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February 24, 1992

William Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004
Attn: Guideline Comment

Re: Proposed Amendments to Sentencing Guidelines for Offenses Involving the Environment

Dear Chairman Wilkins:

These comments are submitted in response to the notice soliciting public comment published by the Commission in the Federal Register on January 2, 1992. 57 Fed. Reg. 90-118. The comments are submitted on behalf of the Subcommittee on Environmental Crimes of the Section of Criminal Justice of the American Bar Association, and reflect the views of the chairman of that subcommittee and not the views of the American Bar Association generally.

Members of the subcommittee have encountered a number of inconsistencies, structural problems and ambiguities with the guidelines for environmental offenses applicable to individuals. Addressing all of these issues requires careful consideration, especially because there is limited experience to date with sentencing environmental offenses. We therefore urge the Commission to continue its broadbased reexamination of these guidelines with a view toward their comprehensive revision and as a necessary precursor to revision of organizational guidelines for environmental offenses. The proposed amendment to Section 2Q1.2 is a beneficial step that we endorse.

Proposed Amendment to Section 2Q1.2

The Commission proposes to amend Section 2Q1.2(b)(4) to make clear that this specific offense characteristic should not be applied if an adjustment under Section 2Q1.2(b)(1) applies. 57 Fed. Reg. at 97. The stated purpose of the proposed amendment is "to

clarify the intent of the guideline and eliminate 'double counting.'" Id. The source of the double counting is identified as an overlap between Section 2Q1.2(b)(1), which requires an adjustment for a "discharge, release, or emission" and Section 2Q1.2(b)(4), which requires an additional adjustment if the discharge occurred "without a permit or in violation of a permit." The notice recognizes that in many cases the "discharge, release, or emission" is not a violation of law unless it occurs without or in violation of a permit.

We applaud the Commission for proposing to correct what we have viewed as an obvious flaw in the structure of the guideline. We believe, however, that the cause of the double counting is more often an overlap between Section 2Q1.2(b)(4) and the base offense itself rather than an overlap between Section 2Q1.2(b)(4) and Section 2Q1.2(b)(1). Those statutes that are at the core of environmental criminal enforcement (Clean Water Act and Resource Conservation and Recovery Act) establish permit-based regulatory schemes. In almost all instances a requisite element of the base offense for a violation of these acts is the failure to obtain or to comply with a permit. Thus, analytically, double counting is avoided if Section 2Q1.2(b)(4) is not applied where the base offense violation requires proof of the failure to obtain or comply with a permit.

The Commission may wish to consider adding to the end of Section 2Q1.2(b)(4) slightly different amendatory language:

> Do not apply this adjustment if a requisite element of the base offense is the failure to obtain or comply with a permit.

In any event, the consequence of the language of the proposed amendment or the above language is the same. We strongly feel that an amendment correcting the double counting should be made.

Other Issues

The Federal Register notice solicits comments on two additional issues: 1) an increase in the offense levels of Section 2Q1.2(b)(1), and 2) if Section 2Q1.2 is amended, whether a comparable amendment should be made to the parallel guideline Section 2Q1.3.

1. An increase in the offense levels under Section 2Q1.2(b)(1) would appear to be predicated on the factual conclusion that sentences pursuant to this guideline, at least some of which involved double counting, nonetheless, appropriately penalized or underpenalized defendants. The Federal Register notice does not set forth any factual basis for an increase in the offense levels nor provide any further explanation for this action. Without any factual showing, we have difficulty reaching a conclusion on whether the proposed increase in offense levels is warranted or wise. An upward adjustment is inconsistent with the purpose, intent and history of the Commission in assessing sentences based on historical data. Such an adjustment may leave the Commission subject to the perception that it acted arbitrarily or ideologically.

We would note that for offenses that involve a discharge, release or emission, but do not occur in the context of a permit oriented system, an increase in the offense levels under Section 2Q1.2(b)(1) would significantly increase the severity of punishment for such offenses. Violations of the Toxic Substances Control Act, the Federal Insecticide, Fungicide and Rodenticide Act, the Deepwater Ports Act, the Safe Drinking Water Act, the Outer Continental Shelf Act and some violations of the Clean Air Act and the Comprehensive Environmental Response, Compensation, and Liability Act would receive more severe punishment. Although there may have been few criminal violations of these acts historically, this change would increase the period of imprisonment by 4-9 months for such violations.

2. If Section 2Q1.2(b)(4) is amended to eliminate double counting, we believe a comparable amendment to the parallel guideline, 2Q1.3, is necessary. Section

2Q1.3 is the relevant guideline for offenses involving nonhazardous and nontoxic substances. The two guidelines are parallel except for somewhat lower offense levels due, presumably, to the view that less serious offenses result from violations involving nontoxic and nonhazardous substances. Almost all of the offenses subject to application of Section 2Q1.3 (Clean Water Act, Rivers and Harbors Act, Clean Air Act) involve permit-based regulatory systems for which application of Section 2Q1.3(b)(4) would result in double counting. Since enactment of the guidelines, there have been no guideline sentences under the Ocean Dumping Act or the Act to Prevent Pollution From Ships, the other two statutes covered by Section 2Q1.3.

A brief hypothetical demonstrates the mischief that would result from the failure to make a comparable amendment to Section 2Q1.3. The knowing discharge of a hazardous substance (e.g., dioxin, kepone, toluene) into a river without a permit would result in an offense level of 12 without applying Section 2Q1.2(b)(4). Knowingly disposing of a truckload of clean topsoil on the bank of the stream would result in an offense level of 14 with application of 2Q1.3(b)(4), although the harm and culpability are less in this situation.

Conclusion

We strongly urge the Commission to amend Section 2Q1.2 to eliminate the structural flaw that results in double counting in assessing punishment for conduct done without or in violation of a permit. It is necessary that a comparable amendment of Section 2Q1.3 be made. We take no position with respect to the wisdom of increasing offense levels under Section 2Q1.2(b)(1) generally. It is not a sound amendment, however, if its purpose is solely to compensate for the amendment to Section 2Q1.2(b)(4) since it would be seriously overinclusive in increasing the penalty for violations that do not involve permits.

Sincerely yours,

Benjamin S. Sharp

Judson W. Starr

Chair of the Subcommittee
on Environmental Crime of
Section of Criminal
Justice

BSS:pap

Proposed Amendments 2(A) and 2(B):
§ 1B1.8 - Use of Certain Information

Two amendments have been proposed with respect to § 1B1.8, which relates to the use of incriminating information pursuant to an agreement with the government. The first amendment clarifies the operation of the Guideline and further details the Commission's policy that a cooperating defendant not be penalized as a result of having provided incriminating information pursuant to an agreement with the government. The second amendment would broaden § 1B1.8 to apply to information provided by a defendant concerning himself and would thus eliminate the requirement that to qualify for protection under § 1B1.8, the information provided relate to the activities of others. Both of these proposed amendments have the unqualified support of the NYCDL.

The provisions of § 1B1.8 first became effective on June 15, 1988, more than a year and a half following the effective date of the Guidelines. Essentially, § 1B1.8 seeks to preserve the ability of government attorneys and defense counsel to enter into agreements whereby a defendant who volunteers information to the government is appropriately assured that his truthful disclosures will not be detrimentally used against him, either to further prosecute him or to increase his sentence, provided that he has otherwise complied with the terms of his agreement with the government.

Although § 1B1.8(a) protects against the use of such information "in determining the applicable guideline range," the current version of Application Note 1 advocates much broader protection, and sets forth the policy of the Commission that a cooperating defendant "should not be subject to an increased sentence by virtue of that cooperation where the government agreed that the information revealed would not be used for such purpose." Proposed Amendment 2(A) clarifies this Application Note by making clear the Commission's policy that information provided under § 1B1.8 not be used by the court either in considering an upward departure or in selecting a sentence within the applicable guideline range. We believe that the proposed language is a thoughtful and necessary means of further ensuring that a defendant not be unfairly penalized for his or her truthful disclosures to the authorities.

Proposed Amendment 2(B) would remove the limitation in § 1B1.8 that now makes it applicable only to disclosures by a defendant concerning the activities of others. In our testimony and written statement to the Commission last year, as well as in our letter dated August 28, 1991, the NYCDL urged the Commission to expand the coverage of § 1B1.8 to encompass those few instances in which the defendant, in truth, can offer no evidence implicating anyone other than himself. As we previously stated:

> To be sure, the government rarely enters into cooperation agreements except with defendants believed to possess

> information concerning the unlawful activities of third parties. However, there are occasions on which the government may elect to enter into an agreement with a defendant to provide information about his own criminal activities -- either to enable the government to close out its investigative files or as part of an agreement by which the defendant will voluntarily make restitution to the victims of his various misdeeds. Where the parties thus agree that the information provided by the defendant should not be used against him in imposing sentence, we perceive no policy reason to exclude such agreements from the ambit of § 1B1.8. The government and the defense should be permitted to enter into such agreements with the knowledge that the Guidelines and the court will effectuate the parties' intent.

Accordingly, the NYCDL recommends that the Commission adopt both proposed amendments to § 1B1.8.[2]

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[2] In last year's submission to the Commission, we noted that at least one prosecutor's office has refused across-the-board to afford any cooperating defendant the protection embodied in § 1B1.8. We recommended then -- and do so again -- that this issue be considered in connection with the next amendment cycle. We also again urge the Commission to consider amending Application Note 3 to § 1B1.8, to express the view that the Guideline applies to so-called "proffer agreements," by which many defendants provide self-incriminating information prior to entering into more formal cooperation agreements with the government.

Proposed Amendment 5:
§§ 2B1.1 and 2F1.1 - Larceny/Theft and Fraud/Deceit Tables

We oppose any changes in the theft and fraud tables that would increase the base offense level for a particular defendant solely because of the amount of the alleged loss. We believe that no need has been shown to increase the sentences already mandated for loss-based offenses.

Moreover, we oppose proposed changes in the theft and fraud tables that would create a "cliff effect" as the amount of loss increases (e.g., table 3, which increases the base levels by 2 points at a time), and encourage the continuation of theft and fraud tables that provide for more graduated increases (for example, table 1).

We recognize that one of the reasons for increasing the base offense levels in the theft and fraud tables is the proposed elimination of the "more than minimal planning" offense characteristic. We believe that this factor should be retained.

The stated reason for eliminating this offense characteristic is because it has "proven difficult to apply consistently in practice." However, rather than simply eliminating this characteristic and leaving the base offense levels where they currently are, the proposed amendments would increase the base offense levels in the theft and fraud tables across the board. This effectively removes from judges their ability to differentiate defendants who have

committed the same crime but with different levels of planning and sophistication. The current Application Notes to 1B1.1, in our view, appropriately contemplate that distinction ("more than minimal planning 'means more planning than is typical for commission of the offense in a simple form.'"). Although we recognize that the goal of the Sentencing Guidelines is to promote uniformity in sentencing, surely (for example) an unsophisticated fraud by a desperate defendant should not receive the same sentence as a pre-planned and sophisticated fraud of venality, which coincidentally resulted in the same amount of loss.

Proposed Amendment 6:
§ 2F1.1 - Fraud and Deceit

A proposed amendment of § 2F1.1 would increase the base offense level four levels "[i]f the offense affected a financial institution." We oppose this proposed amendment.

Section 2F1.1(b) already provides for a four-level increase if the offense "substantially prejudiced the safety and soundness of a financial institution." That provision allows substantial additional punishment for high-level banking crimes, and itself accomplishes the stated purposes of this proposed amendment, "to reflect the increase by Congress during the past several years in the maximum terms of imprisonment from 20 to 30 years for violation of Title 18 bank fraud and embezzlement offenses." Even without any increase in the fraud tables, the simplest false statement on

an application for a relatively modest loan would require a prison sentence. We are unable to see any law enforcement need for this.

Proposed Amendments 18(a) and (B): § 3B1.2 - Role in the Offense

We oppose eliminating the option currently available that permits a three-level reduction under § 3B1.2 if the court finds that a defendant's role in the offense falls somewhere between minimal and minor conduct. We believe that the court should continue to have the option to sentence defendants between the two levels, so that defendants who have different levels of culpability are sentenced to appropriately different sentences.

We endorse the proposed amendment to the Application Notes in § 3B1.2 that would allow the court to depart downward, below the applicable Guideline range, when a defendant's minimal participation exists to an extent not otherwise contemplated by the Guidelines.

Issue for Comment 28(A): Chapter Five, Part A - Sentencing Table

The NYCDL opposes the proposed creation of Criminal History Category 0 as currently promulgated in the relevant Working Group Report. We agree that proposed Category 0 would appropriately recognize that there should be a beneficial effect in being a "first offender" and we thus endorse the concept of Category 0. As promulgated by the

Working Group, however, Category 0 would have a disproportionate impact on racial minorities and should be viewed with extreme caution.

The Working Group's definition of a "true first offender" with zero points and with no known criminal history of any kind is, we believe, unfair. As undoubtedly demonstrated by empirical data, inner-city youth is more susceptible to arrest or charges later found to be without substance than are white defendants. Many of these charges are dismissed before they go to court. Others are dismissed after they go to court. Some of these are perfectly consistent with true innocence.

The notion that a dismissed charge should prevent the defendant from being considered a "true first offender" simply presumes that if he were truly innocent, he would not have been in harm's way and is therefore somehow less redeemable than someone who was never arrested at all. This concept does not account for the fact that there are areas subjected to increased police surveillances and to police action that is not racially balanced -- in contrast to white middle-class communities, where a stop or an arrest generally will not occur absent true probable cause.

While it is not clear that the disproportionate impact on racial minorities would, if unintended, be sufficient to set aside the Guideline under a strict scrutiny

test, it would certainly be subject to divisive and unnecessary litigation. See Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

Consequently, we believe that to be denied the benefit of Category 0, the defendant should have a prior arrest that, at a minimum, resulted in some accountability, even if less than a crime (e.g., a conviction of a violation, or an offense). Such a factor could then legitimately be considered in depriving a criminal defendant of the benefit of Category 0 without taxing that defendant with charges as to which he or she may well have been blameless.

This approach would be more consistent with the Working Group's theory that prior contact with the criminal justice system that has not resulted in a conviction within the meaning of the current Guidelines would nonetheless seem to indicate a propensity towards some criminal behavior that should deprive the defendant of the benefit of Category 0.

It should be noted that there is little, if any, authority nationally for consideration of an arrest in sentencing enhancement. While courts, on sentencing, have traditionally been permitted to consider acquittals, they have only been allowed to do so upon a finding (by a preponderance of the evidence) that the defendant in fact committed the crime. In contrast, the Working Group's proposal would penalize the defendant for an arrest that resulted in a dismissal, without any fact-finding requirement

as to the defendant's guilt or innocence.[3] The dangers of racial disparity and violation of due process are too great to justify any perceived benefit that might be gained.

Proposed Amendment 35(A):
§ 6B1.2 - Sentencing Procedures and Plea Agreements

We support the addition of Commentary to § 6B1.2 that would encourage the government to disclose to the defendant, prior to entry of a guilty plea, the government's analysis of the application of the Sentencing Guidelines. Such disclosure by the government would reduce the uncertainty that currently prevents some defendants from pleading guilty, and might also have the effect of reducing litigation over the application of the Guidelines. For this reason, courts have sought to persuade the government to make such disclosure, see United States v. Pimentel, 932 F.2d 1029, 1034 (2d Cir. 1991), and at least one prominent United States Attorney's Office (i.e., the Southern District of New York) has in the past year instituted a policy whereby prosecutors, if requested, will advise a defendant, in writing, of the government's analysis under the Guidelines. We believe that the Commission should endorse this approach by amending § 6B1.2 as proposed.

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[3] Moreover, in the event of an inaccuracy, police arrest records -- which might well be the only records reflecting a dropped charge -- would be extremely difficult for the defense to counter years later.

Issues for Comment 35(B) and (C): Chapter Six - Sentencing Procedures and Plea Agreements

In response to Issue for Comment 35(B), we oppose any amendment of the Guidelines that would allow consideration on sentence of conduct that is described in a count dismissed by plea agreement and does not fall within the scope of relevant conduct under § 1B1.3.

Prior to the Guidelines, a defendant's "relevant conduct" could be but was never required to be considered in imposing sentence. Section 1B1.3's relevant conduct provisions, and particularly those of § 1B1.3(a)(2) involving acts that were "part of the same course of conduct and common scheme or plan as the offense of conviction," already serve to increase sentences substantially, and thereby to increase the prosecution's power over sentences.

Those offenses that do not, under the present Guidelines, allow for the consideration on sentence of other uncharged or unconvicted conduct should not be changed, so as to permit upward departures on the basis of such conduct. Under the Guidelines structure, the very reason that sentencing levels for such offenses do not take into account non-offense conduct is that these offenses can "readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing." Background comment, § 1B1.3. For example, when one of a defendant's two robbery counts is dismissed, none of the factors that the Commission has

concluded warrant increasing the offense level for uncharged or dismissed "relevant conduct"[4] supports a court's consideration on sentence of the facts involved in a "discrete," dismissed robbery count.

Allowing prosecutors to charge additional unprovable offenses and then seek upward departures on the basis of dismissed counts would substantially do away with this basic distinction and would result in further, unwarranted control by the prosecution over sentencing.

With respect to Issue 35(C), we oppose any Guideline provisions specifically addressing any of the enumerated possible uses of conduct for which the defendant has been acquitted. While we understand that pre-Guidelines courts sometimes took such conduct into consideration on sentence, they did so very rarely, and we believe that encouragement of this use by any specific Guideline provisions would be inappropriate.

Proposed Amendment 36(T):
§ 3B1.3 - Abuse of Position
of Trust or Use of Special Skill

We support this proposed amendment and agree that it provides a fairer and more workable definition of that conduct which justifies an adjustment on the basis of an abused position of trust.

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[4] E.g., additional quantities in a drug case, or additional loss amounts in a mail fraud case.

Proposed Amendments 33(A) - (D):
Chapter Five (Departures)

We support all of the proposed amendments that would expressly permit downward departures in those situations in which offender characteristics that are ordinarily not relevant to a departure either are present to an unusual degree or in combination present an unusual circumstance meriting a downward departure. Proposed Amendments 33(A) and (B) incorporate recommendations of the Judicial Conference, which noted that in particular cases, the present Guidelines have produced unduly harsh results that are inconsistent with the rehabilitative purposes of sentencing. We believe that the recommendations of the Judicial Conference, which reflect the combined experience of sentencing judges across the country, should be adopted.

In a similar vein, we believe that a court should be able to consider a defendant's lack of youthful guidance, history of family violence, or a similar factor as a ground for departure, where such factors are present to an unusual degree or are combined with other factors. We would also welcome an amendment that permits a downward departure, in appropriate circumstances, for a defendant of an advanced age.

#17

STATEMENT OF
JEFFREY S. WEINER
PRESIDENT
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE
UNITED STATES SENTENCING COMMISSION

FEBRUARY 25, 1992

Mr. Chairman and Commissioners, it is my privilege to appear before you today as President of the National Association of Criminal Defense Lawyers, on behalf of 25,000 dedicated private lawyers, public defenders, law professors, law students and related professionals who are members of NACDL and its 54 state and local Affiliates.

We appreciate this opportunity to testify today, to continue a process of NACDL working with the Commission which is as old as the Commission itself. Though we may not always see eye to eye, I want to express our most sincere appreciation for your ongoing openness to our input. You have labored mightily at a difficult and important task, under an often contradictory statutory mandate, and have excluded no one.

We extend our deepest appreciation to the Commission

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for establishing the Practitioners' Advisory Group, as a channel for the criminal defense bar to work more closely with the Commission. We hope that the input the Commission has received from the Advisory Group has been useful in identifying problem areas in the guidelines and advancing our common goal of sentencing rationality and fairness.

We urge one more important step in this direction, however. Of the three basic components of the criminal justice system--defense, prosecution and judiciary--two have been generously represented among the membership of the Commission since the beginning. The authorizing legislation mandates three seats for federal judges and one ex officio seat for the Justice Department, and in fact, prosecutorial experience has been well represented in various members of the Commission.

But as commendable as the Commission has been in bringing the defense bar into the process through outreach such as the Practitioners' Advisory Group, the fact remains that the defense bar--the third necessary, coequal and in fact <u>constitutionally mandated</u> branch of the criminal justice system--is not yet an equal partner in the process. No criminal case in the nation can go forward without a defense lawyer participating, and yet these guidelines which bind every defendant and defense lawyer in the federal system have been written for years with no direct participation by any person with significant practical experience in the representation of people accused of crime.

We ask the Commission to throw its weight behind seeking a public or private defender member of the Commission. Obviously,

the final appointment power rests in the White House. But if the Commission were to take the position that the addition of a defense member would enrich the Commission's deliberative process and improve the chances of producing guidelines which require less subsequent refinement and correction, we have no doubt that such a position would be considered most seriously at both ends of Pennsylvania Avenue.

We also suggest that the Commission make a formal recommendation to Congress for legislation establishing a non-voting defense seat equivalent to that provided for the Justice Department--an ex officio seat, that is, either for a federal public defender or a representative of the Defender Services Division of the U.S. Judicial Conference.

Mr. Chairman, one of the most powerful and unsettling criminal law reform documents to come forth in recent years was this Commission's extraordinarily thorough August 1991 report on mandatory minimums. Such a report we think fulfills one of the Commission's most vitally important statutory mandates--that is, to recommend to Congress, under section 994(r), legislation to help the Commission fulfill its mission of providing fair and individualized sentencing, and avoiding unwarranted sentencing disparities.

Mandatory minimums are the main obstacle to that mission. They are the bull in the china shop of sentencing reform.

We commend the Commission for dissecting this issue so conscientiously. Never has there been such a clear and well

documented understanding of the disastrous consequences of mandatory minimums. We are confident that reform will come, as it did in 1970.

The problem, as you know too well, is that political considerations may prevent quick action.

We would like to suggest a few significant related problem areas which can and should be corrected without waiting for a comprehensive repeal of mandatory minimums.

1. Race proportionality review: The first is the issue of race in sentencing. Your report found disturbing evidence of racial disparities in mandatory minimum cases. And though we realize that you may have some disagreement, Judge Heaney's study in the Eighth Circuit found some similar evidence in guideline cases. Looking at either of these findings, it is not necessary to say that either mandatory minimums or the guidelines are inherently racially discriminatory. Such discrimination as there may exist does not necessarily enter through the law but through the people who carry it out--from the law enforcement officers who investigate offenses and make arrests, to the prosecutors who file charges, to the juries and judges who hear the case. Though both Congress and the Commission have made clear that they expect race-neutrality in sentencing, indications are that racial disparities creep in nevertheless.

We appreciate that the Commission has sought conscientiously to carry out Congress's directive that the guidelines must be

neutral as to race, by providing in guideline 5H1.10 that race is simply "not relevant" in determining a sentence. Our concern is that, although the guidelines are race-neutral, other factors contributing to the sentence may not be, and the guidelines' prohibition against considering race has the unintended effect of preventing judges from adjusting sentences to correct for discrimination which has otherwise already influenced the case. Currently, a federal judge is powerless to correct a racial disparity even if he conclusively determines that the defendant's or victim's race is the sole factor responsible for a higher sentence.

