

THE FEDERAL JUDICIAL CENTER

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#25

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March 2, 1992

Mr. Michael Courlander  
Public Information Specialist  
United States Sentencing Commission  
1331 Pennsylvania Avenue, N.W.  
Suite 1400  
Washington, D.C. 20004

Dear Mr. Courlander:

Enclosed please find comments on the proposed sentencing guideline amendments sent to Judge Vincent Broderick, care of the Research Division of the Federal Judicial Center.

Sincerely,

A handwritten signature in cursive script that reads "Pamela B. Lawrence". The signature is fluid and elegant, with the first letters of each word being capitalized and prominent.

Pamela Lawrence

Attachment

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February 27, 1992

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

RE: 1992 GUIDELINE AMENDMENTS:  
COMMENTS ON A.O. MEMO  
DATED 1/29/92

To Whom It May Concern:

These comments are being offered for consideration in regards to the 1992 proposed guideline amendments.

1) AMENDMENTS RESPONSIVE TO JUDICIAL CONFERENCE RECOMMENDATIONS

Expanded Availability of Nonprison Sentencing Options:

It is my opinion the options proposed regarding expanding the availability of nonprison sentencing options does not compromise the guidelines as originally drafted. Instead, it appears to be a consideration or concession to those individuals who feel the guidelines are too punitive and restrictive, and do not provide for sufficient discretion.

If the commission does decide to adopt these expanded alternatives, they certainly should adopt an "offense by offense" approach and remove from consideration people such as white collar offenders.

In my opinion, there is no need to include additional alternative programs at the low end of the guideline.

#### Departures Based on Offender Characteristics

The Commission should be cautious in wording departures that may be appropriate when offender characteristics are present to an unusual degree, either alone or in combination. The use of discretion and judgement lead to disparity among offenders in opposition to the purpose of guidelines. Offender characteristics are currently considered under terminology stating that they are "not ordinarily relevant," and there is no reason why one cannot argue in a specific instance why a departure may be relevant to the sentencing process.

One should be careful in considering age; particularly as it relates to young offenders, because they are the most criminally active group in society.

Status of being elderly should not receive leniency simply because it is fair to attribute to these individuals sufficient decision making skills to hold them accountable for their errors in judgement, or their free choices.

An infirm defendant should not be able to use that to obtain leniency.

A defendant's lack of youthful guidance, history of family violence, or similar factors as grounds for departure would place the offender's parents, sociocultural and socioeconomic background on trial in the sentencing process as opposed to the offender.

Downward departure for advanced age should not be considered because those individuals should possess considerable background and experience that would lead them to make good judgements.

#### Departures Based on Inadequacy of Criminal History Score

Option #1 is preferable to Option #2, as it seems to provide a more structured process. Part B does not appear to be necessary. In Part C, there should be a prohibition against the use of adequacy of criminal history as sufficient reason to depart below the career offender and the armed criminal provisions.

#### Acceptance of Responsibility

As to Option #1, I have no difficulty with limiting the scope of what is required to receive acceptance of responsibility,

as long as this does not impact the use of relevant conduct in calculating the offense level. This is a practical approach. An individual could be expected to object to his offense level being raised by the use of relevant conduct. However, I have no problem with one acknowledging his responsibility for the offense of conviction, and receiving a downward adjustment while objecting to the relevant conduct which might raise his offense level. This option is expedient and should receive consideration.

Option #2 should not receive consideration. There is an old saying, "If you're going to make a mistake, make it a good one," or "If you're going to make a mistake, make it a big one." Why should one receive more leniency just because he participates in a more serious offense. The guidelines should treat serious offenses seriously.

Option #3 does not appear to be one which would produce sufficient incentive for the defendant to plead guilty. In addition to this, there is no clear indication as to whether one would be entitled to a one level reduction for acceptance of responsibility if there were no relevant conduct issues involved.

Option #4 appears to be better than Option #3 because there is some continued emphasis on offenders not receiving a reduction when they put the government to its proof at trial. In my opinion, this increases pleas of guilty when they are appropriate. One should not receive a one level reduction after the trial has begun. Additionally, this option does not address the issue of whether one would receive a reduction if there were no contested issues regarding relevant conduct.

