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WILLIAM W. WILKINS, JR.  
U. S. CIRCUIT JUDGE

February 27, 1992

The Honorable Vincent L. Broderick  
Chairman of the Committee on Criminal Law of  
the Judicial Conference of the United States  
101 East Post Road  
White Plains, New York 10601

The Honorable William W. Wilkins, Jr.  
Chairman of the United States  
Sentencing Commission  
P. O. Box 10857  
Greenville, South Carolina 29603

Re: Sentencing Commission's Proposed 1992 Amendments to  
Guidelines

Dear Judge Broderick and Judge Wilkins:

On behalf of Chief Judge Richard S. Arnold and Eighth Circuit Judges Theodore McMillian, John R. Gibson, Donald P. Lay, Myron H. Bright, and myself, I submit the following response to the Sentencing Commission's proposed amendments to the sentencing guidelines, policy statements, and commentary.

**I: Amendments Responsive to the Recommendations  
of the Judicial Conference**

1. We support Amendment 29, which gives the district courts greater flexibility to impose sentences which call for alternatives to imprisonment. We prefer Option 6, which expands the availability of probation and provides for split sentences. We do not believe that these changes will compromise the guidelines, but will rather more carefully carry out the intent of the Sentencing Reform Act of 1984.

2. We support Amendment 33, which broadens the discretion of the sentencing judge to depart upward or downward when certain offender characteristics are present. We are confident that the district court judges will exercise this discretion wisely.

3. We support Amendment 26, Part (A), Option 2, and Part (B), which gives the sentencing court more authority to consider the nature rather than the number of prior offenses when considering whether to depart from the guidelines.

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4. We support Amendment 23. Rather than adopting any of the options suggested by the Commission, we would prefer an option which would permit a sentencing judge to give a one- to three- level reduction for acceptance of responsibility, depending on the circumstances of the case.

5. We do not take a position on Amendment 1 dealing with relevant conduct, other than to recommend that the guidelines be amended to state that conduct for which a defendant has been acquitted or conduct included in a dismissed count not be considered in fixing the offense level. See Amendment 35, Part (C). Such conduct could, however, be considered in determining where within a guideline range a person should be sentenced.

## II: Additional Amendments of Special Interest

1. There are twelve amendments in this category: four are changes in the commentary, and eight are changes in the guidelines. Most of the amendments tend to define and direct the discretion of the district judges in the sentencing process rather than broadening that discretion. They also follow the philosophy that the Commission should attempt to anticipate every factual circumstance and develop a guideline to meet that circumstance. In our view, it would generally be better, as Chief Judge Tjoflat suggests, to define the "heartland" and leave to the courts the task of adjusting for particular circumstances.

2. We support Amendment 27, Parts (A) and (B). Part (A), option (1) provides that a prior conviction that is used to enhance a statutory maximum sentence could not also be used in determining the offense level for a career offender. Part (B) changes the definition of a "prior felony conviction" so that only crimes having a statutory penalty of two years, rather than one, be counted.

3. Amendment 35, Part A is a very important and needed amendment. It would encourage the government to disclose all guideline relevant facts and circumstances to the defendant before the defendant enters his plea. Not only will this introduce more fairness into the process, but it will significantly reduce the number of appeals.

## Part III: List of Additional Proposed Amendments

The Commission proposes an additional thirty-six amendments to the guidelines and four changes in policy statements and

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commentary. It also asks for comments on a number of other proposed changes in the guidelines.

1. We support Amendment 2, Part (A), which makes clear that information provided by a defendant pursuant to a plea agreement should not be used to increase a defendant's sentence.

2. We support Amendment 3, which, in substance, states that guidelines may provide a starting point for the sentencing of juveniles, that sentencing above the guidelines for juveniles should be accompanied by reasons, and that a defendant's youthfulness may make a sentence below the range appropriate. The amendment properly leaves a large degree of discretion to the sentencing judge.

3. We make no recommendation with respect to Amendments 4 through 14 of Chapter 2. Many of the amendments appear to be a response to a sentence imposed by one or more district courts, and each amendment will further limit the discretion of the sentencing judge.

4. We make no recommendation as to Amendment 15, which provides for a three-level enhancement where a felony was committed to promote terrorism.

5. We take no position with respect to Amendment 24, which essentially gives more weight to prior offenses.

6. We oppose Amendment 25, Part (A), Option 1, which will further limit the discretion of the district courts.

7. We support Amendment 30, which provides guidance to judges in determining fines of greater than \$250,000 or fines for each day of violation. We also support Amendment 31, which permits but does not require a sentencing judge to consider the cost of incarceration when setting fines; and Amendment 34, which eliminates the requirement of a government motion for a 5K1.1 departure, but directs the court to give substantial weight to the government's evaluation.

8. We support Miscellaneous Amendment 36, Parts A, B, C, D, and E. These are, in the main, clarifying amendments.

9. We oppose Miscellaneous Amendment 36, Part F as tending to unduly limit the discretion of the sentencing judge.

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10. We take no position on Miscellaneous Amendment 36, Parts H and J. We support Part I, which clarifies the counterfeiting guidelines.

11. We support Miscellaneous Amendment 36, Parts K, L, M, N, O, P, and Q. All are clarifying amendments.

12. We support Miscellaneous Amendment 36, Parts R, S, and T.

13. We take no position on Miscellaneous Amendment 36, Part U.

14. We support Miscellaneous Amendment 36, Parts V and Y.

We have been asked to comment on the following amendments:

1. Amendments 21 and 22. We would prefer to leave the matters covered in these amendments to the discretion of the district judges.

2. Amendment 28, Parts A and B. In general, these amendments seek to give the district courts more latitude in giving probation to offenders with whom the likelihood of recidivism is low and to give the district courts more latitude in imposing longer sentences on persons with a very serious criminal record. Our concern is that the Commission is trying to do this by establishing additional directives that will mandate a particular sentence. We believe a better approach is to permit district courts to depart downward when the danger of recidivism is low and upward when the danger is high.

Sincerely,

GERALD W. HEANEY

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