We believe that the Commission can correct this problem itself, within the statutory restrictions, simply by changing the "not relevant" sentence in 5H1.10 to read: "Sentences imposed shall be entirely neutral as to race, sex [etc.]." Under this formulation, judges would be authorized to depart where necessary to avoid a discriminatory result.

Alternatively, if it is determined that the statute does not afford the Commission this latitude, we recommend that legislation be sought revising the last sentence of §994(d) to read: "The guidelines and policy statements shall contain provisions ensuring that sentences are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."

This process of sentence correction can be called "race proportionality review." We have drafted legislative and

explanatory language on this issue, based upon the non-discrimination theme of the administration's "Equal Justice Act," as approved by the House of Representatives last Fall, which I will be happy to furnish to the Commission.

2. Good time. Bureau of Prisons Director Michael Quinlan has told Congress that the current automatic 54 days per year of good time does not give him sufficient tools to control discipline, particularly among inmates serving long mandatory minimums. We agree with this assesment, and with the findings of the National Task Force on Correctional Substance Abuse Strategies, published by the Justice Department's National Institute of Corrections in June 1991, which strongly recommended the establishment of incentives for inmates to initate and maintain their commitment to treatment and other correctional programs. The report particularly commended good time credits as a "powerful incentive" for good behavior.

Again, we have prepared legislative and explanatory language on this point, which we offer for the Commission's consideration in recommending to Congress. It is based upon the most thoroughly analyzed and successful good-time program in the nation--the one in Illinois. That state's 90-day per year good-time allowance was reviewed in an extensive report by the National Council on Crime and Delinquency, under contract with the state Department of Corrections, which found that the law saved the state $1.2 billion in prison costs, while having a negligible effect on

public safety--that is, only one-fifth of one percent of the offenders released committed a new offense during the period of their early release. I will provide a copy of the report to the Commission with our other submissions.

Under the Illinois program, violent offenders are not eligible for good-time consideration, and the credits must be earned, by participation in some desirable program, such as education, treatment, or job training.

Based on this report, the Illinois legislature voted to double the 90-day maximum allowance, to 180 days. We would note that if there is a concern that vesting this type of authority in the Director of the Bureau of Prisons--where current good-time authority is vested--might begin to undermine the guidelines, the new legislation could give the Commission the authority to set guidelines governing the BOP's determinations or, alternatively, the authority to make the determinations could be vested back in the sentencing judge. The bottom line is maintaining some power of rational and consistent sentencing differentiation, consistent with the principles driving the guidelines--i.e., where such differentiation is warranted and controlled by uniform factors.

3. Consistency in Drug Sentencing. The third and final issue we wish to suggest is drug-quantity disparities. The Commission is well aware of the drug-dosage disparities produced in LSD cases, because of counting the weight of the carrier, whether sugar cubes, blotter paper or some other medium. Unfortunately,

LSD is only the most egregious situation where sentencing uniformity is frustrated--if not obliterated--by the combination of arbitrary drug quantities, carriers or cutting agents, and mandatory minimums.

As Justice Stevens pointed out in his dissent in the Chapman LSD case, dose disparities are scattered throughout title 21's sentencing provisions: In his footnote 12, he notes that the defendant in Chapman actually sold about 12,000 doses of LSD and got a 20 year sentence, but that a heroin dealer would have had to sell ten kilograms--yielding between one and two million doses--to get the same sentence, a cocaine dealer would have to sell between 325,000 and 5 million doses, but a crack dealer would have to sell only 50,000 doses.

We think it is time to do two things: First, immediately change the LSD provision to exclude the weight of any carrier substance. Your letter to Chairman Biden, Judge Wilkins, on April 28, 1989, indicates your longstanding sensitivity to this issue. Ultimately, we support the elimination of the "detectable amount" standard in the title 21 mandatory minimum penalty provisions--a standard which, like the LSD carrier issue, results in low level dealers receiveing proportionately heaview sentences than their higher-ups who deal only in the pure drug.

Second, we hope that the Commission will seek a full review of the dose equivalencies in current law, with an eye to recommending to Congress that those amounts be changed to assure greater sentencing uniformity among different types of drugs.

Again, we have prepared legislative and explanatory language proposing such a review to be conducted by the National Institute on Drug Abuse--that is, as dose comparison, including any appropriate multiplier to take relative dangerousness of the various drugs into account--and we are happy to furnish this material for your consideration.

The question we would ask today is for you to consider whether this is a review that the Sentencing Commission might be able to undertake itself, in consultation with NIDA or other expert drug agencies, and then furnish a report to Congress documnenting the disparities and recommending appropriate changes in the statutory drug quantities.

I realize that the issues I have presented are a mix of legislative and guideline issues. But all affect the fundamental mission and success of the guidelines, and we hope the Commission will be as activist as possible in working for the necessary legislative changes.

We thank you for your kind consideration of these important matters.

#18

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
PROBATION & PRETRIAL SERVICES OFFICE

JACK R. SAYLOR
CHIEF PROBATION OFFICER
212 U.S. Courthouse
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Sioux Falls, SD 57102
605/330-4437
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Reply To: Sioux Falls

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Rapid City, SD 57701
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February 21, 1992

United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D.C. 20005

RE: Proposed Amendments

Dear Sir/Madam:

Attached are our comments on selected proposed amendments to the sentencing guidelines. Please call if you have any questions or comments.

Sincerely,

Jack R. Saylor

Jack R. Saylor
Chief Probation/Pretrial Officer

/jrs
Enclosure
cc: Honorable Vincent L. Broderick, c/o Research Division, Federal Judicial Center.

RESPONSES TO PROPOSED AMENDMENTS TO FEDERAL SENTENCING GUIDELINES

I: Amendments Responsive to Judicial Conference Recommendations

Introduction: Option preferences, comments, and other requested responses are offered in the order presented in the "Synopsis of Proposed 1992 Amendments to the Federal Sentencing Guidelines," prepared by the Federal Judicial Center.

Amendment 29

Options 1,2, and 3 preferred.

Comments:
1. Options 4-6 might, but 1-3 do not.
2. Consistent w/Congressional intent, certain "white-collar" offenders who have historically received "lenient" sentences in the past, should not be eligible for straight probation or even probation with a fine and/or restitution. Some other, more punitive, sanction(s) should be required. The challenge, of course, is arriving at an acceptable definition for the term "white-collar".
3. Yes. Sentencing alternatives similar to those suggested should be available. This could be accomplished by creating zones on the Sentencing Table where these options would be available as conditions of probation.

Amendment 33

Part (A): Agree.
Part (B): "
Part (C): Perhaps in the case of a youthful defendant and/or in other extreme cases where there is convincing evidence that the defendant's early experiences were so devastating that a mental state approaching "diminished capacity" exists, a downward departure may be appropriate. Consistent with a fundamental principle of the Guidelines, the Commission should promulgate a departure policy statement in this area and then let the Courts "carve out a heartland".
Part (D): In these days of severe prison overcrowding, fiscal restraint, and community confinement options, downward departure should definitely be permitted for the profile described.

Amendment 26

Part (A): Option 2 preferred; however, illuminating the "nature of prior offenses" will increase the investigative burden of the Probation Officer and could delay sentencing in some cases.
Part (B): This appears to be a good amendment, but once again, it will increase the Probation Officers' investigative burden; determining "degree" and "type" of risk is time consuming.
Part (C): Agree.

Amendment 23

Option 3 preferred. Enactment of Option 3 could also resolve the problem of the split among the Circuits relative to the scope of acceptance of responsibility, i.e., a defendant would be able to choose if he/she wants to accept responsibility for the relevant conduct, and thereby, receive the additional one-level reduction. They would receive benefit of pleading without being "forced" to accept responsibility for all the relevant conduct.

Amendment 1, Part (A)

Agree with amendment.

Amendment 1, Part (B)

Agree with amendment.

II: Additional Amendments of Special Interest
(Comments offered relative to **selected** amendments only)

Amendment 16, Part (A) & (B)

Agree with amendments.

Amendment 17, Part (A)

Agree with amendment; however, including law enforcement officers as "participants in the offense" must be monitored closely.

Amendment 17, Part (B)

Agree with amendment.

Amendment 18, Part (A)

Comments:
1. Agree with amendment if the conduct characterized as "individuals who typically participate" can be adequately defined.

Amendment 18, Part (B)

Disagree. The current guideline appears adequate.

Amendment 19, Part (A)

Disagree. This issue is better addressed through the proposed amendment to the 1B1.3, Relevant Conduct, and is already addressed to some extent in the Drug Table.

Amendment 20

Agree with amendment. Option 3 with a minimum offense level of 16, and a cross reference to §2D1.1, appears most appropriate.

Amendment 4, Part (A)

Agree with amendment. The circumstances addressed in this amendment have been at issue in cases sentenced in this district.

#19

To: U. S. Sentencing Commission
1331 Pennsylvania Ave., NW
Suite 1400
Washington D. C. 20004

Attention: Guideline Comment

From: C. U. R. E. (On behalf of over 72,000 federal prisoners)

C. U. R. E. (Citizens United for the Rehabilitation of Errants) would like to offer the following comments and proposals relevant to the published recommendations of the Commission:

§ 1B1.3, Relevant Conduct: C. U. R. E. objects to the further expansion of "relevant conduct," which is what the Court considers in setting base offense levels and making other important determinations. The Commission does not appear to view its recommended changes as an expansion of the existing guideline. However, particularly in the situation of uncharged conspiracies, it is not fair to the defendant to have a finding made that an act or omission by others was reasonably forseeable by him, when he, in fact, did not foresee any such act or omission taking place. Holding a person responsible for such behavior of others goes far beyond aiding and abetting and expands the conduct for which the defendant may be responsible by inserting the Commisssion's proposed amendment into Section 1B1.3(a)(1). When uncharged conduct is considered at all, the defendant's intent should be the governing guide.

§ 2F1.1, Fraud and Deceit: C. U. R. E. objects to the treatment of individuals sentenced for fraud involving financial institutions being differently situated (in this case significantly more stringently) than those frauds that involve other type victims. The Commission is proposing creation of a disparity.

§ 2D1.1, Unlawful Manufacturing, Importing, Exporting, or Trafficking: C. U. R. E. requests modification of the current offense levels for Schedule I or II depressants and Schedule III substances, so as to reflect the same existing level as now for a larger amount of drugs and a corresponding lowering of levels for the amount now listed as the threshhold Level 20. There should be a difference in sentence for those selling 100 kilograms of a substance as opposed to 20 kilograms, but the level for 20 kilograms should be lower, as opposed to making a higher level for 100 kilos. The present sentence levels for all drug offenses is too high! These lengthy sentences are accomplishing nothing, except creation of an enormous bill for the American taxpayer and perpetuation of a bureaucracy of prison guards, despite the noble goal envisioned.

§ 2T1.1(b), Offenses Involving Taxation: C. U. R. E. strenuously objects to the treatment of tax evaders differently, depending upon their source of income. Drug defendants have to deal with substantial sentences as it is. To treat one tax evader with a minimum level of 12, but treat another tax evader with a minimum level of 17, just because his criminal activity relates to controlled substances is the equivalent of overkill. Once again, the Commission proposes creating a disparity - exactly what the Guidelines is supposed to eliminate.

§ 3B1.1, Role in the Offense: A. C. U. R. E. strenuously objects to including law enforcement agents as participants to aggravate the defendant's role. Potential abuse of this proposed change should be obvious. The Commentary does not control this abusive potential. Undercover agents would not have to "recruit" other

agents for them to count as participants. By contending that an operation needed more than one agent, each would be counted, as the proposed section now reads. This is particularly deplorable when considering the fact that government informers (who are not government employees, but perform as if they are) are now included and the further fact that law enforcement officers cannot be considered members of a charged conspiracy.

B. C. U. R. E. feels mitigating role adjustments should apply in all cases in which the defendant is substantially less culpable than other defendants in the same case. Certain functions that are minor roles in drug activity should be automatically eligible for mitigating adjustments. The Judge should have discretion to make findings based upon the preponderance of the evidence standard and treat the defendant discretionarily. No defendant should be disqualified from mitigating role adjustment. New Application Note #4 for the Commentary to § 3B1.2 is laudatory, as is proposed amendments to § 2D1.1(b), involving minimal participation, because it is desireable to have different offense level caps for minor role offenders. Each drug should have a different offense level cap, which would limit the sentence imposed. Mandatory minimum penalties should be dropped entirely and criminal history should not affect offense caps.

§ 3C1.2, Reckless Endangerment During Flight: C. U. R. E. objects to the possibility of enhancement based on the wording "substantial risk of death or serious bodily injury," unless intent of the wrongdoer is fully considered. If the escapee had absolutely no intention of hurting anyone, and, in fact, did not injure anyone, he should not have his conduct aggravated for something that never happened.

§ 3D1.2, Multiple Counts: C. U. R. E recommends no change in the present structure relating to multiple counts.

§ 3E1.1, Acceptance of Responsibility: C. U. R. E. believes that acceptance of responsibility should not be affected by the exercise of the constitutional right to proceed to trial, and that a two level decrease should be available at any time prior to sentencing. Acceptance of responsibility should be limited solely to the offense of conviction and not to related conduct, for which the defendant may not have been charged. Three level reductions should be available for all offense levels over 30 and four level reductions should be available for all offense levels over 40. There should be no penalty for going to trial under any circumstances.

§ 4A1.2, Definitions and Instructions for Computing Criminal History: C. U. R. E. strongly urges not counting convictions that have been reversed, vacated, annulled, set aside, expunged or pardoned. The sentencing authority that made the prior decision to do any of the above, obviously meant that such prior conviction should not have a future detrimental effect on the defendant. By allowing such effect to take place anyway is to mandate invalid convictions affecting future sentences.

§ 4A1.3, Adequacy of Criminal History Category: C. U. R. E. opposes the proposed amendment for this section, simply because complete and total discretion to charge defendants under the Career Criminal sections remains with the prosecution - not the judiciary. To allow one offender with the same criminal history as a second offender the benefits of a departure, because he was not charged under a Career Criminal section is discriminatory. Disparity is what the New Guidelines is supposed to be about and departures should not be magnified by discretionary government charging authority.

§ 4B1.2, Definitions of Terms Used in § 4B1.1: A. "Offense Statutory Maximum" should refer to what the statute says before any enhancement caused by another statute. A prior criminal record should not be used in determining the offense

level under this guideline.

B. C. U. R. E. strongly urges that two prior offenses which are not related be counted as one conviction, if they could have been consolidated for trial as joinable offenses under FRCrP 8(a), for Career Offender purposes. Furthermore, this option should be expanded to include offenses that could have been joined under FRCrP 20(a) and (b) in one jurisdiction. The alternative is potential abuse by prosecutorial manipulation.

C. In order to count, the instant offense should have been committed subsequent to the prior conviction. There should be three separate encounters with the criminal justice system for career criminal status. As it is now, manipulation by an AUSA of his charging authority under either Rule 8 or Rule 20 FRCrP can make a recidivist for career criminal purposes out of a person who really has only one short crime spree in more than one jurisdiction.

Chapter Five, Part A - Sentencing Table: C. U. R. E. favors no change in the present table, which begins with Category I and ends with Category VI for criminal history purposes.

Chapter Five, Part C - Imprisonment: C. U. R. E. favors any enlargement of the number of defendants eligible for alternatives to imprisonment. These alternatives should apply to all defendant's. C. U. R. E. suggests the minimum term for eligibilty should be one year and that §5B1.1(a)(2) should be amended accordingly. Probation with confinement conditions should be available to those previously eligible for "split sentences." Split sentences should be available to guideline ranges up to 24 months. The judge at sentencing should have all intermediate options available as alternatives to incarceration.

Chapter Five, Part A - Departures: C. U. R. E. objects to a change in departure that would make it necessary to combine age with another factor to justify departure. Citizens over 60 have no business being in prison. The additional costs to the American taxpayer are enormous. Furthermore, the use of the nebulous term "major drug trafficker" should be avoided entirely, in determining whether an elderly defendant merits a downward departure, if the defendant's risk of recidivism has been reduced and he is to serve a substantial portion of his sentence. Elderly drug traffickers should not be singled out and treated differently than any other elderly defendants.

§ 5K1.1, Substantial Assistance: Under no circumstances, should a government motion be necessary for a court to reward a defendant for "substantial assistance to authorities." The Court should be able to make this finding by itself.

Chapter Six - Sentencing Procedures and Plea Agreements: A. The Commission should not "encourage," it should require the Government in plea discussions prior to Rule 11 colloquoy to disclose any and all information that is relevant to the application of sentencing guidelines.

B. If a count is dismissed, C. U. R. E. urges that the conduct underlying that count should not be considered as grounds for an upward departure. Furthermore, if a defendant is acquitted of conduct, under no circumstances should any evidence related to such conduct be used 1) to determine offense level; 2) for selecting a sentence within the guideline range, or; 3) as a basis for an upward departure. The alternative is incarceration, even though the defendant has not been found guilty.

Proposed Amendment to §1B1.10 (Retroactivity of Amended Guideline Range). C. U. R. E believes that all proposed amendments to the Guidelines which may lower a defendant's sentence should be retroactive and be considered under Title 18 U.S.C. §3582(c)(2). The amended guideline range should not be limited to amendments listed in subsection (d) of §1B1 10. Regardless of the purpose of the amendment or the magnitude of the change in the guideline range or the "difficulty" of applying the amendment retroactively, it should be remembered that the guidelines themselves were conceived to eliminate disparity. It does not behoove the Commission to have two inmates with the same conduct serving different lengths of incarceration, merely because one was sentenced at a different time than the other. The ISM (Inmate Systems Manager) at each BOP facility recomputes release dates on a daily basis. It is in the public interest to have each defendant with similar conduct - similarly sentenced - regardless of sentencing date. By appropriately amending the retroactivity section, this goal can be accomplished.

Commentary to § 2D1.1 - Proposed Additional Paragraphs. C U. R. E. strenuously objects to the "aggregating" of quantities involved in a substantive drug offense together with an attempt or conspiracy involving the same substantive offense. C. U. R. E. also objects to the weight under negotiation in an uncompleted distribution being used to calculate the applicable amount, unless there is a specific finding by the Court that the defendant had the ability to produce the negotiated amount. Agents and informers puff up the amounts negotiated so as to exceed certain minimum mandatory levels (levels that are unknown to the defendant). To say that the defendant is reasonably capable of producing an amount is not the same as saying that the defendant intended to produce that amount. There should always be "intent" to conduct a crime. Presently, there are many incarcerated individuals, who never had any intention of going through with the details of a government induced reverse sting operation. Yet, they are incarcerated based on these fictitious puffed-up amounts for inappropriate sentence lengths.

§ 5K2.17, Extraordinary Physical Impairment. C. U. R. E. applauds the creation of this new section.

There are additional proposals C. U. R. E. wishes the Commission to consider this year. They include the following.

I. Reinstitute Parole: Neither of the two prime objectives of the New Sentencing Guidelines would be diminished by allowing parole to all first-time non-violent offenders after service of one-third of their sentences.

A. Disparity of prior parole release dates would be avoided by an across-the-board policy.
B. Establishment of the certainty of jail time for even minor offenders would be unaffected.

C. U. R. E. envisions the absence of an arbitrary disenfranchisement of parole or departure for so-called "aggravating factors." Reinstituting parole mandates the repeal of mandatory minimum sentencing laws for all crimes and a further expansion of alternatives to incarceration for all offenders. Experts in the field of corrections realize it does not take a lengthy prison sentence to deter future criminal conduct. The lesser recidivism rate for non-violent first-time offenders indicates these people deserve a second chance.

II Institute Superior Programming Achievement As a Release Incentive: Under

the new guidelines, there is no incentive to reward superior deeds to those who are incarcerated. Studies prove that society benefits from an inmate who is able to help himself upon release. If an inmate can earn a degree or learn a vocation, he should be rewarded with a meaningful sentence cut. C. U. R. E. suggests a one year sentence cut for each degree and/or apprenticeship earned by an inmate.

III. Increase Good Time Benefits for Those Under the New Law: Meaningful good time credits must be instituted for all inmates who are non-parolable before prison riots become a certainty and innocent people are hurt.

Presently, those incarcerated under the New Sentencing Guidelines are faced with doing 85% of their time. There is no incentive for good behavior or self-improvement. For the long-termers that make up a disturbingly large amount of the people entering the system, the handwriting is on the wall - they will spend the majority of their time in prison. It is only a matter of time before this situation deteriorates into chaos. When the higher security level institutions consists of a large majority of inmates with no hope, violence and anarchy will escalate. Try telling a 25 year old non American citizen that he must spend the next 30 or 40 years in prison and that you expect him to spend his time at non-meaningful labor at slave wages and what do you think will be his retort?

IV. Increase Availability of Halfway House, Curfew Parole and House Arrest: Both halfway house and house arrest (also known as curfew parole) should be available for longer periods of time (current maximums: halfway house - six months; house arrest - two months). These options should be available to all federal prisoners according to need because they are proven concepts that work. These programs should be a requirement for long term offenders who need them for an orderly transition to society. C. U. R. E. suggests a combination of these programs be made available for up to two years to those who will be incarcerated for more than five years. The Commission needs to establish set criteria and take the abuse of discretion relating to placement away from the BOP. If implemented, the costs to taxpayers will be reduced from the $40,000 per year, per inmate range to the $10,000 per year per inmate range.

C. U. R. E. thanks the Commission for allowing us the opportunity to offer this input.

UNITED STATES SENTENCING COMMISSION
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#
80

William W. Wilkins, Jr. Chairman
Julie E. Carnes
Helen G. Corrothers
Michael S. Gelacak
George E. MacKinnon
A. David Mazzone
Ilene H. Nagel
Benjamin F. Baer (ex officio)
Paul L. Maloney (ex officio)

February 27, 1992

MEMORANDUM

TO: Chairman Wilkins
Commissioners
Senior Staff
Mike Courlander

FROM: Phyllis J. Newton
Staff Director

SUBJECT: Comment from Federal Probation Officer

At the Commission's recent training program in San Diego, Deputy Chief Probation Officer Jerry Denzlinger (an officer who has been an extremely valuable friend and aide to the Commission) asked me to deliver the attached recommendation from one of his officers. He has very high praise for this officer and feels confident that the suggestion has been well researched and undergone considerable discussion among presentence report writing officers in the Southern District of Texas. Please excuse his remark at the end; he has submitted suggestions previously that I believe got lost in the shuffle (I have written what I hope will be an appeasing letter).

I attach the recommendation for your consideration during this amendment cycle.

Attachment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
PROBATION OFFICE

February 6, 1992

CORPUS CHRISTI DIVISION
606 N. Carancahua, Suite 1500
Corpus Christi, Texas 78476

Mr. Jerry Denzlinger, Deputy Chief
U. S. Probation Officer
P. O. Box 61207
Houston, Texas 77208-1207

RE: SINGLE ACT OF ABERRANT BEHAVIOR

Dear Jerry:

During the staff meeting here in Corpus Christi on February 4, 1992, you mentioned that there are some proposals to the Sentencing Commission regarding an increased emphasis on the defendant's social background. I am quite concerned that such arbitrary issues as a defendant's social history will become an issue at sentencing proceedings. As you are aware, sentencing proceedings already have become very adversarial and complicated concerning the guidelines. To now try and account for experiences a defendant may or may not have had in their formative, as well as adult lives, on a social basis, would be a nightmare.