**NOTE:** I would also like to suggest to the commission that they consider a revision of USSG 3E1.1, comment (n.4), which indicates "that conduct resulting in enhancement under USSG 3C1.1, Obstructing or Impeding the Administration of Justice, ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. However, there may be extraordinary cases in which adjustments under both USSG 3C1.1 and USSG 3E1.1 may apply." I do not feel acceptance of responsibility should be tied so closely to obstruction of justice. Obstruction of justice may occur early on in the proceedings, and the defendant may later make an adequate demonstration of acceptance of responsibility. The terminology in the application note which bothers me in the interpretation process is the use of the word "extraordinary." There are not many extraordinary cases. I feel this application note is being ignored. Consistency of application would be increased if this application note were revised.

### RELEVANT CONDUCT

All of the information presented in this section is essentially positive except the 120-day time frame relating to the same course of conduct, and being significantly connected. I believe 120 days is too short and restrictive.

NOTE: It would be helpful in applying this guideline if there was some emphasis placed on what a defendant must do to withdraw from a conspiracy or concerted activity, and to be no longer accountable. In the commentary, and in the new proposals, there is considerable emphasis on definitions that lead to assessments in other areas. However, one can enter a conspiracy and later withdraw from the conspiracy, or argue that they have done so. I think it should be made clear as to whether this withdrawal is passive or active, and these terms should be defined.

## 2) ADDITIONAL AMENDMENTS OF SPECIAL INTEREST

### ROLE IN THE OFFENSE, ESPECIALLY OFFENSES INVOLVING DRUGS

Amendment 16, Part A, is a good thought. Part B still appears to be vague, and probably should be stated as a factor under which one would receive no aggravating or mitigating adjustments.

Amendment 17 is essentially good but I do not feel you should exclude the terminology "otherwise extensive."

Amendment 18 calling for the deletion of the interpolation is good, and so is the further definition proposed regarding adjustments for mitigation of role, and eligibility and ineligibility for mitigating role reductions.

The commission further requested comments on several items. In regards to Item #1, if one is to receive a mitigating role, it should be clear on the surface, and he should be less culpable than the other participants in the same case, and not someone who is less culpable than individuals who typically participate in similar conduct.

In reference to Item #2, there should be no specific functions that are either eligible or ineligible for mitigating role because this would cause everyone to claim or seek such eligibility or definition.

Item #3, a mitigating role reduction should be available to those in lower positions of priority decision making functions in a structured offense behavior. There are also obviously individuals who should receive no mitigating or aggravating

role as well. The factors considered should be those factors that are situation specific to the offense that tend to set this defendant apart from other defendants as one who deserves a mitigating role.

Item #4, there should not be any bar to receiving role adjustment because one has not been held accountable for all of his relevant conduct. This is a situation and circumstance that can be taken care of under the relevant conduct guideline, and does not need to affect the assessment of role.

Item #5 is no different than Item #4. One should not receive consideration under one guideline just because another guideline has not been correctly applied or assessed.

In regards to Part B of Amendment 18, I do not feel that commentary such as that mentioned is warranted. It would appear to me that if the proper role adjustment had been made, and the proper offense level determined through the use of relevant conduct, that all the appropriate information has been considered, and because of this, there is no departure justified.

In reference to Amendment 19, I do not think it is necessary to establish caps for a minor or minimal participant, as that is already accounted for in the establishment of the offense level through relevant conduct and the role reduction. It would seem to me that these adequately address the issues which this amendment is attempting to focus on.

**NOTE:** Reference the Commission's request for comments on questions; in particular, that dealing with mandatory minimum sentencing statutes. It is very possible that some of these amendments may place certain offenders below the mandatory minimum, when in fact they will not receive any benefit from the actual guideline application procedures, if they do not receive a 5K1.1 motion from the government.

#### **REDEFINITION OF CAREER CRIMINAL GUIDELINE 4B1.1**

As it relates to Amendment 27, Part A, I recommend that the enhanced statutory maximum sentence be used. As it relates to Part B of the amendment, I recommend the definition of prior felony conviction remain unchanged. As it relates to Part C, I think the date should be the date of sentence. As it relates to Part D, I do not think it is necessary to develop a category of "lessor" crimes. As it relates to Part E, I think the guidelines should remain as they are. As it relates to Part F, I think it should remain unchanged, and I do not think there should be any requirement for a "strictly consecutive sequence."

