stumped me with Option 1. Perhaps I do not appreciate the problem posed by enhancements under 18:USC 924(e) [Armed Career Criminal]. Since the Commission made it clear that Ex-felon in Possession of a Firearm does not constitute a crime

of violence (Commentary to 4B1.2) these offenders are not subject to application of 4B1.1. And in our District we see few bank robbers or drug traffickers charged with an enhancement under 924(e). Regarding Parts B, C, D, E and F to this amendment, we urge the Commission to reject each one. Particularly with the amendments effective November 1, 1991 calculation of the defendant's criminal history has become even more complex and time consuming. Accurate calculation requires the probation officer to obtain the following documents: sentencing order, charging instrument (indictment or information), documentation of attorney representation, date of release from confinement and investigative report. It can often be very challenging just to document the elements of the offense of conviction (e.g. Was the offense of conviction burglary of a dwelling or the lesser offense burglary of a building?) and whether the offense of conviction was finally a felony (i.e. Was the felony conviction later reduced to a misdemeanor?). Finally, it is necessary for the officer to determine whether otherwise related offenses may have been separated by arrest. Many prior felony convictions are for offenses that occurred well over a decade ago and records sufficiently complete to make all required calculations are not always available.

Part B to Amendment 27 would additionally require the officer to determine the statutory maximum penalty for the prior felony conviction, even tho the conviction may have taken place many years ago in another state. Parts B and D would both add two more special classes of prior offenses, all with presumably different definitions. (See e.g. 2L1.2 Application Note #7 and 4B1.2.) For career offenders the difference between the bottom and the top of the imprisonment range is wide, usually exceeding 24 months. The Court can easily take into account such things as "lesser crimes of violence" by imposition of a sentence at or near the bottom of the range.

Part C would require the officer to obtain documentation showing date of conviction, yet another court document separate from the judgment/sentencing order. Why interject one more piece of data necessary to make a correct application? The date of sentence is used in 4A1.2(e) to establish the applicable time period for counting prior convictions. This is likewise sufficient for application of the Career Offender guideline.

Part E is unworkable in any context--it is simply too subjective.

VII. CHAPTER FOUR GUIDELINES AND COMMENTARY

We recommend **against** Amendments 24, 25 and 28. These are the type of situations that can be appropriately **sanctioned** by a particular point within the already established guideline range. These proposed amendments would unnecessarily complicate sentencing. Our thoughts concerning the complexity of the existing Chapter Four guidelines are set forth in more detail above. Correct application of Chapter Four guidelines requires a high degree of competency with the guidelines and experienced investigative skills. This chapter has been significantly amended several times and it would be my earnest suggestion that the Commission resist any temptation to tinker with it again this year.

VIII. CHAPTER FIVE GUIDELINES AND COMMENTARY

We recommend the Commission reject all four of these proposed amendments. Amendments 30, 31 and 32 appear unnecessary. Amendment 34, I believe, would put the Court in the difficult position of attempting to evaluate a defendant's substantial assistance to the government when the government does not agree that the information was so valuable as to warrant departure. Great weight is already given to the government's position on all aspects of the guideline applications. This particular guideline appears uniquely within the government's purview to evaluate.

Respectfully yours,

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Deputy Chief Probation Officer

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