As indicated in our meeting, it is felt as an alternative to trying to measure the concerns noted above, the Sentencing Commission should instead consider defining "single acts of aberrant behavior" committed by defendants, which would warrant a downward departure. The Commission notes in the last line of page 7 of the guidelines manual, that it has not yet dealt with this issue. I believe it is time to define this term. With the assistance of Sr. USPO Dick Leonard and USPO Glenn Reinecke, the following proposal for a departure issue is being presented:

5K2.17 Single Act of Aberrant Behavior

The Court may depart downward for a single act of aberrant behavior provided the following criteria exists:

The offense (1) was opportunistic in nature; (2) did not involve more than minimal planning; and (3) did not involve the use of sophisticated means to impede the discovery or extent of the crime, and

The defendant (1) was not given an adjustment under 3B1.1, 3C1.1, or 3C1.2; (2) has no prior convictions, countable or otherwise, with the exception of the type of offenses found at

4A1.2(c)(2); (3) the court did not find the provisions of 4A1.3(c)-(e) are applicable; and (4) there is no other evidence of prior criminal conduct.

Commentary

This section is designed to provide the court with the discretion to depart downward in a case where an otherwise law-abiding citizen becomes involved in a criminal act that uncharacteristically deviates from the defendant's usual behavior. This section is not intended for those cases where relevant conduct includes additional criminal acts committed by the defendant, except where those illegal acts would have been grouped in accordance with 3D1.2(b).

Jerry, it has been my experience that the Sentencing Commission pays little heed to the other letters I have written them concerning such issues as criminal history scoring and Role in the Offense issues. If you believe that the above would be of benefit, please feel free to use and promote it. Should you feel the need to discuss it further, please don't hesitate to contact me.

Sincerely,

Bill Cazalas
Sr. U. S. Probation Officer

BC/rht

#21

WASHINGTON LEGAL FOUNDATION
1705 N STREET, N. W.
WASHINGTON, D. C. 20036
202-857-0240

March 2, 1992

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

Re: Comments of Proposed Amendments to Guidelines

Dear Commissioners:

In addition to my testimony submitted and delivered on February 25, 1992, I would like to add the following comments on behalf of the Washington Legal Foundation to the Commission's proposed changes to Section 2Q2.1 relating to protection of Fish, Wildlife, and Plants.

In particular, we take exception to the Commission's proposed revision of Section 2Q2.1(b)(2)(A) and (B). With respect to (b)(2)(B), the Commission proposes increasing the sentencing level if the offense "involved a pattern of similar violations." As I pointed out in my testimony on February 25, 1992 with respect to Section 2Q1.2 and 2Q1.3 of the environmental guidelines and Section 2N2.1 regarding Food and Drug laws, past administrative, civil, or criminal history is totally inappropriate when considering offense characteristics. Rather, past misconduct is clearly an offender characteristic and is already accounted for either in the criminal history category, or in Section 4A1.3 which allows a court to depart if that history does not adequately represent the prior misconduct of the defendant.

With respect to revising the term "pecuniary gain" under 2Q2.1(b)(2)(A), the Commission proposes to add Application Note 1 which defines pecuniary gain to include cases where "losses are reduced (e.g., farmer destroys migratory birds to prevent their consumption of cereal grains." We think that this example is an extremely unfortunate one to use as one justifying an increase in punishment. Indeed, to prohibit a farmer from protecting his or her own property raises serious due process and "takings" considerations under the Fifth Amendment. See, e.g., Christy v. Lujan, 109 S.Ct. 3177 (1989(dissenting opinion to denial of certiorari by Justice White). The right to protect one's property as Justice White notes is a fundamental right at common law. See also Burrows v. City of Keene, 432 A.2d 15, 19 (N.H. 1981).

In the Christy case, the farmer killed a grizzly bear which had been eating the farmer's sheep; an administrative action was filed against him under the Endangered Species Act and he was fined $2,500. The farmer filed a civil suit arguing that the law constituted a taking of his property just as surely as if federal rangers took his sheep and fed them to the bears. The Commission appears to be insensitive to legitimate property rights of farmers and property owners (with respect to wetland violations) who reasonably use and protect their own property. Why should a farmer protecting his grain from the ravages of nature be faced with a criminal penalty greater than a person who wantonly and senselessly shoots and kills endangered species for no reason whatsoever? Why does the Commission equate the conduct of an farmer protecting his crop from being devoured by common blackbirds with greedy poachers who kill rare and endangered species and sell their parts here and abroad?

The Christy case further illustrates the capricious manner in which the Justice Department exercises its prosecutorial discretion in bringing criminal rather than civil charges as more fully described in my testimony. If a person poisons a common blackbird that is causing a nuisance, a violation of the Migratory Bird Treaty occurs which is a strict liability crime. In United States v. Von Fossan, 899 F.2d 636 (7th Cir. 1990), a criminal case was filed against a man who poisoned common blackbirds because the town fathers of Springfield, Illinois told him to get rid of the birds on his property making a nuisance. While it is perfectly lawful to shoot and kill them, the law prohibits poisoning them. As Judge Easterbrook noted in Von Fossan, "[c]an it be that the Migratory Bird Treaty Act condemns as criminal anyone who takes (effective) steps to rid his land of pigeons carrying histoplasmosis? The answer is 'yes' [because courts have held that] the Migratory Bird Treaty Act establishes a strict liability offense." 899 F.2d at 639. As Judge Easterbrook further noted, Mr. Von Fossan should consider himself "lucky" because he was sentenced to probation for a pre-guideline offense. A similar offense today would likely draw a prison sentence under the guidelines, and almost certainly so under the proposed amendments despite Congress' command that probation be the appropriate punishment for minor non-violent offenses (against humans) for first offenders.

The Commission also proposes to change 2Q2.1(b)(3)(B) by eliminating the notion that a quantity of protected fish or birds were killed, and to substitute "(ii) any fish, wildlife, plant on endangered or threatened species" list regardless of the number killed. Again, lucky for our farmer in Christy that only administrative charges were brought; if the proposed changes are adopted, we predict that the Commission will see more John Pozsgai-type cases where substantial prison time is imposed for minor regulatory offenses. The Commission has not indicated that there are any studies showing why the current guidelines in this area are not sufficient to meet the ends of punishment and are in need of revision. We urge the Commission not to make any changes in this section without further study, review, and justification.

Respectfully submitted,

Paul D. Kamenar
Executive Legal Director

TESTIMONY OF

PAUL D. KAMENAR,
EXECUTIVE LEGAL DIRECTOR
WASHINGTON LEGAL FOUNDATION

before the

UNITED STATES SENTENCING COMMISSION

February 25, 1992

Mr. Chairman and Members of the Commission:

My name is Paul D. Kamenar; I am the Executive Legal Director of the Washington Legal Foundation, a nonprofit public interest law and policy center that has participated in Commission hearings and proceedings over the years. Thank you for the opportunity to testify again today before the Commission on the proposed revisions of the sentencing guidelines and other aspects of the guidelines. My remarks will be brief although I hope to supplement these comments with further written comments for the record.

While I will focus my testimony on the proposed changes to the environmental guidelines, specifically Proposed Amendment 10 to Section 2Q1.2, I would also like to make some general observations about proposed changes to certain other parts of the guidelines.

Proposed Change To Section 2Q1.2

As the Commission is well aware, we have been urging the Commission over the years to remedy the fundamentally flawed environmental guidelines that mandate offense levels of 16 or higher for minor regulatory environmental offenses. Such levels result in minimum prison terms of 21-27 months for first time offenders where little, if any, harm to the environment occurred. In some cases, the court is required to sentence first time offenders to prison for the statutory <u>maximum</u> term (e.g., three years for a Clean Water Act violation or one year for negligent violation) because the guidelines dictate sentences that exceed those statutory maximums. I refer the Commission to the prior testimony and submissions we have made describing this problem in greater detail and incorporate them here by reference.

These statutory maximum sentences as the mandatory minimum are clearly unjust and undermines the credibility of this Commission as Commissioner Gelacak pointed out to then Assistant Attorney General Dick Stewart at last year's Commission's hearings regarding the levels of fines to impose for environmental offenses.

A major part of the problem with the environmental guidelines (but by no means the only one) is one recognized by the Commission in the proposed change: the inappropriate double-counting of offense characteristics. To illustrate: a person who places topsoil or clean building sand on their own property without a permit which the EPA deems to be a wetland is charged with "discharging pollutants without a permit" under the Clean Water Act. That person receives a level 6 for the base offense under 2Q1.3 for discharging pollutants without a permit; 4-6 more points under 2Q1.3(b)(1) for discharging the so-called pollutant; and 4 more points for not having the permit under 2Q1.3(b)(4), for a total of a 14-16 offense level for a minor offense resulting in substantial prison time (up to 27 months) for a first offender. That sentence is not only clearly unjust, it is inconsistent with Congress' command that the guidelines "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense. . . . " 28 U.S.C. 994(j).

While we believe that the environmental guidelines are in need of major revision, we nevertheless support the proposed revision that would at least partially address the double-counting problem by excluding the 4 points to the offense level for not having a permit where the underlying offense already includes the failure to have the permit as an element of the offense.

As for the Commission's inquiry as to whether this change in Section 2Q1.2 (dealing with toxic/hazardous substances) should be applied to the parallel provision in Section 2Q1.3 for non-toxic substances, we believe the changes should apply to both sections to be consistent. There is no principled reason why a double-counting flaw should be eliminated in one section but not the other.

The Commission also seeks comment as to whether there should be any adjustments to (b)(1)(A) or (b)(1)(B) upward of 2 to 4 levels each. We strongly oppose any adjustments

in this regard; there has been no evidence or showing that these offense characteristics are too low; if anything, they are too high. As it now stands, a typical environmental case involving a discharge of a pollutant, regardless of whether any harm to the environment occurred, automatically results in a score of at least 12-14 under 2Q1.2 (8 points for the base; 4-6 for the discharge) and 10-12 levels under 2Q1.3 (6 for the base; 4-6 for the discharge). There is no reason why these already high levels should be increased further to the high levels of 14[16] to 16[18] under 2Q1.2 and to 12[14]-14[16] for non-toxic substances under 2Q1.3.

Indeed, one could argue that even with the current levels in (b)(1)(A) and (B), double-counting would still occur in many cases because that specific offense characteristic-- requiring 4 to 6 additional levels-- apply to a discharge of a pollutant; yet the discharge is also the underlying conduct charged in the indictment and presumably already accounted for in the base offense level. Thus, in accordance with the Commission's query as to whether "other adjustments should be made to the specific characteristics in subdivisions (b)(1). . . to address the perception of double counting," this problem should also be addressed. In short, the current guidelines impermissibly allow for triple-counting in many cases, and the Commission's proposal to eliminate at least one source of the double-counting (i.e., the permit provision) should, at a minimum, be adopted.

Consideration of Prior Offender Misconduct As Offense Characteristics

While this concludes our comments with respect to this specific environmental proposal, we would also like to comment generally on any future changes of the environmental guidelines, or indeed, of any other category of offenses, that would include as a specific offense characteristic the prior misconduct of the defendant as it pertains to past violations of administrative orders and the like. We believe that the Commission is improperly blurring the distinction between offense characteristics and offender

characteristics. One of the latest staff drafts to the environmental guidelines, for example, would have a specific offense characteristic based on past violations of administrative or civil orders or directives.

This issue, however, is already addressed by the Commission in Commentary 9 to Section 2Q1.2 which cross-references to Section 4A1.3 (Adequacy of Criminal History Category). That section allows the court to depart from the guidelines if the criminal history score does not adequately represent the prior misconduct of the defendant. Accordingly, that notion of past misconduct, whether for prior crimes or violations of administrative orders, should not be built into the offense characteristics for this or any other category.

In that regard, we note the Commission is currently considering such a proposal with respect to Section 2N2.1 regarding violations of Food and Drug laws. Option 2, for example, proposes to increase the base offense level by at least two levels under (b)(1) for a prior conviction, and under (b)(2) by at least two, and more likely four levels for a single violation of a administrative order. Putting aside the anomalous result that a person can receive up to an additional 4 points for a technical violation of an FDA administrative order, whereas that same person would get assessed only 2 points for a felony criminal conviction, any consideration of prior misconduct more properly should be left to the sentencing court to decide where within the range dictated by the guidelines should the court set the sentence.

We believe, as do many other observers, that the Commission should not attempt to account for every conceivable aspect of an environmental offense, all of which results in a higher offense levels. Once that level is reached, there really is nothing left for the judge to consider in deciding where within that range a sentence should be imposed. Indeed, the same alleged aggravating characteristics that drove the offense levels higher may be used by the court yet again to impose a sentence at the high end of the range in the high offense level, causing yet another, more sinister double-counting problem.

Past misconduct for regulatory offenses also should not be considered as a specific offense characteristic because that factor is considered by the government in deciding whether to bring criminal charges in the first place or allowing less drastic civil or administrative remedies solve the problem. Thus, with respect to two individuals who engaged in identical conduct and had the same intent to commit the offense, the government may choose to resolve one case administratively or civilly, and the other criminally. The fact that the latter individual is branded a felon because the government decided to prosecute based on past administrative misconduct, already accounts for this past conduct and should be used again against the defendant to punish him further; this too, would be another form of double-counting. Indeed, there are many regulatory cases where more serious offenses with repeated past administrative violations are still prosecuted civilly while less serious offenses are prosecuted criminally.

For example, the same U.S. Attorney's office in Philadelphia that prosecuted our client John Pozsgai for putting clean fill on his property with no resultant environmental harm and sending him to prison for 27 months, the longest sentence in U.S. history for any environmental crime, resorted only to civil proceedings against BP Oil for causing major pollution of the Delaware River by repeatedly violating EPA discharge levels over six years. I am also enclosing a recent letter from WLF to EPA Director William Reilly disputing his testimony to Congress that EPA seeks criminal prosecutions against wetland violators only after less drastic measures have failed to further demonstrate the arbitrariness of the prosecutorial decisionmaking process.

As the Commission revises the environmental guidelines, it should not only eliminate the double-counting, but also take into account the multitude of environmental laws with sentences ranging from 60 days to 5 years or more. The one-size-fits-all approach of the current guidelines are producing grossly unfair prison sentences not only disparate within the same category of offenses, but also as noted earlier, producing disparate sentences compared

to other more serious crimes.

For example, as noted in my prior testimony, the Commission has set a base level of only 16 for running a crack house under Section 2D1.8 where the maximum term for that serious crime is 20 years. Yet a level 16 is easily reached for many minor environmental offenses with statutory maximum terms of three years or less. Likewise, the Commission would provide only for a level 6 with no specific offense characteristics for illegal using registration numbers to manufacture controlled substances. This would invariably result in probation; yet Congress set the maximum term of 4 years for this crime. Thus, where "heartland" violations of certain drug laws occur, the Commission's guidelines produce sentences on the low range of the scale; on the other hand, where non-heartland or non-serious violations of the environmental laws occur, the resulting prison sentence is at or near the top of the statutory maximum.

There are several ways to solve this problem. One is to have a guideline for each environmental statute; after all, if the Commission can devise some 20 separate guidelines for drug offenses under Part D, it can do the same for environmental statutes. The other approach would be to have one guideline with some kind of multiplier to apply at the end of the computation process with the multiplier based on the maximum sentence allowed under the particular statute so that statutory maximum or near maximum sentences are not the norm. To use a rough example, if a the particular environmental statute calls for a one-year maximum and the guideline produces a range near that level, if the offense is an average type of offense, then the multiplier could be .5, thereby allowing the sentence to fall in mid-range of the statutory maximum. If the offense is not serious, and it is a first offense, we emphasize yet again that probation should be the norm as Congress intended. Furthermore, the Commission should keep in mind the basic sentencing principles that Congress mandated in 18 U.S.C. 3553(a) and 3572 relating to conservation of punishment. In other words, fines, restitution, conditions of probation (such as clean up costs, etc.) constitute punishment

and that in many regulatory infractions, any prison sentence, let alone excessive ones, simply constitutes gratuitous punishment. It is one thing for the Commission to conclude that in a particular case, a prison sentence should be imposed; the Commission has yet the further responsibility for ensuring the sentence range actually arrived at is one that is reasonable and proportionate. As it now stands, there is a sharp cliff between level 12 and 13 with the latter level (and one easily reached under the environmental guidelines) resulting in a mandatory prison term of one year (comparable to three years for pre-Guideline sentences where parole after serving one-third the time was the norm for minor offenses). We will be glad to work with the Commission in the coming months to develop just and reasonable environmental guidelines.

Category O Offender Level

As a final and general comment on the Commission's proposal to have a Category O for criminal history, we support such an idea. Indeed, we believe that this concept is consistent with what Congress has stated with respect to special treatment of those who are first offenders who have not committed a serious crime. As we study the Commission's report in this regard, we hope to provide further comment on this proposal.

Thank you for this opportunity to testify before you today.

FEBRUARY 25, 1992

U.S. Department of Justice

United States Attorney
Eastern District of Pennsylvania

3310 United States Courthouse
Independence Mall West
601 Market Street
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October 23, 1990

PRESS RELEASE

United States Attorney Michael M. Baylson and EPA Regional Administrator Edwin B. Erickson announced today an agreement between the United States and BP Oil Corporation, Incorporated under which BP Oil will pay the largest fine assessed by the United States against a company in 13 years for water pollution violations. The agreement, reflected in a Consent Decree lodged with the Court today, assesses a penalty of $2.3 million against BP Oil for discharging pollutants over a period of six years into the Delaware River in violation of its wastewater permit and the Clean Water Act. BP Oil owns and operates an oil refinery in Marcus Hook, Delaware County, Pennsylvania.

Baylson stated that this is the second largest penalty ever collected by the United States in an enforcement action under the Clean Water Act. "No company will be allowed to profit from violating our environmental laws," according to EPA Administrator William K. Reilly. "The Bush Administration is committed to assuring clean water for all Americans."

As a result of this enforcement action, BP Oil spent over $25 million to build a new wastewater treatment system to cure the

years of violations of the Clean Water Act. Prior to this settlement, BP Oil was in constant violation of the law. Its unlawful discharges included excess oil and grease, ammonia, solids and various oxygen demanding pollutants.

BP Oil's violations contributed to two important pollution problems in the Delaware River that the United States is seeking to correct through this and other enforcement actions. First, oxygen demanding pollutants placed into the River deplete the River's oxygen supply, making it impossible for many fish to survive and reproduce. Second, poly aromatic hydrocarbons present in the oil and grease in the discharge from BP have the potential to become concentrated in fish and shellfish to undesirable and unsafe levels. Although BP Oil is not the only source of the pollutants, their past violations were a major contributor to the pollution problem in the River.

Erickson stated that, "The penalty paid in this case demonstrates the government's commitment to protecting the Delaware Estuary. It sends a message to industrial polluters that cutting corners in protecting the environment does not pay. EPA intends to assure a steady improvement in the quality of water in the Delaware River through vigorous enforcement actions against polluters."

Under a separate agreement BP Oil paid the Commonwealth of Pennsylvania $109,00 for the same permit and Clean Water Act violations and will pay the United States $2,191,000.

This $2.3 million settlement recovers the money BP Oil saved by not installing the wastewater treatment equipment necessary to

WASHINGTON LEGAL FOUNDATION
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WASHINGTON, D. C. 20036
202-857-0240

January 10, 1992

The Honorable William K. Reilly
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Re: Wetlands Enforcement Policy

Dear Mr. Reilly:

On October 22, 1991, you testified before the Subcommittee on Water Resources of the House Committee on Public Works and Transportation about the EPA's wetlands policy under Section 404 of the Clean Water Act in general and about EPA's wetlands enforcement policy in particular. On page nine of your testimony, a copy of which was recently brought to my attention, you told the subcommittee that "Section 404 enforcement is another area plagued by misinformation" and that you welcomed the opportunity to explain "the process under which we choose enforcement actions." In the course of doing so, however, it appears that you may have misled the committee about EPA's enforcement policy. The Washington Legal Foundation demands that you clarify your remarks and set the record straight.

You initially noted that EPA's "primary goal in enforcement is environmental protection. Therefore, EPA seeks timely removal of the illegal discharge and restoration of the site, where appropriate." You then proceed to respond to charges that the EPA is engaged in heavy-handed treatment of alleged wetland violators by seeking criminal prosecution. In particular, you mention WLF's client John Pozsgai, a self-employed truck mechanic who was criminally prosecuted and imprisoned for three years for putting topsoil and clean fill on a couple acres of his own land to build a garage. The property was an old dumpyard zoned light industrial that he cleaned up which, even by EPA's strict standards, contained wetland areas of marginal ecological value at best, and one where an after-the-fact permit would be normally processed.

You assured the congressional committee that in the Pozsgai case "[a]s in other criminal wetlands enforcement cases, the federal government initiated stiff [criminal] enforcement action [against Pozsgai] only after less drastic and more conciliatory measures failed." (emphasis added). The clear import and context of this statement suggests that EPA seeks criminal action in wetland cases only after less drastic administrative and civil enforcement actions have been exhausted. If this was the impression which you were trying to convey to the committee, it is clearly a false one based on a review of the criminal wetland actions brought by EPA. The facts show that EPA is quick to seek criminal action without either letting the less drastic civil enforcement measures take their course, or by by-passing those less drastic measures altogether, with the result that the allegedly offending fill material remains on the so-called wetland while the offender spends months and years in prison for what many regard, even conservationists, as a minor regulatory offense.

With respect to the Pozsgai case, you suggested to the committee that criminal action was absolutely necessary to stop the filling activity because Mr. Pozsgai allegedly ignored

"10 warnings, as well as a temporary restraining order issued by a Federal judge, to stop filling wetlands on his property without first obtaining a Section 404 permit." Reilly Testimony at 11. According to the record in the case, there were only three written letters, two from the Corps of Engineers and one from the EPA; none of them constituted formal cease and desist orders as required by the Corps of Engineer's own regulations (33 C.F.R. 326.3(c)).. With respect to the TRO, Mr. Pozsgai was arrested by EPA special agents on September 12, 1988 before there was any adjudication or finding of any violation of that order; indeed, all filling on the property ceased a week or so before he was arrested. As Chief Judge John Fullam who handled the civil TRO case admonished the government attorney at the September 16, 1988 hearing (transcript attached):

> THE COURT: Now, I read somewhere in the paper. . . that criminal prosecution has been instituted * * * [W]hose idea was that?
>
> GOV'T ATTY: Our criminal division, sir.
>
> THE COURT: Do you and the criminal division ever talk to each other?
>
> GOV'T ATTY: Yes, we do.
>
> THE COURT: Did it not occur to you this was a rather stupid kind of timing?
>
> * * * *
>
> It might have been a little more civilized and sensible to wait until after today.

Clearly the EPA was not really interested in letting the less drastic measures work; formal administrative proceedings were incomplete, and the civil proceedings were just getting started when the EPA and the Department of Justice sought the most drastic remedy possible --felony criminal charges-- when all filling had stopped even before any civil adjudication was made. Even the pretext of using less drastic civil proceedings has been abandoned in most, if not all, of the other criminal wetland proceedings:

United States v. Ocie Mills. Mr. Mills and his son served almost two years in federal prison for putting 19 loads of clean building sand on a quarter-acre lot of his in Florida. The EPA did not file any civil enforcement action and instead sought criminal indictments. If EPA's goal was truly environmental protection, EPA would have filed a civil suit ordering the removal of the so-called "pollutant." Instead, the sand remained on the property over two years while Mr. Mills and his son were in prison; and now that they're out, it appears that the property was not even a wetland to begin with, let alone an important one, and that criminal prosecution may have motivated because of Mr. Mills' public complaints about the EPA's enforcement tactics.