PLEA BARGAINING POLICIES, USE OF ACQUITTALS

As it relates to Amendment 35, I believe these are good ideas. As it relates to Amendment 36, Part W & Part X, I believe they are also good ideas.

As it relates to Amendment 20, I believe that Option #3 is the more appropriate.

As to Amendment 4, Part A, I have had little involvement with these types of cases, and am not familiar with information relating to this guideline. The same is true for Amendment 9.

As it relates to Amendment 36, Part G, I do not think it would be a good idea to remove these citations. They help give structure and direction to the guidelines. Removing them would possibly make the guidelines more flexible, but may also lead to inconsistency in application. As it relates to Part P, I believe the cross-reference idea is good.

ITEM #3, LIST OF ADDITIONAL PROPOSED AMENDMENTS

CHAPTER 1, GUIDELINES & POLICY STATEMENTS

Amendment 2, Parts A & B are both appropriate ideas. So is Amendment 3.

CHAPTER 2, GUIDELINES & COMMENTARY

I have no difficulty with Amendment 4. As it relates to Amendment 5, if you're going to remove the more than minimal planning adjustment, then there should be some corresponding increase in the base offense level.

Amendment 6 is appropriate.

As it relates to Amendments 7 & 8, I have had no significant dealings with these issues, and do not really know how these amendments might impact the guidelines.

As it relates to Amendment 10, it appears to be a logical and appropriate amendment.

As it relates to Amendment 11, I have had no dealings with this guideline.

Amendments 12, 13, & 14 all appear to be appropriate amendments.

CHAPTER 3, GUIDELINES & COMMENTARY

NOTE: No opinion or comments offered.

NOTE: It would be helpful to give some attention to examples relating to grouping issues involving money laundering guidelines and other offenses. This is something that, to my knowledge, is currently not in the application notes in Chapter 3, Part D, and I believe it would be useful.

#### CHAPTER 4, GUIDELINES & COMMENTARY

As it relates to Amendment 24, I do not believe an additional criminal history point is necessary because I think those sentences that deal with time actually served of 5 years or more reflect serious offenses that are often times given consideration. In such instances as armed career criminal and career offender enhancement, or possibly they also might reflect themselves in enhancements to the instant offense, such as mandatory minimums for second convictions, etc.

Amendment 25, Parts A & B are both good ideas.

Amendment 28, Part A, is unnecessary.

Amendment 28, Part B, is also a good idea, and of the options offered, Option #3 seems to be more appropriate.

#### CHAPTER 5, GUIDELINES & COMMENTARY

Amendments 30, 31, & 32 all appear to be good amendment ideas.

Amendment 34 is unnecessary and would complicate the sentencing procedure. The most effective aspect of USSG 5K1.1 is that it can only occur when the government does make a motion. It has been my experience that those who have substantially assisted authorities have received credit for doing so. It appears this amendment would allow for input from other parties as it relates to the substantial assistance issue, and would in effect result in less substantial assistance being provided. It would allow people other than those receiving substantial assistance to in fact make some determination as to the quality and substance of this assistance. Those people are actually not in a position to evaluate that substantial assistance.

#### MISCELLANEOUS AMENDMENT #36

Part A, Part B, Part C, Part D, and Part F are all appropriate amendments.

Part D, Part E, & Part F are all appropriate amendments.

Part H, the market value should continue to be the retail value. It should make little difference where the product was embezzled or stolen from. The retail value is still a fair and logical way to deal with monetary loss. Such an amendment would only complicate the determination of such a factor.

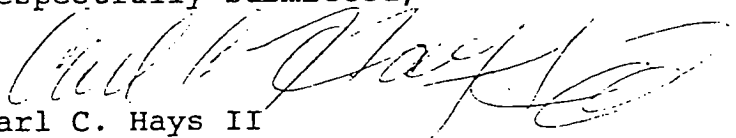
Part I is difficult to evaluate, but if one is to assume that the items were not intended for circulation because they were simply poor items is not sufficient reason for such a change. Quite frankly, had they been good items, they would have been circulated. I do not think this is a good amendment. It will cause arguments surrounding the intentions which will be difficult to resolve. If someone is counterfeiting something, one should be able to fairly state that they would intend to misrepresent its true value or status if they could.

Parts J, K, L, M, N, O, P & Q are all good amendments.

I do not understand enough about the proposed change in Part R to make any comment.