United States v. Jones; Ellen. Criminal charges were brought against a property owner and his project manager for disturbing wetlands in the course of creating a 2,800-acre preserve and wildlife sanctuary. Approximately 14 acres of wetlands had been filled, but 56 acres, five times that amount, were created. Again, no civil action was brought which would require removal of the allegedly offending fill material; instead, the owner and project manager were indicted in May 1990 and later convicted.

United States v. Ramagosa, et al. A family-owned home-building business and its owners were indicted on felony charges for allegedly filling wetlands on a couple of home sites, even though the administrative proceedings had not been resolved, and the Corps

refused to process an after-the-fact permit. In any event, less drastic civil enforcement actions were never sought before the government resorted to criminal sanctions.

United States v. Hartford Assoc. In late June, 1991, attorneys for Hartford Assoc. agreed in an administrative proceeding to restore an area of land in Elkton, Maryland where the EPA claimed that some fill was placed on a wetland, although jurisdiction was questionable. Despite this apparent resolution of the matter, on July 3, 1991 EPA Special Agent Susan Helbert served Grand Jury Subpoenas for documents about the matter, and on October 7, 1991, no less than ten (10) FBI and EPA agents, armed with a search warrant, conducted a surprise raid (lasting almost nine hours) on the company's and lawyer's offices housed in the same building, at first refusing to give the attorney the search warrant or allowing him to call his outside counsel, grabbing the phone from his hand. Again, no civil enforcement action was filed, and indeed, the administrative resolution of the case was being undertaken; yet criminal enforcement proceedings were initiated. In both the Hartford case and the Pozsgai case, EPA also conducted video surveillance of the so-called wetland area.

Clearly, these cases suggest that the EPA prefers to utilize taxpayers' funds for what many have called Gestapo-type tactics against private property owners rather than more rational, and indeed, more environmentally prudent civil and administrative proceedings, contrary to import of your congressional testimony. It is incumbent upon you to correct your testimony, and indeed, to provide the committee with the case information on all criminal wetland enforcement actions to demonstrate whether the government exhausted less drastic enforcement measures as you suggest.

The criminal enforcement actions are particularly reprehensible where your agency is regulating private property, and where the definition of what even constitutes a wetland is a highly controversial and debatable subject, as evidenced by the EPA's current proposal redefining wetlands.[1] In addition, Executive Order 12,630 (Mar. 15, 1988) requires government agencies to be sensitive to private property rights, and there are serious takings implications under the Fifth Amendment of the failure by the government to provide permits in these cases as evidenced by the Loveladies Harbor case in the court of appeals and the Lucas v. South Carolina Coastal Council case before the Supreme Court. Thus, property owners being sent to prison for putting topsoil on their property without a permit may even be entitled to compensation for a denial of an after-the-fact permit.

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[1] In the Pozsgai case, for example, the government conceded that his property is above the headwaters and thus is covered by Nationwide Permit No. 26. Under government regulations, "an application for a . . . permit does not have to be made." 33 C.F.R. 320.1(c)(emphasis added). Indeed, even in your testimony, you accurately state that fill material on such isolated wetlands "will have only minimal adverse environmental effects." And yet Mr. Pozsgai received the longest prison term in U.S. history for any environmental offense, including the dumping of toxic and hazardous wastes, and all he did was place topsoil and clean fill on his property which he cleaned up. Indeed, the tiny drainage stream adjacent to his property in Morrisville, PA actually runs clearer today thanks to his clean-up efforts. The flooding incident you cited in your testimony regarding Pozsgai's property is also misleading since it was a minor isolated event which occurred long before most of the fill was placed on the property; rather, it occurred shortly after Pozsgai removed the blockage of tires from the stream which was then re-aligned to flow closer to his neighbors property, suggesting that the incident was not caused by unpermitted filling activity. In any event, under the proposed EPA wetland regulations, it is clear that Mr. Pozsgai's property would not even qualify as a wetland because it is not saturated to the surface or inundated with water. According to the U.S. Sentencing Commission, the three-year prison sentence imposed is longer than the average sentence imposed on repeat criminals convicted of larceny, fraud, many drug offenses, and other serious crimes. WLF has pending with President Bush a commutation petition to allow Mr. Pozsgai to serve the remainder of his three-year prison term under home detention so he can return to work there as a truck mechanic and take care of his 62-year old ailing wife.

I would also like to call your attention to a letter WLF sent early last year to Congressman John LaFalce of the House Small Business Committee (copy enclosed) pointing out that recent government reports show that we are not losing 500,000 acres of wetlands a year, or 250,000 acres, figures which you and others at EPA are fond of repeating without citing any authority, and which, in turn, are reported in the press as fact. Indeed, we may be actually gaining wetland acreage as farmers allow converted cropland to revert to wetlands. Your touting the values of wetlands in your October 1991 testimony is also misleading since not all wetlands have the same function and values, and it is wrong to treat them so categorically. Thus, when you boasted in your testimony, "I know of a wetland outside of Chicago that removed 90% of the toxics and heavy metals that entered it," Reilly Testimony at 3, you could just have easily stated that the government knows of a salt marsh in Massachusetts where pollutants of nitrogen and phosphorus increased 20 percent as water filtered through the wetland. Wetlands: Their Use and Regulation (Washington, D.C.: U.S. Congress, Office of Technology Assessment) at 51 (1984).

The point is that not all wetlands are of equal ecological value, and if the government begins compensating property owners for requiring them to keep their wetland property in its natural state, it will begin to prioritize its values and refrain from regulating, let alone filing senseless criminal charges, against private property owners who, like Mr. Pozsgai, own wetlands of marginal ecological value. The real policy issue should be not how many inches water must be within the surface of the property or for how long before it is a wetland; rather, the real question is whether the federal government is willing to pay for these wetlands, or whether it should use creative incentives such as the "Swampbuster Program" under the Food Security Act of 1985 or tax breaks to encourage property owners to voluntarily keep their property in its natural state.

Your pseudo-market approach to preserving wetlands that you outline in your testimony which entails "mitigation banking" and "compensation" by the owner to the federal government is fundamentally flawed. Property owners are not required to "compensate" the government for the reasonable use of their property, it's the other way around. Indeed, all of the mitigation requirements you and the Corps have imposed on property owners over the years can be properly characterized as "out and out extortion" to use a phrase the Supreme Court did to characterize similar exactions in the Nollan v. California Coastal Comm'n case. Millions of dollars of liability by the government, with interest, are looming over all of these past wetland conditional permits and denial of permits, not to mention the negative impact on the economy where jobs were lost in the name of preserving wetlands. For some reason, this larger issue seemed lost, or was never raised, in the no net-loss of wetlands debate.

We look forward to your correction of your public statements regarding EPA's criminal enforcement policy.

Sincerely yours,

Paul D. Kamenar
Executive Legal Director

encl.
cc: Vice-President J. Danforth Quayle
Attorney General William P. Barr
Congressman Henry J. Nowak,
Chairman, House Subcommittee on Water Resources

Statement of

Henriette D. Hoffman
Attorney-in-Charge
Criminal Appeals Bureau
Federal Defender Services Unit
The Legal Aid Society
New York, New York

on behalf of

Federal Public and Community Defenders

before the

United States Sentencing Commission
Washington, D.C.

February 25, 1992

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.

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[1]Although 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

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[2]The 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

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[3]For 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

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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").

[4] See 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

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[5]Presumably, 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]

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[6]United 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

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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).

[7]Amendment 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

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[8] See 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.

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

[10] Presumably 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

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[11]S. 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

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

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

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

[15]Id. ("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,

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[16]See 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 currrently 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

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[17] See 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,

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[18] See 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 adequate account for.

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

[20]See 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

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[21]28 U.S.C. § 994(h) (enacted by Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 2021).

[22]U.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

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[23]See 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 case[24] 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

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[24]United 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.

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

[26]The 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

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

[28]Id. 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

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[29]P. 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.

[30]In 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,

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[31]J. 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

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[34]Recidivism 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

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

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

[37]Id.

[38]Id.

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

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[39]The 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.

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

UNITED STATES PROBATION SERVICE

MEMORANDUM #22

DATE: February 27, 1992

REPLY TO ATTN OF: Presentence Unit/Western District of New York

SUBJECT: Proposed Amendments to Sentencing Guidelines

TO: Sentencing Commission

The members of the presentence unit in the Western District of New York individually reviewed the proposed amendments to the Sentencing Guidelines. Individual responses were formulated. The unit then met and are now submitting this collective response to the proposed amendments to the Sentencing Guidelines.

Amendment 29 - Expanded Availability of Non-prison Sentencing Options

There was a general concurrence that Option 6 is the most favorable. One officer expressed concerned about Option 6 because it combines options 1, 4, and 5. The concern specifically revolves around Option 4. This officer's concern is that defendants with increased criminal history categories should not receive the same benefit as defendants in criminal history categories I or II.

However, in general, Option 6 was viewed favorably because it allows expanded use of numerous alternatives to incarceration which will result in less overall prison time for low-level defendants. It also provides judges with greater discretion.

Amendment 33 - Departures Based on Offender Characteristics

There was a general concern that this amendment creates a Pandora's Box. It is too subjective. There is grave concern that an amendment such as this lends itself to abuse by defense attorneys. This type of amendment invites disparity between offenders. The only amendment in this section that warrants consideration is Part D, where a downward departure for advanced age is allowed as long as the required details are met.

Amendment 26

In general, there is overall support for Option 2 which adds advice the court should consider in determining

whether to depart from category VI, the nature of prior offenses rather than simply the number of prior offenses.

Amendment 23 - Acceptance of Responsibility

Our office concurs that a graduated approach to acceptance of responsibility is the most appropriate approach. The tendency is to concur with Option 3. One officer expressed concern regarding defendants who go to trial getting a two level reduction for acceptance of responsibility.

Additional Amendments of Special Interest

Amendment 17 - Part A - Role in the Offense, Especially Offenses Involving Drugs

There was general support for both Part A and Part B of Amendment 17. It is our experience that this can be one of the most misused adjustments in the guideline applications, especially from the standpoint of the government. One of the most important factors that should be considered for applying a mitigating role reduction is the time of the individual's involvement in the offense, the amount of renumeration the defendant was expected to receive, and at what level he knew other participants in the offense.

Amendment 18

The group generally liked this amendment in that it provided a clearer definition of when reductions can be applied. There is support for the court being able to depart below four levels for a defendant's more than minimal participation.

Amendment 19

Again, we direct the Sentencing Commission back to Part B of Amendment 18 and emphasize that the court should be able to depart below the applicable guideline range when it determines that a defendant's minimal participation exists to a kind or degree not taken into consideration by the Commission. While Option 1 under Amendment 19 had some reception, the main concern was how to decide which cap you choose. Based on the abuse of discretion that could occur under this option, there is some concern.

Amendment 27 - Redefinition of Career Criminal

Most of the changes under this guideline were concurred with. Part C makes it easier to calculate conviction dates, using the date of plea rather than the date of sentence. Part E, two cases consolidated for trial as

joinable issues under 8(a) should be counted as one conviction.

Amendment 35 - Plea Bargaining Policies

There was strong support for Part A of Amendment 35, it would be helpful and pressure the U. S. Attorney's Office to disclose the true guideline relevant facts, and circumstances, rather than what sometimes amounts to a fantasy version in plea agreements.

Amendment 36

This amendment also received strong support by the unit. It makes clear that dismissal of a charge does not mean that the conduct cannot be considered under relevant conduct.

List of Additional Proposed Amendments

Amendment 5

In general, there is great concern in a move to remove the more than minimal planning adjustment. The unit felt that there are some offenses which are unsophisticated and others that are well planned out and executed. These types of offenses should be differentiated and receive different consideration. The more sophisticated offender would receive no additional sanctions for the sophistication other than possibly an increase in the offense level based on the amount of loss. Sophistication and loss do not always go hand in hand.

Amendment 8

This section discusses the idea of increasing the offense level depending on the number of unlawful alien smuggled. Each alien represents money. Therefore, the current two level increase for previous convictions should not be deleted.

Amendment 13

General support with this amendment; currently you end up with a lower guideline score for willfully failing to file than you do for an evasion. This difference makes little sense.

Amendment 15

The three level upward departure would usually be insufficient to capture promoting terrorism and if it is adopted, should not certainly include both international and

domestic terrorism. The full wording states that it would apply to international terrorism. This might eliminate from consideration domestic terrorists or white supremacy groups.

Amendment 21

Should be adopted. There should be some adjustment for a range of behavior for reckless endangerment during flight.

Amendment 22

The current multiple count rules are very workable, however, they do not really result in much of an increase for multiple counts.

Amendment 24

This amendment should not be adopted. Different states impose different periods of incarceration for the same basic offense. Therefore, like offenders would not be treated similarly.

Amendment 25

This amendment under Chapter 4 of the Guidelines should definitely be implemented. This is a very clear statement was to what should and should not count.

Amendment 28

In general, the group did not believe a criminal history category VII is necessary. We find that the criminal history categories as they presently exist are functional. It seems to complicate the sentencing guidelines more than is necessary. Criminal history category I is usually a good measurement of the first time criminal who is not likely to be a recidivist.

Amendment 30

The general consensus for this amendment was a "NO".

Amendment 34

Amendment 34 under Chapter 5 guidelines is very important. This gives the court more discretion and allows the Probation Service to provide information to the judge concerning substantial assistance if, in fact, it truly exists.

Amendment 36

Amendment 36, Part H, is strongly urged not to be adopted. It will make it more difficult to determine loss and will essentially give a break to a defendant who preys on wholesaler victims rather than retailer victims.

In general, the group strongly urges the Sentencing Commission not to further complicate the sentencing guidelines. There seems to be a general consensus that more judicial discretion with direction or parameters is preferable.

FAX TRANSMITTAL

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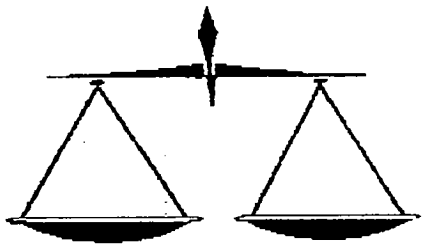
To: UNITED STATES SENTENCING COMMISSION

From: JOHN T. BABI, SUPERVISING U.S. PROBATION OFFICER

Date: 02/28/92

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Comments:



Testimony before the United States Sentencing Commission on the Structure and Operation of the Federal Sentencing Guidelines

Dr. Edward J. Burger, Jr.
Member of the Board of Directors
Council for Court Excellence
Washington, D.C.

February 25, 1992

Mr. Chairman and members of the Commission, my name is Dr. Edward Burger. I am pleased to have the opportunity to comment on aspects of the Federal Sentencing Guidelines. I represent the Council for Court Excellence of the District of Columbia. I am a member of its Board of Directors and Chairman of the Criminal Justice Committee of the Council. The Council for Court Excellence is a nonprofit civic organization that works to improve the administration of justice in the local and federal courts, and related agencies, in the Washington metropolitan area and in the nation.

The Council for Court Excellence embraces, by design, several groups interested in seeking improvements in the courts - jurists, U.S. attorneys, practicing lawyers, members of the business sector and the general community of the citizenry. My remarks this morning should not be understood as necessarily representing the opinions of the separate institutions from which some of the Council's members come.

The Council for Court Excellence has, from near its beginning ten years ago, contributed to the discussions of sentencing and sentencing reform. The Council, early in its history, played an important role in bringing to the attention of the local courts, prosecutors and defense

lawyers and the District's legislative council, in a systematic fashion, the fund of experience across the nation concerning sentencing reform efforts and the relationship of sentencing practices to broader matters, including parole and prison capacity.

In December 1986, we testified before the Commission on aspects of what were then Preliminary Draft Sentencing Guidelines. Our position at that time was to commend the Commission both for the concept and for the then emerging guidelines process. We applauded and associated ourselves with the Commission's goals of moving the federal courts towards reducing sentencing disparity, preserving sentencing authority in the court, increasing the correspondence between the sentence imposed and the sentence served and, as a result, enhancing public confidence in the criminal justice system. At the time, we commented on eight specific features of the guidelines:

1. We expressed concern that the draft guidelines were highly detailed and overly specific.

2. We observed that it was not clear how proposed guidelines were linked to past sentencing practices and experience.

3. We applauded the adoption of the concept of modified real offense

sentencing.

4. At the Commission's specific request, we commented on the proposal to reflect "other offender characteristics" such as age, education, or community ties, as mitigating or aggravating factors in reaching sentencing judgments.

5. We observed that the draft guidelines at that time seemed to give little focus to alternatives to incarceration such as fines and restitution.

6. We noted our concern that at that time, there appeared to be no provision for analysis of the effects of the operation of the guidelines on prison use in the face of pressures on prison capacity.

7. Finally, the draft guidelines at that time were silent as to procedures for departures from the prescribed guidelines.

The institution of the federal sentencing guidelines process four years ago was unquestionably a bold step, conceived by Congress and developed by the members of the Sentencing Guidelines Commission. Development of the Federal Sentencing Guidelines followed in time the introduction of several other sentencing guidelines systems in state courts. The results and effectiveness of the federal guidelines in practice are only now beginning to

be understood.

There is still little empirical information of recognized quality, and what data there are reflect only a portion of the period since the guidelines process was introduced. At the same time, the institution of the federal guidelines process has been accompanied by proffered appraisals from many quarters, including a very large number of severe criticisms.

The evidence thus far does seem to indicate that, since the U.S. Sentencing Commission's guideline process was put into effect, disparity of sentence among similar offenders and similar offenses has been reduced. Further, there is strong indication that there is now greater certainty in sentencing. Finally, as the Commission itself reports, with the abolition of parole, there is correspondence between the sentence awarded and the sentence actually served.

I must qualify these judgments by pointing out that empirical data to support the conclusion of reduced disparity, pre-guidelines versus post-guidelines, are still quite limited. The only real data bearing on this subject come from Commission itself. They cover only 2 1/2 years of experience and are drawn from relatively few cases.

In our view, there are two features of the present system which

threaten to compromise the ability of the guidelines process to achieve its intended goals. One derives from the combining of the guidelines system with the series of statutory mandatory minimum sentences. The other concerns the highly mechanical and formulaic character of the guidelines, themselves. As the Commission's own reviews have noted, the evolution of the Federal Sentencing Guidelines corresponded in time with the Congress' enactment of a large number of statutory mandatory minimum sentence laws directed especially at drug- and weapons offenses. In our view, and in the opinion of others, this enforced admixture has compromised the intended workings of the guidelines, has contributed to a number of perverse outcomes and may be a principal factor provoking criticism of the guidelines themselves.

The Commission's challenge, when crafting the guidelines, of incorporating the statutory minimums into the guidelines framework has led to numerical values for base case categories which, in the view of some, may not be justified in all instances. In some instances, undesirably harsh sentences are said to have emerged from the resulting combined numerical values. The mandatory minimum sentences appear to have further exaggerated an unwanted transfer of sentencing discretion from judges to

prosecutors, who are able to craft charges to match intended sentencing outcomes. Finally, the mandatory minimum sentencing values appear to have compromised the intended operation of real offense sentencing. It is this latter process which was designed by the Commission as a mechanism intended to provide a balance to the findings of prosecutors.

The Commission staff have also pointed to the fact that statutory mandatory minimum sentence penalties have tended to diminish the achievement of the principal goal of the guidelines process - reduction in disparity in sentencing. As the Commission's own analysis has shown, patterns of prosecutors' selection of charges to bring to the court have varied among geographic regions and among racial groups of offenders. The Commission's assertion that "...lack of uniform application creates unwarranted disparity in sentencing..." is a serious matter to the extent that it may undermine the singular goal of the guidelines process.

The second issue I would like to underline for the Commission is the highly mechanical, structured process that is the character of the federal guidelines. The determination of a numerical value in the federal guidelines system is supposed to be a process which anticipates all possible factors which could shape the character of both the offender and the offense. The

federal process appears highly complex, overly mechanical and highly specific. Judicial discretion appears to have been substantially reduced to a point which exceeds what the Commission had originally intended. As you know, a plea for more flexibility in the structure and operation of the guidelines was the sense of the recent recommendations of the Judicial Conference of the United States.

Again, I would note that this comment is consonant with our testimony on this matter in 1986. The Commission should examine again the perverse and undesired effects of the high degree of attempted specification in the guidelines and the constraining, formulaic character of the process of determining sentences. In doing so, the Commission would do well to study the experience and character of some of the mandatory state guidelines systems designed around more conceptual structures. For example, Minnesota's 10-year experience is a worthy example.

Finally, as we did in our earlier testimony, I would urge the Commission to put in place mechanisms for keeping track of the effect of sentencing practices under the guidelines system, among other factors, on prison use. Burdens on prison capacity and on public expense for incarceration will continue to be important issues raised by the public and

legislators. An understanding of these relationships will be important in future support for sustaining confidence in the elements of the criminal justice system.

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Revised 2/23/92



U.S. Department of Justice

STATEMENT

OF

ROBERT H. EDMUNDS, JR.

UNITED STATES ATTORNEY

MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PROPOSED SENTENCING GUIDELINES AMENDMENTS

ON

FEBRUARY 25, 1992

Mr. Chairman and Members of the Commission:

I appreciate the opportunity to appear before you on behalf of the Department of Justice to discuss the sentencing guideline amendments the United States Sentencing Commission has recently proposed. The amendments cover a number of important guideline areas, and we commend the Commission for considering many of the concerns we raised with you early in this amendment cycle.

I would like to highlight a few of the most important proposed guideline amendments in my statement today.

DOWNWARD DEPARTURES FOR CAREER OFFENDERS AND ARMED CAREER CRIMINALS (Amendment 26(C))

We urge the Commission to adopt the proposed amendment of policy statement §4A1.3 to specify that the adequacy of a defendant's criminal history category not be a basis for downward departure when a guideline mandates a particular criminal history category, such as for career offenders and armed career criminals. In the case of a career offender, guideline §4B1.1 establishes an offense level related to the statutory maximum for the offense of conviction and places the defendant in Category VI, rather than the category that would apply to the defendant if his criminal history score were calculated under the guidelines.

However, several courts of appeals have undermined the career offender guideline by ruling that the sentencing court may depart downward from the guideline range where the court determines that Category VI overstates the defendant's criminal

history. These courts have relied on policy statement §4A1.3 on the adequacy of the criminal history category. See, e.g., United States v. Lawrence, 916 F.2d 553, 554-555 (9th Cir. 1990); United States v. Brown, 903 F.2d 540, 544-545 (8th Cir. 1990); United States v. Adkins, 937 F.2d 947, 950-953 (4th Cir. 1991). In our view the Commission's placement of a career offender in the highest criminal history category is simply a guidelines mechanism to assure fulfillment of the statutory directive in 28 U.S.C. § 994(h) that career offenders be sentenced at or near the statutory maximum for the offense of conviction. It was not meant to reflect the defendant's actual criminal history category calculated under the guidelines. Under the courts' reasoning any career offender whose actual criminal history category was less than Category VI could be eligible for a downward departure on the basis of his inadequate criminal history, and the career offender guideline would become meaningless.