Parts S, T, U, V & Y are all good ideas.

Respectfully submitted,



Carl C. Hays II  
U.S. Probation Officer

CCH/smh

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SOUTHERN DISTRICT OF INDIANA  
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208 U. S. Courthouse  
Terre Haute, IN 47808  
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Reply To: Indianapolis

February 25, 1992

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

To Whom It May Concern:

I have received and reviewed a copy of the proposed 1992 amendments to the U.S. Sentencing Guidelines and would like to offer the following comments:

**Amendment 29: Expanded Availability of Non-Prison Sentencing Options**

1. Do the proposals "compromise the structure of the guidelines as originally drafted?"

No, they don't compromise, but would allow opportunity for more offenders to be placed on probation. I like the idea of changing the "split" in option #1, but I think that is as far as it should go. There is nothing wrong with the present table in the guidelines so why mess with it.

2. Should the Commission adopt an offense by offense approach under which certain types of offenders within the alternative eligible guideline cells would be excluded from eligibility?

No this gets too involved. Keep it simple.

3. Should the available sentencing options be expanded...

No, USPO's have enough "options" to keep track of now. I'm curious, would there be "boot camps" for females or is this only a male option?

**Amendment 33**

This amendment is ridiculous. It shows a return to pre-guideline thinking. Every defense attorney around will argue his defendant is young and naive or elderly and infirm. I'm sure defense attorneys will probably "coach" their clients to say they were misguided as a child just so they can qualify for a departure. I can see probation officers telling offenders, "It's a shame you didn't come from a broken home, etc., you could have qualified for a downward departure!" If this amendment is passed we might as well chuck the guidelines.

**Amendment 26: Departures based on inadequacy of the criminal history score.**

I prefer option 2 because many of the defendants who have criminal history categories more serious than VI are also more serious than VII. Using option 2, the court may sentence to a category VII but can also depart above this category if needed. I like parts B and C of option 2 because I think they address areas which should be given consideration in determining the criminal history category.

**Amendment 23: Acceptance of Responsibility**

I believe under option 1 the defendant should be required to accept responsibility for his offense of conviction. For example, a defendant is charged with Rape and Felon in Possession. The Rape charge is filed in state court and the Felon in Possession is charged in federal court. In applying the guidelines in the federal case a cross reference to consider the rape conduct is considered using the preponderance of evidence standard. Requiring the defendant to admit he did commit the Rape in the federal case is requiring him to compromise his defense in the case at the state level. For cases such as this I believe the defendant's acceptance of responsibility for the offense of conviction alone should be sufficient.

In my experience, most judges have equated acceptance of responsibility with entering a plea of guilty. Consequently, many times the probation officer does not give a defendant acceptance of responsibility because that acceptance did not go beyond entering a plea of guilty. Option 3 allows the courts to continue to do what they have always done in the past yet allows a person who has truly demonstrated acceptance of responsibility to receive a further reduction. However, I

Re: February 24, 1992

would recommend the defendant receive one point for pleading guilty and two points for further demonstration of acceptance, instead of the other way around.

**Amendment 1, Part A and Part B: Relevant Conduct**

Relevant conduct continues to be a major problem area and any commentary, illustrations or definitions to clarify are helpful to everyone trying to compute the guidelines.

**Amendments 16, 17 and 18: Role in the Offense, Especially in Offenses Involving Drugs**

I think these changes to the commentary concerning mitigating and aggravating role guidelines are very good, especially amendment 16, part A and amendment 17, part A. I have seen several defendants charged by way of information, limiting the scope of their involvement in the instant offense, receive a further reduction for playing a minor role in the offense. I think the proposed changes in the commentary will help clarify the proper application.

I believe when determining whether a mitigating role adjustment should apply in a case the comparison should be between participants in the same case. When you try to gauge culpability based on "typical participant" you have the age old problem of defining what is a typical participant.

**Amendment 19**

I believe the sentencing guidelines appropriately address minimal participants and minor participants through reductions in the offense level. Consequently, I do not believe there should be a cap based on the defendant's participation in the offense. However, perhaps a cap could be considered for a defendant who is a first time offender in conjunction with being a minimal or minor participant.

**Amendment 27: Re-Definition of Career Criminal**

Part A. I agree with option number 2. Offenders who fall under this section deserve to receive the maximum sentence available. Therefore, I believe the enhanced statutory maximum sentence should be the one used.

Part D. I do not believe crimes of violence can be quantified. Therefore the definition at 4B1.2 is sufficient.

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Part E. When two cases are not related they should be considered as two convictions for purposes of the career criminal guideline.

Part F. A requirement for a defendant to have been arrested, convicted and sentenced for one offense before he commits the second excludes those defendants who commit a second offense while they are on bond for the first offense. In my opinion, a defendant should be held accountable for all prior arrests and convictions which occurred prior to his commission of the instant offense.

#### **Amendment 35 Plea Bargaining Policies: Use of Acquittals**

Part B. I agree the defendant should be held accountable for conduct contained in counts dismissed as part of a plea agreement.

Part C. I believe the preponderance of the evidence standard should be sufficient in considering conduct in which the defendant was acquitted. I do not believe it should be a basis for a departure but should be used to determine the offense level and/or to select a sentence within the guideline range.

#### **Amendment 36, Part X**

Defendants should be sentenced based on their real offense conduct and not merely the offense of conviction. The purpose of the cross references from the guideline of conviction to the guideline for the underlying behavior allows the court to pronounce a more just sentence. However, when the defendant incriminates himself by giving the government information they would not otherwise have access to, he should not be punished for that information.

#### **Amendment 20**

I agree with option number 3.

#### **Amendment 4, Part A**

I agree with the proposed amendment.

#### **Amendment 9**

I agree with option number 2.

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**Amendment 2, Part A and B: Chapter 1 Guidelines and Policy Statements**

I agree with this amendment.

**Amendment 3**

I agree with this amendment.

**Chapter 2 Guidelines and Commentary**

I agree with amendments 4 through 14 as provided in chapter 2.

**Chapter 3 Guidelines and Commentary**

**Amendment 21.** I believe a floor offense with additional levels for degree of risk is a good modification to be considered for reckless endangerment enhancement.

**Amendment 22: Multiple Counts**

This is a difficult area of the guidelines. Perhaps more examples would help clarify the rules.

**Chapter 4, Guidelines and Commentary**

**Amendment 24.** I believe one additional point for sentences of imprisonment exceeding one year and one month in which the defendant actually served five or more years of imprisonment is a good idea.

**Amendment 28.** I believe the criminal history category I is sufficient to address defendants who are first time offenders.

**Part B.** I believe a category VII should be added to the sentencing table as listed in option 3. This would give the court the option of departing above a category VII and departures could be structured to establish "pseudo" categories in three point increments as is presently done in the sentencing table.

**Chapter 5, Guidelines and Commentary**

**Amendment 34.** As much as I believe the U.S. Government abuses § 5K1.1 of the guidelines, I do not believe the answer is to eliminate the requirement for a government motion. I believe there should be requirements for the government to structure

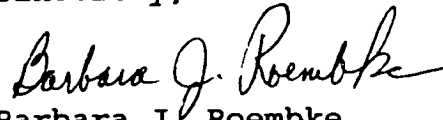
Page 6

Re: February 24, 1992

any departure under this section and limit the departure to two levels, four levels or six levels. This would eliminate the "free fall" that we currently have with 5K1 motions.

I hope my comments will be considered. If you have any questions please feel free to call me at 317-226-6756.

Sincerely,



Barbara J. Roembke  
U. S. Probation Officer  
Sentencing Guidelines Specialist

BJR/njh

cc: ✓ The Honorable Vincent L. Broderick  
c/o The Research Division  
Federal Judicial Center  
1520 H Street N.W.  
Washington D.C. 20005

Honorable Vincent L. Broderick  
C/O The Research Division  
Federal Judicial Center  
1520 H Street, N.W.  
Washington, D.C. 20005

RE: Comments to Proposed  
Amendments to the  
Sentencing Guidelines

Dear Sir:

The following are my comments to the proposed amendments to the Sentencing Guidelines as outlined in the "Synopsis of Proposed 1992 Amendments to the Federal Sentencing Guidelines".

**AMENDMENT 29.**

1. Do the proposals "compromise the structure of the guidelines as originally drafted?"

Yes, I believe the proposals do compromise the structure of the guidelines as originally drafted. The guidelines were meant to eliminate or reduce the disparity of sentencings throughout the country. The guidelines as they currently stand do not allow for a considerable amount of disparity as they limit the options available. If the range for probation is expanded and the "split-sentence" options are enhanced thereby eliminating the service of at least one-half of the minimum guideline range in prison will cause an increase in sentencing disparities nationwide. A district which believes white-collar offenses, for example are serious and harmful to the community may sentence an offender to a term of imprisonment while another district may sentence that offender to a term of probation.