A similar problem could occur with respect to the armed career criminal guideline, §4B1.4, which may place a defendant in a higher criminal history category than the criminal history calculations would otherwise provide. The criminal history component of the armed career criminal guideline operates more in the nature of a specific offense characteristic by recognizing that certain conduct (e.g., possession of a machine gun) warrants an enhanced sentence and also operates to provide a guideline sentence commensurate with the mandatory minimum 15-year term provided by statute, 18 U.S.C. § 924(e). If the defendant's

actual criminal history can be used as a basis to depart below the guidelines, the factors reflected in the criminal history component of the guideline would be lost.

To overcome these problems, policy statement §4A1.3 should provide that downward departure on the basis of the adequacy of a defendant's criminal history category is not warranted when the guidelines specify a particular criminal history category in lieu of the category that would otherwise result from calculation of the criminal history points under guideline §4A1.1.

REVISION OF DECAY FACTOR (Amendment 25(B))

In its letter proposing guideline amendments to the Commission last fall, the Department had sought the elimination of the decay factor applicable to career offenders. (Letter of October 3, 1991, from Deputy Assistant Attorney General Paul L. Maloney.) As the guideline now operates, a sentence of more than one year and a month that was neither imposed nor served during the 15 years prior to the commencement of the instant offense is not counted as a predicate offense for the career offender guideline. Similarly, a lesser sentence does not count unless it was imposed within 10 years of the commencement of the instant offense. See guideline §4B1.2, Application Note 4. These limitations are inconsistent with the statutory mandate to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for defendants who are convicted of felonies that are crimes of

violence or certain drug offenses and who have two prior convictions for such crimes. 28 U.S.C. § 994(h). In particular, it makes no sense to apply the time limitations otherwise applicable for criminal history purposes to the career offender provision, which is designed to look at the defendant's entire life span.

The Commission did not propose the simple elimination of the decay factor for career offenders, as we had suggested, but instead took a broader approach in amendment 25(B). The proposal excludes from the applicable time periods for purposes of calculating the defendant's criminal history score periods during which the defendant was continuously imprisoned if such periods exceeded a time to be designated in the guidelines of one to five years. These periods of incarceration would be excluded from the applicable time periods regardless of whether the defendant were a career offender.

Two options are presented. One excludes periods of imprisonment only in the case of the 15-year decay factor for sentences of more than one year and one month. It does not affect lesser sentences, currently subject to a 10-year decay factor. The other option excludes periods of imprisonment for all sentences but provides a uniform time period of 12 years.

We favor the first of these options and believe that the exclusion for imprisonment should apply to periods of imprisonment that lasted over one year. The uniform 12-year decay factor is too short for serious offenses. A third option

we would have preferred would have provided a uniform 15-year decay factor for all categories of sentences with exclusions for periods of imprisonment.

CRIMINAL HISTORY CATEGORY VII (Amendment 28(B))

The Commission has proposed a new criminal history Category VII to provide increased sentences for offenders with particularly extensive criminal backgrounds. We strongly believe that this new criminal history category is needed to provide adequate sentences for the most serious recidivists. Under the current guidelines defendants with criminal history scores of 13 or more are all included in Category VI. Unless the sentencing judge departs from the guidelines on the basis of criminal history, a defendant with a criminal history score of 18, for example, would receive the same sentence for a particular offense as a defendant with a score of 13. Of course, a judge is not bound to depart from the guidelines, even when sentencing a defendant with a substantial criminal history score, and defendants with extremely diverse backgrounds may be sentenced alike. We urge the Commission to include an additional criminal history category in order to recognize distinctions that so far have been ignored.

The Commission has proposed three alternative approaches to creating a new Category VII. We favor the third, which provides that Category VI would include cases with 13 to 15 criminal history points and Category VII would include those with 16 to 18

points. Option three follows the pattern established for Categories III, IV, and V, each of which incorporates a three-point spread in criminal history points.

Option three best addresses the need for an additional criminal history category by focusing on those offenders whose criminal history scores exceed the current cap of 13 by just several points. These offenders belong in a new criminal history Category VII to reflect the more extensive nature of their criminal backgrounds. Of course, upward departures should be authorized for defendants with even more extreme criminal backgrounds under the policy statement on the adequacy of criminal history, §4A1.3 (which would require some adjustment if Category VII were adopted). The number of offenders with high criminal history scores is substantial: 39 percent of Category VI offenders had more than 15 criminal history points in fiscal year 1990 guideline cases. See Memorandum of February 21, 1992, from Phyllis Newton to the Commission.

LACK OF YOUTHFUL GUIDANCE (Amendment 33(A))

The Department strongly urges the Commission to amend its policy statements to provide expressly that a court may not consider a defendant's lack of youthful guidance as a ground for a departure from the applicable guideline range. The recent case of United States v. Floyd, 945 F.2d 1096 (9th Cir. 1991), completely undermines the guidelines by allowing -- indeed encouraging -- courts to impose unlimited downward departures for

lack of youthful guidance. We can envision defendants requesting downward departures on this ground in every case, not only complicating and lengthening sentencing hearings with complex expert psychological, medical, and social science testimony, but also introducing totally subjective factors into the sentencing process, which will lead to the kind of inequality which the guidelines were intended to replace. We believe it is necessary for the Commission explicitly to eliminate the factor of "lack of youthful guidance" as a basis for departure in order to maintain the integrity of the guidelines system and ensure uniformity in sentencing. "History of family violence" and other similar factors would also have the same effect and should not be considered as a basis for downward departure. Consistency, fairness, and certainty will not be served unless these factors are eliminated from sentencing decisions.

IMMIGRATION OFFENSES - ALIEN SMUGGLING (Amendment 8)

The Department supports, with certain modifications, the Commission's amendment of guideline §2L1.2 concerning alien smuggling, and related guidelines concerning entry or citizenship documentation. The amendments would make alien smuggling offenses increase in severity depending upon the number of aliens smuggled, transported, or harbored.

The proposed amendment provides graduated increases for smuggling six or more aliens, with a five-level increase for smuggling 100 or more. We suggest that the proposed amendment be

revised to provide for a five-level increase if the defendant smuggles 100-200 aliens and to instruct the court to consider an upward departure if the defendant is involved in smuggling over 200 unlawful aliens. Large-scale cases should not be overlooked by specific guideline enhancements.

As presently drafted, the increase for smuggling six or more aliens would apply only if the defendant committed the offense for profit. We believe the increase based on the number of aliens smuggled should apply whether or not the defendant violated the law for profit. It might be appropriate to reduce the base offense level to level six, as now required by §2L1.1(b)(1), when the defendant has smuggled three or four aliens into the country for reasons other than profit. However, smuggling many aliens, even though not for profit, should be more severely penalized to recognize serious violations of the immigration laws. Conforming amendments would also be required for the other proposed amendments to the related immigration offenses in Part L of Chapter Two.

In addition, we urge the Commission to revise the guideline language to instruct the court to consider an upward departure in cases in which a defendant is involved in smuggling, transporting, or harboring unlawful aliens who engage in or are connected with unlawful activity upon their arrival in this country. For example, certain smugglers are known to assist in the smuggling of narcotics traffickers into the United States. While these smugglers would not be convicted of conspiring to

traffic narcotics, their activity necessarily furthers the narcotics violations engaged in by the individuals whom they bring into the country.

The Department wholeheartedly supports the addition of upward adjustments to the immigration guidelines in cases involving death, bodily injury, possession of firearms, and possession of other dangerous weapons. Because of the seriousness of these offenses and the need for uniformity in the imposition of the increased punishments, we believe these factors should be addressed as enhancements rather than departures. The enhancements should be consistent with the level of similar enhancements in other sections of the guidelines.

ALTERNATIVES TO INCARCERATION (Amendment 29)

We have serious concerns about the options regarding alternatives to incarceration in Amendment 29 and strongly urge the Commission not to adopt these proposals. Fundamentally, these amendments may compromise the fair and appropriate sentences achieved through implementation of the guidelines.

The proposed amendments would bring about a number of changes, such as (1) redefining the "split sentence" to require only one month of incarceration rather than one-half the minimum term of the applicable range; (2) authorizing probation with confinement conditions at higher offense levels; (3) substituting a range of zero to six months for several categories in the Sentencing Table with higher levels of imprisonment; and

(4) making the "split sentence" available for more serious offenses than under the current guidelines. On the whole, the proposals vastly increase judicial discretion and make non-incarceration sentences available for many more offenders than under the current guidelines.

The Commission has not provided a clear justification for expanding either the number of offenders eligible for alternative sanctions or the types of alternatives available. While most state corrections systems have been motivated by severe overcrowding to implement alternatives, we cannot see that issue as justifying experiments at the federal level. Overcrowding at Bureau of Prisons minimum security facilities is not great, and it is to these facilities that the majority of offenders who would be affected by the amendments are sentenced. Moreover, the question of alternatives should be considered separately from prison population issues; overcrowding is not an appropriate rationale for implementing a program of alternatives.

The proposed amendments generally would provide a level of discretion to judges inconsistent with the Sentencing Reform Act's purpose of reducing unwarranted sentencing disparity. For example, Option 2 would authorize a probationary sentence with conditions of confinement, including home detention, for offenders through offense level 12. In addition, it would authorize imposition of a split sentence with just one month of imprisonment. As a result, two level 12 offenders, for whom the guidelines provide a sentencing range of 10-16 months, could

receive vastly different sentences. One may be sentenced to no imprisonment at all, while the other may be sentenced to 16 months' imprisonment -- both within the applicable guidelines. Of course, the former must be placed on probation with a condition of home detention (or other confinement condition) for 10 months. Thus, a range of 10-16 months of imprisonment is effectively transformed by these amendments into a range of 0-16 months, provided home detention or other condition of confinement is imposed.

Home detention, however, is simply not the same sanction as imprisonment since it protects the defendant from separation from home, family, and work. For many it is more nuisance than punishment. Clearly, the potential for significant disparity in sentences for similar offenses would be reintroduced by adopting these options. Guidelines directing a judge's decision as to **whether** to impose imprisonment are as crucial to reducing unwarranted sentencing disparity as are guidelines on **how long** a term of imprisonment to impose.

We also believe that a number of the options presented by Amendment 29 would produce guidelines that violate the statutory requirement that the maximum of an imprisonment range not exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. §994(b)(2). The purpose of this requirement is to foster the goal of reducing unwarranted sentencing disparity by creating a sentencing system whereby a judge must choose a sentence from a fairly narrow range.

Expanding the use of alternatives to incarceration may also compete with the objective of deterrence in sentencing. While alternatives to incarceration may address the just punishment and rehabilitation purposes of sentencing, fairly short prison terms followed by supervised release can also serve these objectives while providing an adequate deterrent to criminal activity. The threat of spending time behind bars is a powerful deterrent for many would-be offenders, particularly white collar offenders, and should not be jettisoned lightly.

We also see no reason to expand the use of alternatives to additional offenders when we understand from the Commission's research that the current options are underutilized. A more constructive option would be for the Commission to educate judges and prosecutors on the current alternatives. It would seem more appropriate to consider expanding the availability of alternatives after more experience has been gained with the current options available. While the Department might consider the desirability of increasing the types of alternatives available under the guidelines, support for the creation of new, intermediate punishments does not require support for their application to a greater number of offenses than are now subject to non-incarceration sentences.

The Commission specifically requested comment on whether the options listed under Amendment 29 should apply to all defendants at the offense levels specified or whether an offense-by-offense approach should be adopted. The Department believes that, if any

of the options are put into effect, certain offenders should be excluded: white collar offenders generally, those who have abused a position of trust, those convicted of firearms or controlled substance trafficking offenses, and those who have been sentenced previously for a similar offense.

One of the objectives of the sentencing guidelines was to ensure sentences for white collar offenses that are appropriate to the severity of the crime. In general, the guidelines resulted in longer sentences for these offenders. See, e.g., guideline §2T1.1, background commentary. The Department believes strongly that the fairness instituted by guideline punishments for white collar offenders should not be eroded by reducing the time served under the split-sentence option or by offering alternatives to imprisonment where currently there are none. The proposed criminal history Category zero (Amendment 28) would also contribute to this erosion of sentences for white collar offenders and in combination with the proposals expanding alternatives to incarceration would significantly rewrite the guidelines for these offenders.

In addition, the Department recommends that the Commission deny alternative sanctions to those who have previously committed a similar offense. It is obvious in these cases that the earlier sanction was insufficient to deter further similar criminal behavior. The offender needs to experience the full consequences available under the guidelines. Finally, firearms and drug

trafficking offenders should also be excluded because of the dangers they present to society.

SUBSTANTIAL ASSISTANCE TO AUTHORITIES (Amendment 34)

The Commission has proposed an amendment to policy statement §5K1.1 to eliminate the requirement that a motion by the government be made before a court may depart below the applicable guideline range to reflect a defendant's substantial assistance in investigating or prosecuting others. However, the amendment would retain this requirement in the case of departure below a mandatory minimum sentence.

We strongly oppose this amendment. It will result in routine requests by defendants for reduction of sentence and burden the courts unduly. Defense attorneys will view this area as an opportunity to escape guideline sentencing and argue for reduction in many unwarranted cases. The prosecutor is in the best position to determine whether a defendant has provided substantial assistance in investigating or prosecuting others. Even if the policy statement were amended as proposed, the court would have to give substantial weight to the government's evaluation of the defendant's conduct from the standpoint of substantial assistance, and the proposed amendment so directs. Finally, the government has an incentive to seek substantial assistance reductions where warranted in order to encourage defendants to cooperate. The Supreme Court has recently granted certiorari in a case presenting the issue whether a district

court has the authority to review the government's decision not to file a "substantial assistance" motion for a reduced sentence (where a mandatory minimum was applicable). United States v. Wade, 936 F.2d 169 (4th Cir. 1991); cert. granted, No. 91-5771 (1991). For all of these reasons, we urge the Commission to reject this proposed amendment.

SCHEDULE III, IV, AND V CONTROLLED SUBSTANCES (Amendment 7)

The Commission has asked for comment regarding the removal or modification of the current limitations on offense levels for the distribution of Schedule III, IV, and V controlled substances and Schedule I and II depressants so that violations of large quantities of these substances will result in higher sentences. We strongly urge the Commission to remove the current limitations on sentences for trafficking in these controlled substances. In our view the current provisions, which limit sentences to those applicable to 20 kilograms of the substances involved regardless of how much greater the actual quantities may be, are inconsistent with the overall approach of the guidelines.

Guideline §2D1.1 provides that a violation involving 20 kilograms or more of a Schedule I or II depressant or Schedule III substance results in offense level 20 (33-41 months for a defendant in the lowest criminal history category). The same sentence applies to 40,000 or more units of anabolic steroids. A defendant who violates the law by selling hundreds of kilograms of a Schedule I or II depressant or Schedule III

substance would be treated in the same manner as a defendant who sells 20 kilograms. Schedule I and II depressants are serious drugs of abuse and include, for example, methaqualone (Schedule I) and glutethimide (recently moved to Schedule II from Schedule III), which is used with codeine preparations as a heroin substitute. Schedule III substances include codeine preparations such as Tylenol or aspirin with codeine. The Department has prosecuted cases involving far larger quantities than 20 kilograms. Also included in Schedule III are anabolic steroids, which are often distributed illegally in large quantities because of the continuing nature of an athlete's abuse of this controlled substance. Yet, the guidelines treat sales of hundreds of thousands of units of anabolic steroids in the same manner as sales of 40,000 units.

If the current guideline reflects the concern that the guidelines should establish an offense level commensurate with the statutory maximum available, the guideline could still provide a much greater offense level for violations involving large quantities of Schedule I and II depressants, which are subject to a maximum 20-year term of imprisonment, 21 U.S.C. §841(b)(1)(C). Although the maximum term of imprisonment for offenses involving Schedule III substances is five years, 21 U.S.C. §841(b)(1)(D), offenses involving multiple transactions properly result in multiple counts, with the five-year maximum applicable to each count.

Guideline §2D1.1 also places an artificial limitation on sentences involving Schedule IV substances (level 12 for 20 kilograms or more) and Schedule V substances (level 8 for 20 kilograms or more). Schedule IV substances include, for example, Xanax, which has been abused in combination with Schedule I and II substances; and Halcion, which can produce temporary memory loss. Again, larger quantities of these drugs should result in longer sentences. This approach would be consistent with the operation of the drug guidelines for substances such as heroin and cocaine.

The extension of the guidelines for quantities of more than 20 kilograms of Schedule I and II depressants and Schedule III, IV, and V substances and more than 40,000 units of anabolic steroids would correct an unfortunate message the guidelines currently send to would-be violators -- that they may as well engage in large-scale violations since they may do so with impunity beyond the maximum quantities currently in the guidelines.

FRAUD INVOLVING FINANCIAL INSTITUTIONS (Amendment 6)

As we have repeatedly emphasized in letters and in testimony before the Commission during the past two years, the Department has serious concerns about the inadequacy of the guidelines for fraud offenses involving financial institutions. Thus, we strongly support the Commission's proposed amendment of guideline §§2B1.1, 2B4.1 and 2F1.1 to provide a four-level enhancement for

theft and fraud offenses which affect a financial institution, in addition to other enhancements already in these guidelines.

We believe adoption of amendment 6 is critical if the guidelines are to properly reflect the dramatic increases in the penalties for financial institution fraud enacted by Congress during the past several years. Congress has made the maximum terms of imprisonment for ten major title 18 bank fraud and embezzlement offenses as much as 15 times greater than they were in 1988, sending 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. The current guidelines are clearly inadequate and were structured for these fraud offenses as they existed before 1988, with two and five year maximum penalties. See guideline §2F1.1, background commentary. We believe that in raising the maximum penalties for major bank fraud offenses six-fold and more, Congress intended that the sentences be increased over the entire range of offense levels, including those at the lower and middle levels. The proposed amendment would do just that.

In summary, we strongly urge the Commission to adopt amendment 6 in order to respond to the Congressional determination that defendants convicted of fraud affecting a financial institution in the majority of fraud cases be subject to substantially greater punishments. Our testimony with respect to the fraud and theft guidelines is limited to amendment 6

affecting financial institutions. We believe significant revisions to the fraud and theft amendment 5 are needed; the Department will discuss these in other comments to the Commission.

We also will provide comments on a number of other proposals published by the Commission, including our opposition to the proposal to end alleged "double counting" in environmental offenses and our support for increased sentences for violations of wildlife protection statutes.

This concludes my prepared comments. I will be happy to answer any questions you may have.

STATEMENT

of

VINCENT L. BRODERICK, Chair,

Committee on Criminal Law

Of the Judicial Conference of the United States

and

MARK L. WOLF, Chair,

Subcommittee on Sentencing Guidelines and Procedures

before the

UNITED STATES SENTENCING COMMISSION

February 25, 1992

Introduction

We speak on behalf of the Judicial Conference of the United States. The Judicial Conference, through its Committee on Criminal Law and its predecessors, has been involved with the Guidelines since the beginning, and has been mandated by Congress to comment on the operation of the Guidelines and to assess the work of the Commission.

In partial discharge of that mandate the Judicial Conference in September, 1990 submitted eight recommendations to the Commission, expecting that they would be considered in connection with the 1991 amendment cycle. They were not. We have already -- and on several occasions -- expressed to the Commission our concern that the considered

recommendations of the Judicial Conference were being slighted. We were given to understand, however, that those recommendations were being carefully analyzed by the staff of the Commission, and welcomed Chairman Wilkins' assurance to the Judicial Conference at its September, 1991 meeting that in its 1992 amendment cycle the recommendations of the Judicial Conference (along with those of the Corrothers Committee, on which the Chief of the Administrative Office's Probation Division and the chair of the Criminal Law Committee served) would receive primary focus. We are gratified that they have.

The Judicial Conference recognizes that the Sentencing Commission has been deprived of a level playing field by statutorily required mandatory minimum sentences, and thus has welcomed the splendid report of the Commission to Congress on mandatory minimums and the havoc they have created in the sentencing area. The Judicial Conference and the judges of all the circuits involved with criminal sentences have adopted resolutions in opposition to mandatory minimums. We all recognize that until the preemptive effect of mandatory minimums is eliminated, the work of the Sentencing Commission will necessarily -- despite the best intentions of the members of the Commission -- be skewed and flawed. We enthusiastically support, therefore, the implicit recommendation contained in the Commission's report on mandatory minimums that they be repealed. Recognizing that an "effective, humane and rational sentencing policy" cannot be developed within a mandatory minimum regimen we suggest that next year, in connection with or, indeed, in lieu of an amendment cycle, the Commission make

recommendations to Congress, pursuant to 28 U.S.C. § 995(a)(20), to modify those statutes which presently mandate minimum sentences.

It has been -- and is -- the position of the Judicial Conference that it will work to improve the Sentencing Guidelines, and not to abolish them. Thus it rejected, more than a year ago, a recommendation tentatively proposed by the Federal Courts Study Committee that the Guidelines be made optional. It recognized, as indeed did Congress (see 28 U.S.C. § 994(m)), that in the first instance the starting point for certain Guidelines would be the average of sentences historically imposed, and that only in time would Guidelines be developed which would conform in all particulars to the statutory purposes of sentencing.

A primary tool in the development of "an effective, humane and rational sentencing policy" is the statutory authority which a judge has to depart when, in determining the sentence to be imposed, he finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration" by the Commission in formulating the Guidelines. We have discussed the importance of this power to depart many times with the Commission, and it has certainly been our impression that the members of the Commission agree that departure by judges in appropriate cases, and the careful consideration of the rationales for those departures by the Commission, will be essential elements in the meaningful development of the Guidelines.

But year after year the Guidelines Manual has contained language which suggests to judges that departures are inappropriate. I refer to Chapter One, Part A, §4(b) of the current Manual. It sets forth, in a self-fulfilling prophecy, that the Commission believes "that despite the courts' legal freedom to depart from the guidelines, they will not do so very often;" and that while it believes there may be cases in which a departure outside suggested levels is warranted, in its view "such cases will be highly infrequent." This language has undoubtedly discouraged departures by judges where departure was compellingly indicated: it has strongly suggested to some appellate judges -- particularly those who have not had sentencing experience -- that departures constitute rejection of the Guidelines, and are a form of what the Commission formerly (and happily no longer) characterized as "non-compliance."

The text of the Introduction to the Guidelines Manual is not part of the Guidelines. It can be changed by the Commission itself. It should be changed -- for two very good reasons.

The first reason is that the Guidelines at the present time are still largely a "heartland." The Commission has not yet had the experience -- or the input from the field -- that justifies any given Guideline on more than a tentative basis. That input will come from sentencing judges if they understand that their explained departures -- up or down -- and the Commission's consideration of the basis for those departures, are the best hope for the ultimate achievement of fairness in the sentencing process.