Additionally, the proposals compromise the structure of the guidelines as originally drafted as the proposals do not adhere to the sentencing objectives of deterrence, just punishment, incapacitation and rehabilitation. By allowing for an increase in the sentencing disparities, the philosophies of deterrence and just punishment become obsolete.

2. Should the Commission adopt an "offense-by-offense" approach under which certain types of offenders within the alternative-eligible guideline cells (e.g. white-collar offenders) would be excluded from eligibility?

No, I do not believe the adoption of an "offense-by-offense" approach would be a viable option to the expansion of the range of probation or the "split-sentence" options. Again, this type of proposal does not adhere to the sentencing objectives of deterrence, just punishment, incapacitation and rehabilitation. By having an "offense-by-offense" approach it appears at least on the

surface as being an unfair practice. Who shall decide which offenses shall be excludable when they fall within the same guideline categories and have comparable offense levels and criminal history categories. Shall each district decide which offenses are excludable? If an offense shall be excluded from straight probation or the "split-sentencing" options then the offense level for that offense should be increased.

3. Should the available sentencing options be expanded to include additional alternative programs such as intensive supervision, public service, shock incarceration (boot camps), day reporting centers, or other programs?

No. Although alternative programs such as boot camps, day reporting centers, etc are good sentencing alternatives in theory, they are extremely difficult to monitor, as well as impossible to finance. The Probation Offices are expected to run or monitor these programs while not being provided additional personnel or financial backing to provide for the increased workload. The existing personnel is expected to take on the extra work without monetary compensation for the overtime hours needed.

Alternative sentencing programs are for the offender who will not be a recidivist and learns from his/her mistake. However, when the offender does not comply with the conditions imposed with the alternative sentence, it is necessary for the Probation Officer to have the backing of the court in enforcing the ordered sanctions. When the courts fail to reprimand the non-compliant probationer, the alternative sentencing program loses the intended purpose of punishment and general deterrence.

#### **AMENDMENT 33**

Part (A). No comment.

Part (B). "Age may be a reason to impose a sentence below the applicable guideline range if combined with another factor (e.g., young and naive or elderly and infirm.)"

I do not agree with the reasons for downward departure being "young and naive" or "elderly and infirm". How does one determine whether an individual is young and naive? Even though offenders may be of a young age does not in itself mean the individual is in any way naive. Naivety is an ambiguous term at best and should not be open to anyone and everyone's interpretation.

Additionally, because someone may be young and naive or elderly and infirm does not lessen the fact that a crime has been committed. Should a young person or an elderly individual be rewarded because they decided to begin their life of crime at an early age or because they happen to become physically infirm after commission of the offense?

Part (C). "Should the court consider "a defendant's lack of

youthful guidance, history of family violence, or a similar factor as a ground for departure from the guidelines?"

**NO!** This kind of reasoning is a regression to pre-guideline thinking. The large portion of today's society is a product of a broken home, exposed to substance abuse and violence, or are not afforded the same moral guidance which was abundant during the "June Cleaver days". However, the majority of these children do grow up to be law-abiding citizens. Again, should we reward those who wish to make excuses for their abhorrent behavior rather than take responsibility for their actions. This would be the message given to society should the court use these reasons for downward departures.

Part (D). Downward departure based on advanced age (60 or older). No, I do not believe a downward departure based on age should be a consideration.

#### **AMENDMENT 26**

Part (A). I agree with Option 2. Most offenders who exceed Category VI usually do so with many more points than would come within the limits of a Category VII. I believe the court should be able to depart upward to the point to adequately reflect the seriousness of the offender's past criminal conduct.

Part (B). I do not agree with departures due to inadequacy of the Criminal History Category based on the degree of risk or type of risk. Whether the degree of risk is financial or physical, both provide for their own degree of harm to the community.

Part (C). I agree with this provision.