The second reason is that we must not let ourselves drown in large numbers. The Commission provides Guidelines for a statistical universe: each time a judge sentences there is not only a factual pattern before him but there is an individual, different from every other individual in the world. Circumstances which differentiate that fact pattern and that individual from all others are circumstances which judges should be encouraged to consider in determining whether the statutory standard for departure -- up or down -- has been met. If it has been met the judge has a duty -- not a right but a duty -- to depart, and the discharge of that duty should be encouraged by the Commission. We respectfully recommend, therefore, that just as "non-compliance" language has been eliminated from the Commission's lexicon, the Introduction to the Manual which presently discourages departures should be revised.

The Judicial Conference has exhibited considerable restraint, to this point, in suggesting amendments to the Guidelines. Those proposed amendments it did suggest 17 months ago, and which are reflected in the array which the Commission now has under consideration, were carefully drafted and subjected to intensive scrutiny by sentencing judges and by the Committee on Criminal Law before they were finally approved by the Judicial Conference. Other recommendations were considered and rejected. Many of the same problems which these recommendations address were identified by the Federal Courts Study Committee. Appendix B of the Report and Recommendations of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines (hereafter "Report and Recommendations"), which is attached

and which was delivered to the Commission this past August, explains how the recommendations were developed, and references additional possible recommendations which were considered and rejected.[1]

The pendency of these recommendations -- and the confident expectation that they will be adopted by the Commission, together with the knowledge that the Commission through the Corrothers Committee was sensitive to and was forthrightly addressing many of the same problems which prompted the Judicial Conference recommendations -- have acted as a brake on a strong movement within the judiciary more aggressively to confront manifest inequities which are occasioned by application of certain of the Guidelines in their present form. Many federal judges are unhappy with the Sentencing Guidelines -- these judges believe that to a great extent the Guidelines have sacrificed fairness on the altar of uniformity; that they have introduced disparities of their own; that their application often results in sentences which are disproportionate to the offense of conviction; and on the other side of the coin that some of the Guideline offense levels are unduly lenient. Several requests by individual judges and by local associations of judges have been made to the Judicial Conference and to its Criminal Law Committee to initiate independent studies of the Sentencing Guidelines; some have asked for a drastic overhaul of the Sentencing Guidelines system. We have opted, to this point, to refrain from confrontational activity and on a cooperative basis to seek necessary changes in the system.

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[1] There is attached to this statement a copy of the Report and Recommendations of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines.

We stress this to underline the importance which the Judicial Conference, representing the federal judiciary, places upon the adoption of its recommendations at this time.

We comment on those proposed amendments which encompass, in whole or in part, the recommendations of the Judicial Conference. In making those comments please understand that we speak on behalf of, and with the full authority of, the Judicial Conference of the United States. We are not in a position, representing the Judicial Conference, to make substantive comments on behalf of the Judicial Conference with respect to other 1992 proposed amendments which have been published for comment. The Judicial Conference is, in perhaps the best sense of the term, a deliberative body, and it takes time for it to decide matters which are presented to it. It has simply not been possible, through the relatively short window the Commission has provided between publication and time for comments, to give the Commission's 1992 cycle the comprehensive consideration it warrants. We discussed this matter with the Commission last year. We understand that there are statutory time restraints, but we suggest that some system be devised which will provide more time for consideration and evaluation of proposals published for comment.

We also suggest that there must be a reduction in the volume of annual amendments. The probation officers in federal service are a superb and highly intelligent group of public servants, and they have received excellent training by the Sentencing Commission in Sentencing Guidelines

matters. The yearly spate of amendments is, however, taking its toll. The publication of Appendix C may turn out to be of some help, but questions of retroactivity, or of substance versus clarification, are matters which non-lawyers should not be required, as a matter of routine, to deal with. Defense counsel and prosecutors are lawyers, but most defense lawyers (with the notable exception of federal defenders) have great difficulty in coping with a single volume of the Guidelines and do not understand that in may cases resort is necessary to more than one volume. It is hoped that, after the Commission adopts the amendments proposed by the Judicial Conference, a moratorium will be called on piece-meal amendments on a grand scale.

The practice of publishing numerous disparate possible amendments in the Federal Register, without meaningful explanation, makes it extremely difficult for us -- and almost impossible for others not so familiar with the Guidelines -- to understand the purposes of proposed amendments and to comment helpfully concerning them. Rather, we would urge that in the future the Commission build each generation of proposed amendments around a unifying theme, such as relevant conduct or acceptance of responsibility. We would further urge that the proposed amendments be accompanied by a Commission report setting forth the policy issues involved, indicating what approaches to those issues have been considered by the Commission, and describing the rationale for the amendments proposed. Such an approach, if coupled with early notice, would permit judges and others interested in federal sentencing matters to

participate with you in an informed and effective dialogue concerning the amendments proposed.

Comments on Proposed Amendments Which Reflect the Judicial Conference's Recommendations

First a general word about the Judicial Conference recommendations. The recommendations are aimed primarily at giving judges greater flexibility to tailor sentences to the individual within the Guideline structure. They are largely aimed at situations which affect the first offender at the lower end of the sentencing scale, where the possibilities are prison or no prison. They also address the situation of offenders for whom the offense level is affected by a determination of relevant conduct, with respect to which confusion has led to disparate and poorly-individualized sentences. The recommendations also seek to insure that explicit incentives for pleading guilty will be found within the Guidelines so that manipulation of the Guidelines can be reduced.

The comments which follow pertain to those published proposed amendments which reflect the Judicial Conference's September, 1990 recommendations.

1. Flexibility at the Low End of the Guidelines

A principal problem which the Judicial Conference recommendations addressed is the lack of flexibility at the low end of the Guidelines, with particular reference to first offenders. Before the Guidelines took effect, 40% of federal offenders were sentenced to terms of probation instead of imprisonment. For cases sentenced under the Guidelines, this number has dropped to 23%.[2] This is the area where acceptance of the Guidelines by judges has proven most difficult, and where judges see the greatest need for change.

In developing its recommendations, the Judicial Conference gave careful consideration to the structure of the current Guidelines and to the Commission's statutory mandate. The recommendations proposed modest changes to the Guidelines that would further the Congressional purpose of providing adequate flexibility to individualize sentences when warranted. 28 U.S.C. § 991(b)(1)(B). Most judges agree with Congress that the Guidelines should "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j).

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[2]The preGuideline probation rate comes from the D5 tables published by the Administrative Office of the U.S. Courts. In 1987 (excluding cases with fines only) probation was imposed in 40% of the cases (pp. 282-283, Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts (1987)). The guideline case figure comes from the 1990 Annual Report of the U.S. Sentencing Commission, Appendix B.

This is especially true given the demand on prison resources. The federal prison population has grown over 10% a year since 1989, and the federal prison system was crowded to 151% of rated capacity by the end of 1990. (Bureau of Justice Statistics, "Prisoners in 1990," May 1991). The proposed amendments that expand the availability of alternatives to imprisonment can help the Commission meet its statutory obligation to formulate Guidelines that "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission." 28 U.S.C. § 994(g).

Proposed amendment 29 includes six options which would increase the within-Guidelines sentencing options at the lower offense levels. We urge the Commission to adopt Options 1 through 3, which would implement three of the Judicial Conference proposals. Attachment A shows how the zones on the Guideline table where alternatives are permitted would be changed by these proposals.

Option 1: Option 1 would eliminate the requirement that offenders sentenced under the Commission's "split sentence" provision must serve at least one-half of the minimum Guideline range in prison. This would let the court determine the appropriate mix of imprisonment and confinement conditions when imposing a "split sentence." The proposed change would maintain the current structure of mandating some period of imprisonment, but would recognize that a briefer period of prison would serve the purpose of "shock incarceration."

Option 2: Option 2 would extend the alternative of probation with a condition of intermittent confinement, community confinement, or home detention to offense levels with minimum terms of imprisonment of up to and including 10 months. It thus extends this alternative to offenders who are currently eligible for only the "split sentence" option. The proposal continues to provide for, but does not mandate, a "split sentence" where it is now permitted. It also incorporates the redefinition of the split sentence as proposed in Option 1.

Allowing judges to set the mix of prison and alternative confinement in split sentences, or to require substitute punishments such as home confinement, will ameliorate the "cliff" between the lower Guideline ranges and those just above them, where imprisonment for at least the minimum term of the Guideline range would still be required. Offenders sentenced to a split sentence, or to probation with alternative confinement, will lose much of their liberty and will be punished; the court would have discretion only to choose the place of confinement in view of the other purposes of sentencing. We believe such changes would also better enable the court to implement other statutory directives, such as consideration of the need to provide correctional treatment in the most effective manner and the need to provide restitution to victims, while still providing just punishment for the offense.

Options 3 and 4: Option 3 would expand the availability of straight probation to two additional offense levels within Criminal History

Category I. The Guideline range in these cells would be changed to 0-6 months from their current ranges of 1-7 and 2-8 months.[3]

Option 4 would expand straight probation to three additional Guideline cells, one each at Criminal History Categories I to III.

We recommend Option 3 rather than Option 4. Straight probation is more appropriate for first offenders, who present less risk to the public, than for repeat offenders.

Option 5: While the rationale of the Judicial Conference's recommendations would suggest the desirability of expanding the availability of alternative approaches to sentences to the extent consistent with the purposes of sentencing under 18 U.S.C. § 3553(b), the Judicial Conference has not specifically considered or passed upon Option 5.

The Commission has requested comment on whether it should adopt an "offense-by-offense" approach, under which certain types of offenders, such as white collar offenders, would be excluded from eligibility for alternatives (Amendment 29, question 2). We oppose this approach as it would reduce the flexibility of the sentencing court. The Commission has already addressed what it considered the inadequacy of historical sentences for white-collar offenders in establishing starting offense levels in Chapter 2. Our Report and Recommendation (page 16) contained data

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[3] The "Reason for Amendment" section in the Federal Register at p. 110 misstates the guideline ranges for which the 0-6 would be substituted.

showing that the Judicial Conference proposals would not create leniency for white-collar defendants, and we have seen no new data suggesting that they would. Any effort further to constrain judges' sentencing options should be based only on clear evidence that they are somehow being misused.

The Commission has also requested comment on whether the Amendment 29 proposals "compromise the structure of the guidelines as originally drafted" (Amendment 29, question 1). They do not. The Judicial Conference in deciding upon its recommendations gave careful consideration to the structure of the current Guidelines. None of our proposals would compromise the structure of the Guidelines as originally drafted. The newly expanded zones and ranges under our proposals would comport with the Commission's table construction principle of overlapping ranges across two offense levels and one offender category.

Finally, we respond to a question raised by Commissioner Nagel at the last meeting of the Criminal Law Committee, and repeated by other Commissioners and staff. Since data show that alternative punishments are imposed on only a proportion of offenders currently eligible for them, why are new options needed? National figures for October 1989 through September 1990 show that only 70% of persons eligible for straight probation, only 32% of those eligible f or alternative confinement, and only 16% of those eligible for split sentences actually received those options. Since judges are not using the options that are available now, is there a need to expand the availability of alternatives?

There is. These data should in fact reassure the Commission that if it expands the availability of sentencing options, they will not be used in inappropriate cases. If judges always used options when they are available, they would be subject to the criticism of failing to take account of circumstances in individual cases that call for imprisonment instead of one or more of the available alternatives. But, as the data cited shows, judges do exercise discretion.

In any event, the number of offenders who are presently eligible for, but do not receive, a sentencing alternative does not speak to the need for expanded options. What matters is the number of presently-ineligible offenders who do deserve consideration for an option not now available for them. With respect to many offenders now falling in ranges where only limited options are available, it would be appropriate to consider straight probation or another alternative to imprisonment. Even if less than half of all the defendants eligible for alternatives under our proposals actually receive them, thousands of people will in the long run be diverted from prison to alternatives that are better-suited to the purposes of sentencing.

Some alternatives, such as half-way houses, are not available everywhere. Nation-wide implementation of home confinement has been complete only for a few months. By far the largest number (46%) of defendants placed under home confinement in the fourteen districts to which it was expanded last year were placed there as a condition of probation. Of the 597 persons who had been terminated from the home

confinement program through October 1991, 81% completed it successfully. Of the failures who were sent to prison after an unsuccessful period in home confinement, most were for technical violations (e.g. failure to return home promptly after work, or a positive drug test). Seven absconded, and 10 committed new offenses while under supervision. (Report of the Probation Division of the Administrative Office to the Committee on Criminal Law, December 1991.)

These alternative programs deserve further encouragement. We will continue our work with the Probation Division of the Administrative Office and with the Federal Judicial Center to educate judges and probation officers in the use of alternatives and to monitor the track record of these programs.

2. Relevant Conduct and Role in the Offense

Judges have been troubled that under the Guidelines they have imposed draconian sentences on drug "couriers," "cooks," "mules" or other persons who were essentially minor cogs in drug distribution machines controlled by others. These people often knew little about the overall scheme, received little benefit, and were dramatically less culpable than the "kingpins" whom they served.

The Judicial Conference recommendations in this area were predicated upon a general sense that egregious sentences for such defendants often resulted from the inclusion of large amounts of drugs in

the base offense level, through application of the relevant conduct Guideline. A close reading of the Guideline and its accompanying commentary suggests that this broad interpretation is not the only possible reading of the Guideline, and may not have been the intended reading. But the complicated structure of the Guideline and related commentary has led many probation officers and judges to neglect limiting language about foreseeability or scope of the defendant's agreement, and to emphasize broad language about common schemes and plans.

Proposed Guideline Amendment 1 (A) contains much that can help courts tailor relevant conduct to each defendant. We applaud the consolidation of definitions from the commentary into the Guideline itself. It will help to ensure that defendants are sentenced only on reasonably foreseeable acts of others that are in furtherance of the jointly-undertaken activity.

Proposed revisions to the commentary and accompanying illustrations also contain some helpful definitions and examples. We are still troubled, however, that taken as a whole, it remains difficult to discern the precise contours of relevant conduct from the proposed amended Guideline and commentary. The illustrations do not all seem consistent with the Guideline, with each other, or with how relevant conduct has been understood in the courts. Reading the illustrations, it is not immediately obvious how one arrives at the "right" answer. This portends continuing trouble, and suggests that the proposed amendment

may not be enough to end disparate application or appropriately to limit the sentences for low-level participants.

A few examples may illustrate the continued complexity of the Guideline under the proposed amendment. To make sense of the illustrations (e.g. drug dealer's girl friend accountable only for the one drug transaction she participated in, even though she knew of boy friend's other activity; street-level dealer accountable only for amount he sells, even though he knew of others selling for same supplier, unless they pool resources and profits) one must understand that determining whether an activity was "jointly undertaken" is a crucial step in applying the Guideline. The proposed new commentary asserts that determining "the scope of the criminal activity the particular defendant agreed to jointly-undertake is required." And, indeed, the illustrations can be harmonized if we understand that the scope of a defendant's agreement limits his liability.

But this is not exactly what the proposed amended Guideline says. It says that "all reasonably foreseeable [conduct] of others in furtherance of the jointly-undertaken criminal activity" may be attributed to a defendant. The commentary and the illustrations appear to be narrower than the Guideline language. If the Commission intends to limit the scope of relevant conduct further it needs to say so clearly and explicitly.

The commentary to the proposed Guideline may complicate application. The first illustration indicates that if a defendant aids and

abets a criminal activity (e.g. helps off-load a ton of marijuana from a ship), it makes no difference what the scope of his agreement was, nor whether he could foresee the amount of drugs involved -- he is liable for the whole thing. Aiding and abetting "trumps" other limitations. But the distinction between an aider-and-abettor and a co-conspirator is a slippery slope at best. It seems arbitrary and unrealistic to suggest that if a defendant is a co-conspirator, his liability is limited to what he understood to be the scope of his involvement in the conspiracy; but if one is labeled an aider-and-abettor, he is liable for the entire operation no matter how limited his knowledge.

The Guideline and commentary contain so many confusing phrases that both limit and expand the scope of relevant conduct -- e.g. "common scheme or plan," "foreseeable," "in furtherance of," "jointly- undertaken," "scope of the agreement" -- that we think consolidation and simplification are needed more than new definitions and new phrases. While the definitions offered in Part (B) of the amendment may be addressed to some of this confusion, we question how useful they will be. The proposed 120-day limitation seems especially troublesome.

The relevant conduct Guideline is not working fairly in its present form; change is needed. The problem of disproportionate sentences for low-level participants could be solved if a way could be found to allow courts to fix the defendant's offense level based on the reasonable scope of the particular defendant's involvement. Some of the language contained in the commentary -- limiting relevant conduct to the scope of the

defendant's agreement, based in part on his knowledge and the benefit he derived from the joint activity -- moves us in this direction. But we are concerned that the presently proposed amendment and comment may not be clear enough, and we hope that you will improve it before submitting it to Congress this year. The scope of relevant conduct for defendants should be limited, and this amendment will constitute a welcome change from current practice in some circuits. But there should be some commentary that makes it clear -- directly and explicitly -- that such limitation is the purpose of the amendment.

3. Capping the offense level for minimal participants

Evidence suggests that, historically, "role in the offense" has been a more important sentencing factor than drug amount in the sentencing of lower-level drug offenders. (Memo on file at the Federal Judicial Center.)

Amendment 19 would set caps on the offense level of minor or minimal participants. Proposals by the Commission to cap the offense levels of minimal participants provide a useful supplementary approach to the proposals which the Judicial Conference made with respect to relevant conduct and role in the offense. While this "cap" approach has not specifically been reviewed by the Judicial Conference we have no hesitancy in supporting it as a supplement to the Conference's recommendations.

Of the three Options proposed in this amendment, we prefer Option 3. First, we believe that these caps should apply only to minimal

participants, not minor participants as in Options 1 and 2. Judges can then use their discretion to cap the offense level for truly low-level participants, such as those who are paid a one-time fee for acting as a "mule." Second, the type of drug involved, taken into account in Option 2, is not as relevant in these cases as is the fact of the defendant's minimal role. Finally, we believe that the cap should be low. We endorse offense level 16 as suggested in the proposed amendments, because it is the lowest point proposed. We would prefer, however, to have the cap set at 14, so that with the acceptance of responsibility adjustment, first offenders would be eligible for "shock incarceration" or other sentencing alternatives.

4. Departures

The proposed amendments include several which reflect the recommendations of the Judicial Conference concerning departures. Amendment 26, part (B) addresses the Judicial Conference's concern with departures based on the adequacy of the criminal history score, and we urge its adoption. It would clarify that departures due to the inadequacy of the criminal history score may be based on either degree of risk or type of risk. This clarification was proposed in response to concern that the Guidelines do not give enough flexibility to depart upwards based on offender dangerousness.

Amendment 26, part (A) addresses the problem of offenders with extensive criminal histories for whom Criminal History Category VI is inadequate. We favor the departure approach in Option 2, which gives

judges advice about which factors to consider and how to structure the departure. This approach is preferred to adding a new Criminal History Category VII to the Guideline table, as described in Amendment 28, part (B).

5. Offender characteristics

The area of offender characteristics has been of deep concern to judges, and we recommend that the Commission adopt Proposed Amendment 33, part (A). This simple change would send a clear signal that judges are encouraged to look for offender characteristics that are present to an unusual degree or in unusual combinations, and that they should depart if the purposes of sentencing would be served. Part (B) also puts symmetry into the policy statement on age, so that offenders who are young and less culpable may benefit from departures when appropriate.

Parts (C) and (D) do not seem advisable to us at this time. Ambiguous standards such as "lack of youthful guidance" in Part (C) are likely to make the sentencing hearing a battleground over discrete factors that are poorly defined. A departure for advanced age as in Part (D) is addressed to a real concern -- our aging prison population. But this important problem needs additional study.

6. Acceptance of responsibility

We applaud the serious study the Commission has given the "acceptance of responsibility" Guideline, as reflected in Proposed Amendment 23. The Judicial Conference recommended that the Commission reconsider the "acceptance of responsibility" Guideline to address our concern that the incentives to plead guilty are sometimes not adequate, especially at the upper end of the sentencing table. Absent adequate incentives within the Guidelines, manipulation and use of surrogate incentives may result, which would undermine the Guidelines System and lead to disparity.

As to Option 1 the Commission seeks comment on ways to clarify the scope of conduct for which a defendant must accept responsibility. The central question is whether a defendant must accept responsibility for both the offense of conviction and any additional relevant conduct. There is a split in the circuits as to the constitutionality of requiring a defendant to accept responsibility for more than the offense of conviction. The constitutional issue would be eliminated if the Guidelines were amended to require acceptance only for the offense of conviction. This would also permit elimination of the somewhat murky language in the present Guideline requiring that the defendant accept responsibility for "his criminal conduct."

The reduction for pleading guilty should be increased above the current two levels, especially for crimes at higher basic offense levels. At

least a three-level reduction should be allowed, but not required, for a guilty plea. The addition of a separate one-level reduction for other convincing demonstrations of acceptance of responsibility, such as assistance in the recovery of fruits of the offense, etc. would be useful.

Conclusion

We appreciate the consideration given the Judicial Conference recommendations this amendment cycle, as well as your attention to the other suggestions made by judges and probation officers for improvements to the Guidelines. We note with approval, for example, Amendment 31 that addresses a request from probation officers to simplify the application of Guideline § 5E1.2(b) concerning the setting of fines.

With continued communication and cooperation between the courts and the Commission, we believe the Guidelines System can be improved so that the experiment in sentencing reform begun in 1984 will bear fruit.