#### **AMENDMENT 23**

I propose an Option 5 which is similar to Option 3. However, I believe a one point reduction should be awarded to the offender who pleads guilty and an additional two level reduction be given to the offender who provided substantial assistance to authorities, admits to relevant conduct, voluntary payment of restitution etc. This provides for more incentive for the offender to be cooperative with authorities etc. More can be earned by this offender than just by pleading guilty.

I disagree with allowing for a three level reduction to an offender who has a high offense level. This individual should not be rewarded more than someone who commits a less serious offense. For offenders who have higher offense levels, there is a greater chance that this individual can provide more information to assistance authorities. Therefore, they may be able to be considered for a 5K1.1 departure.

#### AMENDMENT 1

Relevant Conduct. I agree with the provisions provided for this section. Relevant conduct continues to plague presentence writers. Any and all definitions and clarifications are greatly appreciated.

#### AMENDMENTS 16, 17 and 18

1. Whether mitigating role adjustments should apply in cases in which the defendant is less culpable...individuals who typically participate in similar criminal conduct.

I do believe mitigating role adjustments should only apply in cases in which the defendant is less culpable than other participants in the same case. When you try to group all offenders into one neat package none will be identical. Therefore, the term "individuals who typically participate" in similar criminal conduct" is ambiguous and will open the door for all kinds of interpretation for "individuals who typically participate".

2. Whether defendants performing certain functions in a drug activity should be eligible or ineligible for a mitigating role adjustment by virtue of the function performed.

I do not believe a person should be excluded from receiving or not receiving a mitigating role adjustment by virtue of the function performed. The guidelines adequately defines who should receive an adjustment for mitigating roles. The guidelines should not incorporate a specific function for defining who receives the adjustment. For instance, one may say a "mule" function warrants an adjustment for mitigating role. This is fine if the "mule" only carries or unloads one shipment of drugs. However, if the "mule" carts several separate shipments involving hundreds of kilos of drugs should he also be eligible for the same reduction based on the function performed?

3. Factors to be considered for a mitigating role reduction.

The definition for application of a mitigating role reduction is adequately addressed in the guidelines and should not be changed.

4. Should a mitigating role reduction apply to someone who has not been held responsible for the full amount to the crime?

No. The offender who is not held responsible for the full extent of the criminal activity is already in receipt of a role reduction by the fact he is not being held accountable for the entire conspiracy. The offender would not have a mitigating role in an offense he fully completed and was aware of.

5. If a defendant does not merit a mitigating role but has been held responsible for the full amount, should he be considered for a mitigating role?

This question could only be answered by reviewing the facts surrounding the case. Depending on what his role is in the overall activity compared to the relative culpability of the other defendants.

#### **AMENDMENT 19**

A. I do not agree with setting caps for minimal or minor participants in drug cases. The role adjustments available in chapter 3 of the guidelines adequately addresses the number of levels the base offense level should be reduced. By placing a cap on the guideline level, the mitigating role adjustments in Chapter 3 are of no value. If an adjustment is made for mitigating role after the cap is in place then the offender is being rewarded twice for mitigating role when the spirit of the guidelines is for a one time reduction for a single offense characteristic.

B. "To what extent do mandatory minimum sentencing statutes, on which the Commission has set its base offense levels for drug offenses, further influence the Commission's consideration of these possible amendments?"

I do not believe the guideline offense levels should be below the minimum sentencing statutes. Congress has determined the penalties of offenses based upon the overall harm it does to society as a whole as well as to individuals. In setting a mandatory minimum sentence, Congress is addressing the serious nature of the offense as well as the harm it inflicts on society. Therefore, allowing an individual to be sentenced below the mandatory minimum penalty is sending a message that these offenses are not as serious or harmful as Congress or the public deem them to be.

#### **AMENDMENT 27**

Part (A). I agree with Option 2.

Part (B) and (C). No comment.

Part (D). The Commission should not address certain categories of crimes of violence that would be considered "lesser" crimes of violence and thereby not counted. By amending the penalty for a felony from one year to two years, the Commission addresses offenses which could be considered "lesser" crimes of violence. Additionally, by stating certain crimes of violence are less serious opens the door for defense attorneys to argue crimes of violence involving spousal abuse should be considered lesser crimes of violence based on the victim.

Part (E). The convictions should continue to be counted as two convictions.

Part (F). I believe the definitions contained in Section 4B1.2(3) adequately define "two prior felony convictions" and an amendment specifying an offender who engages in a single short-lived crime spree is unnecessary and unwarranted.