ATTACHMENT A

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
A 3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	~~1–7~~ 0–6	2–8	4–10	8–14	12–18	15–21
8	~~2–8~~ 0–6	4–10	6–12	10–16	15–21	18–24
B 9	4–10	6–12	8–14	12–18	18–24	21–27
t 10	6–12	8–14	10–16	15–21	21–27	24–30
C 11	8–14	10–16	12–18	18–24	24–30	27–33
12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24				
15	18–24	21–27				
16	21–27	24–30				
17	24–30	27–33				
18	27–33	30–37				
19	30–37	33–41				
20	33–41	37–46				
21	37–46	41–51				
22	41–51	46–57				
23	46–57	51–63				
24	51–63	57–71				
25	57–71	63–78				
26	63–78	70–87				
27	70–87	78–97	87–108	100–125	120–150	130–162
28	78–97	87–108	97–121	110–137	130–162	140–175
29	87–108	97–121	108–135	121–151	140–175	151–188
30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
37	210–262	235–293	262–327	292–365	324–405	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life
43	life	life	life	life	life	life

OPTION 1 RE-DEFINES THE SPLIT SENTENCE

OPTION 2 ELIMINATES DOTTED LINE SEPARATING ZONES B&C

OPTION 3 LOWERS PROBATION LINE FOR CATEGORY I OFFENDERS

KEY

A—Probation available (*see* §5B1.1(a)(1))

B—Probation with conditions of confinement available (*see* §5B1.1(a)(2))

C—New "split sentence" available (*see* §§5C1.1(c)(3), (d)(2))

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
A 1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	~~1–7~~ 0–6	2–8	4–10	8–14	12–18	15–21
8	~~2–8~~ 0–6	4–10	6–12	10–16	15–21	18–24
B 9	4–10	6–12	8–14	12–18	18–24	21–27
10	6–12	8–14	10–16	15–21	21–27	24–30
11	8–14	10–16	12–18	18–24	24–30	27–33
C 12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24				
15	18–24	21–27				
16	21–27	24–30				
17	24–30	27–33				
18	27–33	30–37				
19	30–37	33–41				
20	33–41	37–46				
21	37–46	41–51				
22	41–51	46–57				
23	46–57	51–63				
24	51–63	57–71				
25	57–71	63–78				
26	63–78	70–87				
27	70–87	78–97	87–108	100–125	120–150	130–162
28	78–97	87–108	97–121	110–137	130–162	140–175
29	87–108	97–121	108–135	121–151	140–175	151–188
30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
37	210–262	235–293	262–327	292–365	324–405	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life
43	life	life	life	life	life	life

OPTION 1 RE-DEFINES THE SPLIT SENTENCE

OPTION 2 ELIMINATES DOTTED LINE SEPARATING ZONES B&C

OPTION 3 LOWERS PROBATION LINE FOR CATEGORY I OFFENDERS

KEY

A—Probation available (*see* §5B1.1(a)(1))

B—Probation with conditions of confinement available (*see* §5B1.1(a)(2))

C—New "split sentence" available (*see* §§5C1.1(c)(3), (d)(2))

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
A 1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	~~1–7~~ 0–6	2–8	4–10	8–14	12–18	15–21
8	~~2–8~~ 0–6	4–10	6–12	10–16	15–21	18–24
B 9	4–10	6–12	8–14	12–18	18–24	21–27
10	6–12	8–14	10–16	15–21	21–27	24–30
& 11	8–14	10–16	12–18	18–24	24–30	27–33
C 12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24				
15	18–24	21–27				
16	21–27	24–30				
17	24–30	27–33				
18	27–33	30–37				
19	30–37	33–41				
20	33–41	37–46				
21	37–46	41–51				
22	41–51	46–57				
23	46–57	51–63				
24	51–63	57–71				
25	57–71	63–78				
26	63–78	70–87				
27	70–87	78–97	87–108	100–125	120–150	130–162
28	78–97	87–108	97–121	110–137	130–162	140–175
29	87–108	97–121	108–135	121–151	140–175	151–188
30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
37	210–262	235–293	262–327	292–365	324–405	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life
43	life	life	life	life	life	life

OPTION 1 RE-DEFINES THE SPLIT SENTENCE

OPTION 2 ELIMINATES DOTTED LINE SEPARATING ZONES B&C

OPTION 3 LOWERS PROBATION LINE FOR CATEGORY I OFFENDERS

KEY

A—Probation available (*see* §5B1.1(a)(1))

B—Probation with conditions of confinement available (*see* §5B1.1(a)(2))

C—New "split sentence" available (*see* §§5C1.1(c)(3), (d)(2))

SENTENCING TABLE

(in months of imprisonment)

Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	~~1–7~~ 0–6	2–8	4–10	8–14	12–18	15–21
8	~~2–8~~ 0–6	4–10	6–12	10–16	15–21	18–24
9	4–10	6–12	8–14	12–18	18–24	21–27
10	6–12	8–14	10–16	15–21	21–27	24–30
11	8–14	10–16	12–18	18–24	24–30	27–33
12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24				
15	18–24	21–27				
16	21–27	24–30				
17	24–30	27–33				
18	27–33	30–37				
19	30–37	33–41				
20	33–41	37–46				
21	37–46	41–51				
22	41–51	46–57				
23	46–57	51–63				
24	51–63	57–71				
25	57–71	63–78				
26	63–78	70–87				
27	70–87	78–97	87–108	100–125	120–150	130–162
28	78–97	87–108	97–121	110–137	130–162	140–175
29	87–108	97–121	108–135	121–151	140–175	151–188
30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
37	210–262	235–293	262–327	292–365	324–405	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life
43	life	life	life	life	life	life

A
B
t
C

OPTION 1 RE-DEFINES THE SPLIT SENTENCE

OPTION 2 ELIMINATES DOTTED LINE SEPARATING ZONES B&C

OPTION 3 LOWERS PROBATION LINE FOR CATEGORY I OFFENDERS

KEY

A—Probation available (*see* §5B1.1(a)(1))

B—Probation with conditions of confinement available (*see* §5B1.1(a)(2))

C—New "split sentence" available (*see* §§5C1.1(c)(3), (d)(2))

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
A 3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	~~1-7~~ 0-6	2–8	4–10	8–14	12–18	15–21
8	~~2-8~~ 0-6	4–10	6–12	10–16	15–21	18–24
B 9	4–10	6–12	8–14	12–18	18–24	21–27
& 10	6–12	8–14	10–16	15–21	21–27	24–30
C 11	8–14	10–16	12–18	18–24	24–30	27–33
12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24				
15	18–24	21–27				
16	21–27	24–30				
17	24–30	27–33				
18	27–33	30–37				
19	30–37	33–41				
20	33–41	37–46				
21	37–46	41–51				
22	41–51	46–57				
23	46–57	51–63				
24	51–63	57–71				
25	57–71	63–78				
26	63–78	70–87				
27	70–87	78–97	87–108	100–125	120–150	130–162
28	78–97	87–108	97–121	110–137	130–162	140–175
29	87–108	97–121	108–135	121–151	140–175	151–188
30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
37	210–262	235–293	262–327	292–365	324–405	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life
43	life	life	life	life	life	life

OPTION 1 RE-DEFINES THE SPLIT SENTENCE

OPTION 2 ELIMINATES DOTTED LINE SEPARATING ZONES B&C

OPTION 3 LOWERS PROBATION LINE FOR CATEGORY I OFFENDERS

KEY

A—Probation available (*see* §5B1.1(a)(1))

B—Probation with conditions of confinement available (*see* §5B1.1(a)(2))

C—New "split sentence" available (*see* §§5C1.1(c)(3), (d)(2))

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
A 3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	~~1-7~~ 0-6	2–8	4–10	8–14	12–18	15–21
8	~~2-8~~ 0-6	4–10	6–12	10–16	15–21	18–24
B 9	4–10	6–12	8–14	12–18	18–24	21–27
10	6–12	8–14	10–16	15–21	21–27	24–30
11	8–14	10–16	12–18	18–24	24–30	27–33
C 12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24				
15	18–24	21–27				
16	21–27	24–30				
17	24–30	27–33				
18	27–33	30–37				
19	30–37	33–41				
20	33–41	37–46				
21	37–46	41–51				
22	41–51	46–57				
23	46–57	51–63				
24	51–63	57–71				
25	57–71	63–78				
26	63–78	70–87				
27	70–87	78–97	87–108	100–125	120–150	130–162
28	78–97	87–108	97–121	110–137	130–162	140–175
29	87–108	97–121	108–135	121–151	140–175	151–188
30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
37	210–262	235–293	262–327	292–365	324–405	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life
43	life	life	life	life	life	life

OPTION 1 RE-DEFINES THE SPLIT SENTENCE

OPTION 2 ELIMINATES DOTTED LINE SEPARATING ZONES B&C

OPTION 3 LOWERS PROBATION LINE FOR CATEGORY I OFFENDERS

KEY

A—Probation available (*see* §5B1.1(a)(1))

B—Probation with conditions of confinement available (*see* §5B1.1(a)(2))

C—New "split sentence" available (*see* §§5C1.1(c)(3), (d)(2))

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
A 1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	~~1–7~~ 0–6	2–8	4–10	8–14	12–18	15–21
8	~~2–8~~ 0–6	4–10	6–12	10–16	15–21	18–24
B 9	4–10	6–12	8–14	12–18	18–24	21–27
10	6–12	8–14	10–16	15–21	21–27	24–30
& 11	8–14	10–16	12–18	18–24	24–30	27–33
C 12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24				
15	18–24	21–27				
16	21–27	24–30				
17	24–30	27–33				
18	27–33	30–37				
19	30–37	33–41				
20	33–41	37–46				
21	37–46	41–51				
22	41–51	46–57				
23	46–57	51–63				
24	51–63	57–71				
25	57–71	63–78				
26	63–78	70–87				
27	70–87	78–97	87–108	100–125	120–150	130–162
28	78–97	87–108	97–121	110–137	130–162	140–175
29	87–108	97–121	108–135	121–151	140–175	151–188
30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
37	210–262	235–293	262–327	292–365	324–405	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life
43	life	life	life	life	life	life

OPTION 1 RE-DEFINES THE SPLIT SENTENCE

OPTION 2 ELIMINATES DOTTED LINE SEPARATING ZONES B&C

OPTION 3 LOWERS PROBATION LINE FOR CATEGORY I OFFENDERS

KEY

A—Probation available (*see* §5B1.1(a)(1))

B—Probation with conditions of confinement available (*see* §5B1.1(a)(2))

C—New "split sentence" available (*see* §§5C1.1(c)(3), (d)(2))

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
A 1	0–6	0–6	0–6	0–6	0–6	0–6
A 2	0–6	0–6	0–6	0–6	0–6	1–7
A 3	0–6	0–6	0–6	0–6	2–8	3–9
A 4	0–6	0–6	0–6	2–8	4–10	6–12
A 5	0–6	0–6	1–7	4–10	6–12	9–15
A 6	0–6	1–7	2–8	6–12	9–15	12–18
A 7	~~1–7~~ 0–6	2–8	4–10	8–14	12–18	15–21
A 8	~~2–8~~ 0–6	4–10	6–12	10–16	15–21	18–24
B C 9	4–10	6–12	8–14	12–18	18–24	21–27
B C 10	6–12	8–14	10–16	15–21	21–27	24–30
B C 11	8–14	10–16	12–18	18–24	24–30	27–33
B C 12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24				
15	18–24	21–27				
16	21–27	24–30				
17	24–30	27–33				
18	27–33	30–37				
19	30–37	33–41				
20	33–41	37–46				
21	37–46	41–51				
22	41–51	46–57				
23	46–57	51–63				
24	51–63	57–71				
25	57–71	63–78				
26	63–78	70–87				
27	70–87	78–97	87–108	100–125	120–150	130–162
28	78–97	87–108	97–121	110–137	130–162	140–175
29	87–108	97–121	108–135	121–151	140–175	151–188
30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
37	210–262	235–293	262–327	292–365	324–405	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life
43	life	life	life	life	life	life

OPTION 1 RE-DEFINES THE SPLIT SENTENCE

OPTION 2 ELIMINATES DOTTED LINE SEPARATING ZONES B&C

OPTION 3 LOWERS PROBATION LINE FOR CATEGORY I OFFENDERS

KEY

A—Probation available (*see* §5B1.1(a)(1))

B—Probation with conditions of confinement available (*see* §5B1.1(a)(2))

C—New "split sentence" available (*see* §§5C1.1(c)(3), (d)(2))

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
A 1	0–6	0–6	0–6	0–6	0–6	0–6
2	0–6	0–6	0–6	0–6	0–6	1–7
3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	~~1–7~~ 0–6	2–8	4–10	8–14	12–18	15–21
8	~~2–8~~ 0–6	4–10	6–12	10–16	15–21	18–24
B & C 9	4–10	6–12	8–14	12–18	18–24	21–27
10	6–12	8–14	10–16	15–21	24–30	24–30
11	8–14	10–16	12–18	18–24	27–33	27–33
C 12	10–16	12–18	15–21	21–27	30–37	30–37
13	12–18	15–21	18–24	24–30	33–41	33–41
14	15–21	18–24	21–27			
15	18–24	21–27	24–30			
16	21–27	24–30	27–33			
17	24–30	27–33	30–37			
18	27–33	30–37	33–41			
19	30–37	33–41	37–46			
20	33–41	37–46	41–51			
21	37–46	41–51	46–57			
22	41–51	46–57	51–63			
23	46–57	51–63	57–71			
24	51–63	57–71	63–78			
25	57–71	63–78	70–87			
26	63–78	70–87	78–97	87–108	100–125	120–150	130–162
27	70–87	78–97	87–108	97–121	110–137	130–162	140–175
28	78–97	87–108	97–121	108–135	121–151	140–175	151–188
29	87–108	97–121	108–135	121–151	135–168	151–188	168–210
30	97–121	108–135	121–151	135–168	151–188	168–210	188–235
31	108–135	121–151	135–168	151–188	168–210	188–235	210–262
32	121–151	135–168	151–188	168–210	188–235	210–262	235–293
33	135–168	151–188	168–210	188–235	210–262	235–293	262–327
34	151–188	168–210	188–235	210–262	235–293	262–327	292–365
35	168–210	188–235	210–262	235–293	262–327	292–365	324–405
36	188–235	210–262	235–293	262–327	292–365	324–405	360–life
37	210–262	235–293	262–327	292–365	324–405	360–life	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life	360–life
43	life	life	life	life	life	life	life

OPTION 1 RE-DEFINES THE SPLIT SENTENCE

OPTION 2 ELIMINATES DOTTED LINE SEPARATING ZONES B&C

OPTION 3 LOWERS PROBATION LINE FOR CATEGORY I OFFENDERS

KEY

A—Probation available (*see* §5B1.1(a)(1))

B—Probation with conditions of confinement available (*see* §5B1.1(a)(2))

C—New "split sentence" available (*see* §§5C1.1(c)(3), (d)(2))

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
A 1	0–6	0–6	0–6	0–6	0–6	0–6
A 2	0–6	0–6	0–6	0–6	0–6	1–7
A 3	0–6	0–6	0–6	0–6	2–8	3–9
A 4	0–6	0–6	0–6	2–8	4–10	6–12
A 5	0–6	0–6	1–7	4–10	6–12	9–15
A 6	0–6	1–7	2–8	6–12	9–15	12–18
A 7	~~1–7~~ 0–6	2–8	4–10	8–14	12–18	15–21
A 8	~~2–8~~ 0–6	4–10	6–12	10–16	15–21	18–24
B C 9	4–10	6–12	8–14	12–18	18–24	21–27
B C 10	6–12	8–14	10–16	15–21	21–27	24–30
B C 11	8–14	10–16	12–18	18–24	24–30	27–33
B C 12	10–16	12–18	15–21	21–27	27–33	30–37
13	12–18	15–21	18–24	24–30	30–37	33–41
14	15–21	18–24				
15	18–24	21–27				
16	21–27	24–30				
17	24–30	27–33				
18	27–33	30–37				
19	30–37	33–41				
20	33–41	37–46				
21	37–46	41–51				
22	41–51	46–57				
23	46–57	51–63				
24	51–63	57–71				
25	57–71	63–78				
26	63–78	70–87				
27	70–87	78–97	87–108	100–125	120–150	130–162
28	78–97	87–108	97–121	110–137	130–162	140–175
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30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
37	210–262	235–293	262–327	292–365	324–405	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life
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2	0–6	0–6	0–6	0–6	0–6	1–7
3	0–6	0–6	0–6	0–6	2–8	3–9
4	0–6	0–6	0–6	2–8	4–10	6–12
5	0–6	0–6	1–7	4–10	6–12	9–15
6	0–6	1–7	2–8	6–12	9–15	12–18
7	~~1–7~~ 0–6	2–8	4–10	8–14	12–18	15–21
8	~~2–8~~ 0–6	4–10	6–12	10–16	15–21	18–24
B 9	4–10	6–12	8–14	12–18	18–24	21–27
10	6–12	8–14	10–16	15–21	24–30	24–30
11	8–14	10–16	12–18	18–24	27–33	27–33
C 12	10–16	12–18	15–21	21–27	30–37	30–37
13	12–18	15–21	18–24	24–30	33–41	33–41
14	15–21	18–24				
15	18–24	21–27				
16	21–27	24–30				
17	24–30	27–33				
18	27–33	30–37				
19	30–37	33–41				
20	33–41	37–46				
21	37–46	41–51				
22	41–51	46–57				
23	46–57	51–63				
24	51–63	57–71				
25	57–71	63–78				
26	63–78	70–87				
27	70–87	78–97	87–108	100–125	120–150	130–162
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30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
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40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life
43	life	life	life	life	life	life

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C—New "split sentence" available (*see* §§5C1.1(c)(3), (d)(2))

#23

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
PROBATION OFFICE

ST. LOUIS, MISSOURI

JEROME F. LAWRENZ
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111 U.S. COURT & CUSTOM HOUSE
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February 28, 1992

Ms. Phyllis J. Newton, Staff Director
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

RE: PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES

Dear Ms. Newton:

The following comments are offered by the U.S. Probation Office, Eastern District of Missouri, in response to the Proposed Amendments to the Sentencing Guidelines.

SECTION I: AMENDMENTS RESPONSIVE TO JUDICIAL CONFERENCE RECOMMENDATIONS

Comments to questions by the Commission (Page 4):

1. It does not appear that the proposals "compromise the structure of the guidelines as originally drafted.

2. It is felt that the Commission should not adopt an "offense-by-offense" approach under which certain types of offenders within the alternative-eligible guideline cells would be excluded from eligibility.

3. There is no need to expand the available sentencing options to include additional alternative programs, such as intensive supervision, public service, shock incarceration, day reporting centers, or other programs, since this would unduly complicate the sentencing process, and most of said programs are already available options to the Bureau of Prisons.

Departures Based On Offender Characteristics (Page 4):

This is an important area warranting careful consideration by the Sentencing Commission.

Departures Based On Inadequacy Of Criminal History Score (Page 5):

Increased guidance to Courts as to how to depart based on inadequacy of criminal history is desirable; however, expansion of the criminal history categories to VII and beyond would lessen the need for further guidance.

Acceptance of Responsibility (Page 5):

Of the four proposed options, Option No. 4 appears most preferable since it would reward those defendant's who do more than merely plead guilty.

Relevant Conduct (Page 6):

Any amendments which clarify or help define relevant conduct are duly welcomed.

SECTION II: ADDITIONAL AMENDMENTS OF SPECIAL INTEREST

Comments to questions by the Commission (Page 9):

1. It is felt that the mitigating role adjustment should apply in cases in which the defendant is less culpable than other participants in the same case.

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

3. Factors including function and activity when compared to others involved should be considered by a mitigating role reduction.

4. The mitigating role reduction should not apply to defendants who have already benefitted from not being held for the full amount of controlled substances.

5. Defendants should not be considered for a mitigating role even if they are held responsible for a greater amount of controlled substance than actually trafficked. In general, role descriptions are too subjective and frequently result in objections from the defendant and/or government.

REDEFINITION OF CAREER CRIMINAL, GUIDELINE SECTION 4B1.1 (Page 10):

Part (D) It is recommended that the Commission should not identify certain categories of crimes of violence that would be considered "lesser" crimes of violence and therefore not counted.

Parts (E and F) Unrelated cases that are counted as two convictions should be counted as separate convictions for the purposes of the career criminal guideline. It is felt that a modification is not needed to insure that the two prior convictions in the instant offense shall have been committed in a strictly consecutive sequence. A "short-lived crime spree" involving unrelated offenses required serious consequences.

PLEA BARGAINING POLICY; USE OF ACQUITTALS (Page 11):

Parts (B and C) A departure based on conduct dismissed pursuant to a plea agreement is unnecessary in the Eighth Circuit because of case law associated with the relevant conduct guidelines. However, it is felt that conduct of which a defendant is acquitted should be ignore and not considered under the standards of relevant conduct.

SECTION IV: LIST OF ADDITIONAL PROPOSED AMENDMENTS

Chapter 2 Guidelines and Commentary (Page 14):

Amendment No. 5 - It is recommended that the Commission retain the "more than minimal planning" adjustment.

Amendment No. 7 - An increase of offense levels on the drug tables for distribution of large amounts of Schedule III, IV, and V controlled substances, anabolic steroids, and Schedule I and II depressants is recommended.

Amendment No. 8 - It is felt that an additional enhancement for death or bodily injury as well as possession of a firearm during the unlawful smuggling of aliens should be implemented. The defendant's state of mind does not appear relevant.

Amendments Nos. 10 and 11 regarding toxic substances, pesticides, and protected fish and wildlife appear appropriate.

Chapter 3 Guidelines and Commentary (Page 15):

Amendment No. 21 - It is felt that the present guideline 3C1.2 adequately covers the range of behavior which is applicable when reckless endangerment during flight occurs.

Amendment No. 22 - It is felt that the present guideline 3D1.4, multiple count rules, is already clear and effective, but further guidance and clarification are duly welcomed.

Chapter 4 Guidelines and Commentary (Page 16):

Amendment No. 28 - It is recommended that the Commission establish a new Category zero (0) criminal history to distinguish between a first offender and a category I offender. It is further recommended that a new category VII abe established as well as additional criminal history categories to address the more serious offenders. Option three, which establishes a category of VII (16 to 18 points), appears preferable.

Sincerely,

William R. Thorne

William R. Thorne
Senior U.S. Probation Officer

Approved by: W. A. Lazier

Wellington A. Lazier
Deputy Chief U.S. Probation Officer

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

WRT:tlm
[LT-Sente]



U.S. District Court
Eastern District of Missouri

FAX MACHINE TRANSMITTAL

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DATE: 2/28/92 TIME: 4:45 P.M.

TO: U.S. SENTENCING COMMISSION

FROM: WM. THORNE
U.S. Probation Officer

FAX:

RE: PROPOSED GUIDELINES AMENDMENTS

Pages Sent (including cover sheet): 5

SPECIAL INSTRUCTIONS

Letter to follow!

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
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JAMES D. PROVENCE
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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.

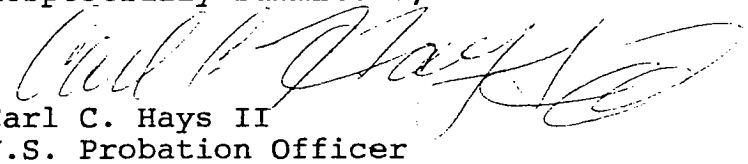
Part I is difficult to evaluate, but if one is to assume that the items were not intended for circulation because they were simply poor items is not sufficient reason for such a change. Quite frankly, had they been good items, they would have been circulated. I do not think this is a good amendment. 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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
PROBATION OFFICE

Frank D. Hall, Jr.
Chief Probation Officer
323 U. S. Courthouse
Indianapolis, IN 46204
317-226-6751
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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 it 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

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.

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.

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

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

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, be 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, nd 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 likihood 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

#27

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
PROBATION OFFICE

ROBERT M. LATTA
CHIEF PROBATION OFFICER

600 U.S. COURTHOUSE
312 N. SPRING STREET
LOS ANGELES 90012-4708

March 2, 1992

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

US PROBATION LA TEL: 213-894-3627 Mar 2,92 9:52 No.003 P.02

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

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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

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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?

US PROBATION LA TEL: 213-894-3627 Mar 2,92 9:52 No.003 P.05

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.

US PROBATION LH TEL: 213-894-3027 MAR 2,92 9:32 NO.005 P.06

#29

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February 21, 1992

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

Attn. Guideline Comment

To Whom This May Concern:

I have read the notice of proposed amendments to the sentencing guidelines, policy statements and commentary contained in the Federal Register, Vol. 57, No. 1, of January 2, 1992, wherein comments were solicited. I have a particular comment not to any proposed amendments but rather to the lack of a proposed amendment where, I believe, one is necessary. Specifically, Application Note 3 to the Commentary to §4A1.2 needs to be clarified because judges are finding it unduly vague.

The government has commenced "Operation Triggerlock" wherein many people convicted of state crimes are being prosecuted federally for possession of firearms discovered during the investigation of the state crime. A typical example is a recent client of mine. He was a native of Guyana who was living unlawfully as an alien in the United States. Specifically, he was living in an apartment in Hartford, Connecticut. At midnight one night the police, armed with a search warrant for narcotics, kicked down his door and found him in bed. Near his bed they found some narcotics and a firearm. He found himself arrested for the first time in his life. He was a "first offender" for the criminal justice system.