#### **AMENDMENT 35**

Part (B). The Commission should amend its guidelines to provide that conduct described in a count dismissed pursuant to a plea agreement may be considered in determining whether or not to depart from the applicable guideline range.

Part (C). If a defendant has been acquitted of an offense, he should not be held accountable for that offense conduct even though the court holds there is a preponderance of the evidence.

#### **AMENDMENT 36**

Part (X). The guidelines should be based on the real offense conduct and not just limited to the offense contained in the plea agreement. Judicial discretion has become prosecutorial discretion as a result of plea agreements which limits the defendant's offense behavior, the actual charge for which the defendant can be convicted and even the guideline in which the defendant can be sentenced within.

#### **AMENDMENT 20**

I agree with Option 3.

#### **AMENDMENT 4**

I agree with the proposed amendment to Section 2A3.1, 2 and 4.

#### **AMENDMENT 9**

I agree with Option 2.

### **CHAPTER 2 GUIDELINES AND COMMENTARY**

#### **AMENDMENT 5**

I agree with the four level increase as proposed in Amendment 6 and with the deletion of "more than minimal planning".

#### **AMENDMENT 7**

I agree with an increase of offense levels on the drug tables at 2D1.1 for distribution of large amounts of Schedule III, IV, and V controlled substances, anabolic steroids, and schedule I and II depressants.

#### **AMENDMENT 8**

I agree with an increase in the offense level from one to five levels for the number of aliens smuggled. I believe an enhancement for death or bodily injury should be incorporated into this guideline. However, I do not agree with the stipulation it should be conditional on the defendant's state of mind. If an alien or someone who smuggles aliens causes death or bodily injury to anyone, he should receive an upward adjustment regardless of the circumstance. An enhancement should be given for the possession of

a firearm. An increase of 2 levels for possession of a firearm would be an adequate adjustment as that is the level assessed in drug cases.

#### **AMENDMENT 10**

The specific characteristics contained in Section 2Q1.2 should be increased by 4 levels. Environmental crimes are life-threatening to society as a whole and should be penalized accordingly. Section 2Q1.3 should be similarly amended.

#### **AMENDMENT 11**

I agree with the proposed amendment to guideline 2Q2.1. I believe an adjustment should be added for more than minimal planning and an upward adjustment should be increased from a two to four for pecuniary gain.

### **CHAPTER THREE GUIDELINES AND COMMENTARY**

#### **AMENDMENT 21**

The commentary to Section 3C1.2 is innocuous in defining Reckless Endangerment during Flight. The range of behavior is not adequately covered in this section. A floor offense with additional levels for degree of risk would be beneficial to the presentence writer in calculating the guideline enhancement.

#### **AMENDMENT 22**

Section 3D1.4 is clear in defining the multiple count rules. However, when an offender is convicted of several offenses which can not be grouped together and the offense levels are too low to be given any units, he does not receive any additional levels for those offenses. Thereby not receiving any guideline penalty. This section needs modification so multiple counts result in an increase in the guideline range.

### **CHAPTER FOUR GUIDELINES AND COMMENTARY**

#### **AMENDMENT 25**

Part (A). I agree with the proposed amendment.

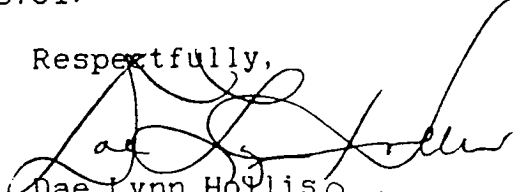
#### **AMENDMENT 28**

Part (A). I agree with the establishment of a Category 0 for first time offenders. However, I do not believe the criminal history category should be used to measure likelihood of recidivism. Also, I do not agree with Category 0 offenders being eligible for reduced sentences. A Category 0 could make it possible for a higher offense level to be eligible for straight probation or the "split-sentence" options.

Part (B). I agree with adding a Criminal History Category VII. Option 3 adequately addresses how Category VI and VII should be structured. Therefore offenders who have criminal history points above 18 would be considered for an upward departure based on the inadequacy of their criminal history.

I hope my comments to the proposed amendments are helpful. Should you have any questions or if I may be of assistance to you, please contact me at FTS 331-6751 or (317) 226-6751.

Respectfully,



Dae Lynn Hollis  
U.S. Probation Officer