The firearm belonged to my client's father and was not possessed for any reason relating to the possession of the narcotics. My client was prosecuted in state court for possession of narcotics with intent to sell by a drug dependent person, pled guilty, and received a sentence of 7 years suspended after 4. He was thereafter prosecuted federally under 18 U.S.C. § 922(g) for being an illegal alien in possession of the firearm. He pled guilty to that offense as well. The United States Probation Officer assigned 3 criminal history points to my client based upon his state drug conviction. I objected in a letter dated January 30, 1992, a copy of which is enclosed. My point was that Application Note 3 to the Commentary to §4A1.2 clearly states that "prior sentences are considered related if they resulted from offenses that occurred on the same occasion." The prosecutor responded in a letter dated February 4, 1992, a copy of which is

enclosed. The prosecutor stated that the probation officer was correct because my client came into possession of the firearm before he came into possession of the drugs and therefore the offenses were not "related" despite the fact that the drugs and the gun were discovered by the police on the same occasion. The prosecutor thereafter argued on the day of sentencing that § 4A1.2(a)(2) only applies to construing whether two prior sentences are related to each other, not to a case such as my client's where the court is determining whether a prior sentence is related to the case at bar. The probation officer and the judge agreed with the prosecutor and, as a consequence, my client found himself in criminal history category II despite the fact that he was a first offender in the criminal justice system.

The case I have described is not an isolated or unusual case under "Operation Triggerlock" but rather illustrates the norm. My client could have been charged in a single federal indictment with one count of possession of narcotics and in another count with possession of the firearm, but instead due to circumstances completely beyond his control he was not. The judge, consistent with the practice of most judges in "Operation Triggerlock" cases, departed downward based upon a conclusion that the elevated criminal history score based on the drug conviction overrepresented the seriousness of the defendant's "criminal history." Neither side is appealing. Nevertheless, I remain convinced that judges are misconstruing §4A1.2(a) and Application Note 3 to the Commentary because they find those provisions to be unduly vague. In my view, the Commission did not intend to say that individuals such as the man whose case I described are more likely to become recidivists if they are prosecuted by separate sovereigns than if they are prosecuted by a single sovereign. I would therefore respectfully suggest that Application Note 3 to the Commentary to §4A1.2 should be amended to provide further examples to illustrate cases that are "related" for criminal history purposes.

Very truly yours,

Gary D. Weinberger
Asst. Federal Public Defender

GDW/aw

FEDERAL PUBLIC DEFENDER
District of Connecticut
450 Main Street, Room 710
Hartford 06103

Thomas G. Dennis
FEDERAL PUBLIC DEFENDER

(203) 240-33
(FTS) 244-335

January 30, 1992

Ms. Virginia Swisher
United States Probation Officer
450 Main Street
Hartford, CT 06103

Re: United States v. Malvin Joseph
Criminal No. 2:91CR61(EBB)

Dear Ms. Swisher:

Please let this letter serve as my written objections to the Presentence Report in the above-entitled case. All of these objections stem from the fact that, due to circumstances completely beyond his control, the state of Connecticut and the federal government split one case into two and prosecuted the two aspects of this case separately. I object to the conclusion in paragraph 31 on page 4 that Mr. Joseph should receive three criminal history points for his state of Connecticut conviction on the drug aspect of this case. I would respectfully direct your attention to the commentary to Guidelines § 4A1.2. Application Note 3 states that, "prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." The drug conviction was "unrelated" in the sense that the drugs and the gun were not part of a common scheme or plan -- that is, the gun was not possessed to protect the drugs. However, the Guidelines do address the matter in the disjunctive through the use of the word "or" and thus consider offenses that occur on the same occasion to be related even if not part of a common scheme or plan. I therefore believe that Mr. Joseph should obtain zero criminal history points from the conviction on the drugs that were found on the same occasion as the gun which is the gravamen of this case. In discussing this objection with you, you have stated that the offenses did not "occur on the same occasion" because they did not begin on the same occasion. That is, Mr. Joseph came into possession of the gun before he came into possession of the drugs. I believe that you have misconstrued the meaning and intention of the sentencing commission in their use of the word "occur". Stepping back and looking at the broad picture as set forth in the Introductory Commentary to Chapter Four, Part A of the guidelines manual, it is clear that the purpose of the criminal history score is to distinguish the first offender from the repeat offender. Malvin Joseph is a first offender for the criminal justice system, the bifurcation of his offense

notwithstanding.

I object to paragraph 36 because I believe that Mr. Joseph's criminal history category is I because he has zero criminal history points and that, therefore, his guideline imprisonment range is 6-12 months. I object to paragraph 40 for the same reason.

I disagree with paragraph 64 because I believe that there is a mitigating factor that warrants a downward departure. Mr. Joseph has been incarcerated since May 22, 1991, as a result of the police kicking down his door in the middle of the night and, with his assistance, discovering a firearm and some drugs. But for the decision of the state and federal governments to bifurcate that incident into separate prosecutions, Mr. Joseph would receive credit toward the imposition of his sentence commencing May 22, 1991. Instead, he is now facing a concurrent sentence that is blind to the imprisonment that he has already suffered. As of the time of sentencing he will have been incarcerated approximately 9 months as to which he will receive no credit. I would respectfully submit that any sentence considered appropriate by the Court should be reduced 9 months, thereby deriving an effective guideline range of 0-3 months.

Very truly yours,

Gary D. Weinberger
Asst. Federal Public Defender

GDW/aw

cc: Nora Dannehy, AUSA

U.S. Department Justice

United States Attorney

District of Connecticut

COPY

RECEIVED
FEB 5 1992
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
HARTFORD CONNECTICUT

450 Main Street *FTS 203/244-3270*
Hartford, Connecticut 06103 *CONN 203/240-3270*

February 4, 1992

Ms. Virginia Swisher
United States Probation Officer
450 Main Street
Hartford, CT 06103

RE: United States v. Malvin Joseph
Criminal No. 2:91Cr00061(EBB)

Dear Ms. Swisher:

The defendant has objected to the criminal history computation contained in the Presentence Report for Malvin Joseph. Specifically, he has objected to the conclusion in ¶ 31 that the defendant should receive three criminal history points for his drug conviction in the State of Connecticut. Based on the facts of the instant case, the Government is in agreement with the computation contained in the Presentence Report.

The defendant was arrested on May 22, 1991 and charged by the State of Connecticut with possession of narcotics and by the federal government as being an illegal alien in possession of a firearm. The defendant was convicted of possession of narcotics by a drug dependent person in state court. Subsequent to his state conviction, the defendant entered a plea of guilty to the firearms charge in federal court. You have indicated in your report that the defendant informed you that he did not possess the gun in connection with the drugs but rather used the gun over a period of time when closing his father's business.

In United States v. Banashefski, 928 F.2d 349 (10th Cir. 1991), the court affirmed the district court's assessment of three points for a prior conviction under facts very similar to the instant case. The defendant in Banashefski was arrested while driving a stolen vehicle. A firearm was found at the time of his arrest. He was arrested by the state on the stolen vehicle charge and indicted on the firearm charge by the federal authorities. The defendant was convicted on the stolen vehicle charge prior to being sentenced on the federal charge. For purposes of computing his criminal history, the defendant was assessed two points for the prior state conviction. On appeal the court noted that "the commentary to §4A1.2 explains that a sentence imposed after the

defendant's commencement of the instant offense, but prior to sentencing on the offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense." As in the instant case, there was evidence in Banashefski that the defendant had possession of the gun prior to the driving the stolen vehicle. Because the possessory acts were separable, the court held that the conduct was not part of the instant offense and did not occur on the same occasion. See U.S.S.G. §§4A1.2(a)(1), 4A1.2(a)(2). See also United States v. Garcia, 909 F.2d 389, 392 (9th cir. 1990); United States v. Cox, 934 F.2d 1114, 1125 (10th Cir. 1991).(state drug conviction properly included in computing criminal history because presence of cocaine, although seized with the guns, not part of the firearms charge).

Malvin Joseph was not charged by the government with a narcotics violation nor was he charged under 18 U.S.C. §924(c). The defendant's possession of narcotics is not part of the instant offense and should not be considered related for purposes of sentencing.

Very truly yours,

ALBERT S. DABROWSKI
UNITED STATES ATTORNEY

Nora Dannehy

NORA R. DANNEHY
ASSISTANT UNITED STATES ATTORNEY

cc: Gary Weinberger, Esq.

FAMM
Families Against Mandatory Minimums

#31

February 25, 1992

Attn: Guideline Comment
U.S. Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

Dear Sentencing Commission Members:

Families Against Mandatory Minimums (FAMM) is a rapidly growing national organization working for the repeal of mandatory minimum sentences.

I am writing on behalf of FAMM's 4000 members, to support the Judicial Conference's recommendations for improving the sentencing guidelines. We strongly support the increased flexibility in sentencing of young, old, and first time offenders; alternatives to incarceration; and an increased adjustment for acceptance of responsibility. Each of these recommendations are improvements that will help maintain the American tradition of justice--that judges provide sentences that are designed to fit the crime and the culpability of the offender.

In addition, the members of FAMM applaud the U.S. Sentencing Commission's Report to Congress on Mandatory Minimum Sentences, released last August. The report did an excellent job of highlighting the inequities and many problems resulting from the use of mandatory minimum sentences. The Commission's report should be the first step in an ongoing effort to capitalize on the momentum in Congress to repeal mandatory sentences. FAMM now urges the Sentencing Commission to recommend to Congress that all mandatory minimum sentences be repealed.

Families Against Mandatory Minimums is available to help the Commission educate the Members of Congress and the public, to the gross injustice, high cost, and counterproductivity of mandatory minimum sentences.

Sincerely,

Julie Stewart

Julie Stewart
President

Families Against Mandatory Minimums
1001 Pennsylvania Ave., N.W. #200-S
Washington, D.C. 20004
(202) 457-5790

#32

United States District Court
Northern District of West Virginia
Post Office Box 1275
Elkins, West Virginia 26241

Robert E. Maxwell
Chief Judge

February 12, 1992

Honorable Vincent L. Broderick
United States District Judge
Chairman of the Committee on
Criminal Law of the Judicial
Conference of the United States
United States Courthouse
101 East Point Road
White Plains, New York 10601-5086

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

Attention: Guideline Comment

Dear Judge Broderick and Members of the United States Sentencing Commission:

In response to Judge Broderick's correspondence of January 22, 1992, with enclosures, the opportunity to comment on amendment proposals, now being considered by the Sentencing Commission, is appreciated.

Rather than addressing the proposals on a one-to-one basis, I believe my comments can be helpful to the Judicial Conference's Committee on Criminal Law, and the Sentencing Commission, if I would address the overall results and effects of the Sentencing Guidelines as they now exist and, as we shall hope, will be improved with the proposed amendments. I will then address several specific proposed guideline amendments, but time constraints limit my ability to adequately comment on all proposed amendments.

My first observation is not particularly addressed directly to the Sentencing Guidelines; however, the guidelines are applicable to criminal actions, regardless of size and importance of the crimes alleged; therefore, the involvement of judicial time and effort is noticeable. In this regard, it is observed that prosecutors are bringing large numbers of small quantity drug cases which could and should be prosecuted in state courts. This action persists despite the Federal Court Study Committee's report of April 2, 1990; the year-end address of Chief Justice Rehnquist delivered at the conclusion of calendar year 1991; and the numerous complaints of trial and appellate judges as to the unnecessary volume of work being visited upon the federal court system.

Chief Justice Rehnquist's year-end report parallels many of my personal observations, particularly in cautioning Congress to "consider the serious implications" of passing legislation that would "unnecessarily expand the jurisdiction of the federal courts and intrude into areas of the law that have traditionally been reserved to state courts."

I am sure that you are aware of the commentaries set forth in Chapter 2 of the April 2, 1990 report of the Federal Courts Study Committee, particularly paragraph designated:

> A. Federal and State Prosecution of Narcotics Violations
>
> Federal prosecuting authorities should limit federal prosecutions to charges that cannot or should not be prosecuted in the state courts and should forge federal-state partnerships to coordinate prosecution efforts. Congress should

> direct additional funds to the states to help them to assume their proper share of the responsibilities for the war on drugs, including drug crime adjudication.

These pronouncements do not appear to be impacting the federal prosecution of drug cases, which could and should be prosecuted in State Court, in this the Northern District of West Virginia. A recent drug sweep in this District resulted in 31 arrests on federal drug charges which prompted a local county prosecutor to publicly comment that these individuals were being prosecuted in federal court because "they could get more time." The Court is advised from the Magistrate Judges before whom the individuals were brought for initial appearances that many of those arrested were street runners with no prior convictions and that a majority of these cases resulted from controlled buys involving small amounts of cocaine.

Also, in recent weeks, the Court received guilty pleas from approximately eight young men who had become involved in marijuana usage while first and second year students at West Virginia University. The facts revealed no interstate or international connections, with most of the drug sales being made to fraternity brothers, roommates, and other college students who may have been equally culpable.

The Court has seen a mass of similar examples which result in unnecessary prison terms under the Guidelines, in many instances because controlled buys are intentionally arranged to occur within a protected zone. These examples direct our professional attention

to seek greater flexibility in guideline sentencing, particularly for the youthful, first time offenders who are totally unaware of the seriousness of the matters with which they are charged.

I quite agree that these youthful offenders should be required to cooperate with prosecuting authorities in locating sources of supply and assisting as witnesses in the state prosecution of low-level offenders and in the federal prosecution of interstate and international traffickers in narcotics; however, I do not believe that young, impressionable individuals should be encouraged to participate in making undercover purchases of illegal substances in order to receive probation or alternative sentencing which would be the result only of a motion by the government for substantial assistance. The Courts must be given discretion to impose alternative sentencing in such instances.

As left in the sole discretion of federal prosecutors, the Court has observed what appears to be completely arbitrary application of substantial assistance motions. In some cases, motions are made and vehemently supported when the offender has made merely one phone call. In other cases, the prosecutor might refuse to make the motion even when it appears that the defendant has performed as much assistance as others who have benefitted from such a motion. In this District, the arbitrariness has resulted in disparity of sentencing for individuals of equal culpability and cooperation.

Perhaps most disturbing, the withholding of pertinent information from the Court, under the guise of § 1B1.8, continues

to persist in this District. Often, the Court learns of a defendant's greater culpability, after his sentencing, when reviewing pre-sentence reports of co-conspirators. It becomes readily apparent that this so-called incriminating evidence was known by investigators long before the defendant agreed to cooperate or was learned from other cooperating individuals. The Court welcomes any suggestions or revisions to § 1B1.8 which would require the Government to detail intelligence information known to them prior to the defendant's cooperation. At present, the Court perceives that the purpose of § 1B1.8 is being seriously undermined.

In applying these general observations to specific amendment proposals, I believe that the adoption of Options 1-5 to Amendment 29, which provide for the expanded availability of non-prison sentencing options, would alleviate some of the problems mounting in this and many other Districts. Adoption of all of these options would not compromise the purpose of the sentencing guidelines. It appears unnecessary to adopt an offense-by-offense approach; sentencing judges are in a unique position to exercise discretion appropriately, given individual circumstances. As many as possible additional alternative sentencing programs should be made available. The sentencing judge should be given complete discretion to determine the appropriate alternatives once it is determined that the defendant qualifies.

Consistent with my earlier general comments, I also support Amendment 33 (A-D) which covers departures based on offender

characteristics. With regard to 33-C, to the extent that a defendant's lack of youthful guidance or history of family violence contributed to the commission of the offense, the sentencing judge should be given the discretion to consider it as grounds for a departure.

In addition to my general concern of the misuse of § 1B1.8, I would oppose Amendment 2A to the extent it proposes to disallow the sentencing judge from using the information to determine where within the range the sentence can fall. This amendment presumes that such information would always compel the judge to sentence higher within the established range, when in fact, the so-called incriminating evidence may reveal mitigating circumstances which might compel sentencing at the lower end of the range. Of course, this might be the exception, but the amendment also seeks to limit sentencing discretion even further and is not justified. Sentencing judges should be given, at a minimum, full discretion to sentence anywhere within the range.

In considering Amendment 23, which covers the acceptance of responsibility guideline, I believe it would be beneficial for the Sentencing Commission to determine whether an individual must merely accept responsibility for the offense of conviction or for all relevant conduct. Although the Fourth Circuit has interpreted the guidelines to require the offender to accept responsibility for all relevant conduct, I believe that the better policy would be to require acceptance of responsibility for the count of conviction, keeping in mind that the individual will still be held accountable

for all relevant conduct, even conduct he may not be willing to acknowledge, if the sentencing judge finds by a preponderance of the evidence that he was involved in such conduct.

In applying the adjustment in this manner, guilty pleas will be encouraged where appropriate, and offenders will not be compelled to confess to conduct in which they may not have participated in order to receive the two-level adjustment. I oppose any further amendments to acceptance of responsibility, in that Option 2 appears unjustified, Option 3 appears to make the adjustment much too complicated and subjective, and Option 4 strips an individual of the right to trial and the presumption of innocence, to the extent that it prohibits a reduction for anyone who puts the government to its proof at trial.

Consistent with my earlier comments, I support the adoption of Amendment 28, Part A, which proposes to create a criminal history category 0.

I believe the adoption of Amendment 34, which eliminates the requirement of a government motion under § 5K1.1, except where departure would go below a statutory minimum, would result in a vast improvement in the Sentencing Guidelines, particularly in light of my earlier comments regarding the arbitrary usage of substantial assistance motions. In several instances, individuals have been encouraged to enter into plea agreements without legal representation and have been refused substantial assistance motions because the plea agreements did not require them, despite their reported extensive undercover work performed prior to judicial

intervention and appointment of counsel. It is for such unjust circumstances that the Court encourages adoption of Amendment 34.

One final proposed amendment which it is believed deserves attention is Amendment 35, Part (C). The sentencing judge should be given complete discretion to determine whether conduct of which the defendant has been acquitted should be used to determine the offense level, to select a sentence within the guideline range, or as a basis for departure. During the trial, the sentencing judge has listened to the evidence as an objective observer and should be given complete authority to consider the acquittal, if he is convinced that punishment is deserved or not deserved despite the acquittal, keeping in mind that the defendant would not be before him for sentencing if the defendant had been tried only upon the counts of which he was acquitted.

The general concerns I have expressed and the amendments which I have attempted to address raise interesting questions which could be discussed in much more detail; however, I have attempted to remain as brief as possible, aware that the Committee on Criminal Law and the Sentencing Commission will be reviewing many, many comments. Once again, the opportunity to address these issues is most appreciated.

Sincerely,

Robert E. Maxwell
United States District Judge

REM/lef

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

#33

MAR 3 1992

OFFICE OF ENFORCEMENT

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

Dear Judge Wilkins:

On January 2, 1992, the United States Sentencing Commission, through the Federal Register, solicited comment on a draft amendment to Part Q (Offenses Involving the Environment) of the Sentencing Guidelines. The stated purpose of the proposed amendment is to rectify the perception of "double counting." As stated below, the Agency believes adoption of this amendment is not warranted because it goes beyond what is necessary to accomplish the Commission's purpose. The Agency suggests that a more limited amendment may accomplish the Commission's objective.

The Commission also solicited comment as to whether, if the above proposed amendment were adopted, a comparable amendment to Guideline Section 2Q1.3 is equally warranted. The principal distinction between the two sections is to have a two-level higher base offense level for offenses involving hazardous or toxic substances or pesticides as compared to other environmental pollutants. Insofar as the double counting issue is therefore equally pertinent to both, we recommend that they jointly be amended or not amended.

We note at the outset that the Sentencing Commission's Environmental Sentencing Guidelines Workgroup considered the possibility of eliminating both the permit and discharge factors as separate specific offense characteristics in favor of incorporating them into a higher base offense level or focusing more on the resulting environmental or community harm caused by a discharge or release. Although the Workgroup adjourned in November before reaching agreement as to a new structure for Part Q, it is our understanding that the Workgroup, in a different format, will resume its mission later this month. Rather than attempt a partial fix as now proposed by the Commission, it may be best to await the comprehensive amendments to Part Q likely to be forthcoming during the next year.

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Should the Commission chose to proceed with amendments at this time, the Agency submits that the Commission's purpose of correcting possible double counting could be more precisely accomplished merely by deleting the words "or in violation of a permit" from (b)(4). The perception of double counting arises because the offense of violating a condition of a permit, as found in RCRA and the CWA, presumably is covered in the base offense level and yet serves also as the basis for an increase in the offense level under (b)(4). The focus of (b)(4) should be on whether the offense occurred outside the regulatory scheme. A violation of a permit condition usually constitutes a less serious disregard for the public welfare than totally circumventing the permitting process.

This is in keeping with the basic thrust of the Guidelines. Through a generic guideline, the Commission sought to broadly identify the relevant features of an environmental offense pertinent to determining the severity of the penalty. The occurrence of a discharge and the failure to have a permit are distinct elements of environmental offenses. Each of the two specific offense characteristics at issue (causing a release, and not having a permit) reflects a different indicator of the seriousness of an environmental crime and each is independently justifiable. Crimes where both apply are particularly serious, and neither alone would adequately capture that level of seriousness.

With respect to the Commission's question whether, in conjunction with its proposed amendment, the offense levels for (b)(1) should be increased 2-4 levels, the Agency is concerned that adoption of the Commission's amendment without a corresponding four-level increase in the offense levels for (b)(1) will have the effect of lowering the available range of imprisonment from twelve to twenty months for the large majority of defendants prosecuted for environmental offenses. Many cases identified as appropriate for criminal enforcement involve a discharge or release of a hazardous substance or other pollutant into the environment and the willfulness of the violation as demonstrated by a total failure to obtain a permit.

As every environmental statute has come up before Congress for reauthorization, Congress has consistently increased the severity of the punishment available for criminal violations. A lessening of the sentences that would result from adoption of the amendment without an accompanying increase in the offense levels would be contrary to Congressional intent. Furthermore, the Commission has stated that the purpose of the amendment is solely to correct any inappropriate double counting, and is not to cause a substantive altering of the sentences imposed for this type of crime. Accordingly, EPA strongly recommends that, if the

proposed amendment must be adopted, it be done in conjunction with a four-level increase in (b)(1) of both 2Q1.2 and 2Q1.3.

Sincerely,

Herbert H. Tate, Jr.
Assistant Administrator

cc: Barry M. Hartman
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
Probation Office

David R. Looney
Chief Probation Officer

Gus J. Solom
United States Courth
620 S.W. Main, Rm.
Portland, OR 97205-3\
503/326-2117

February 28, 1992

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, 3 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,

Katherine Zimmerman
Deputy Chief Probation Officer

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

The Honorable James A. Redden
Chief U.S. District Judge
District of Oregon
620 SW Main
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Writer's Direct Dial Number:
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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,

Pamela B. Lawrence

Pamela Lawrence

Attachment

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February 27, 1992

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
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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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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 it 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

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.

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.

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

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

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

BJR/njh

cc: The Honorable Vincent L. Broderick
c/o The Research Division
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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, be 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, nd 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 likihood 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

#44

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING
POST OFFICE BOX 985
CHEYENNE, WYOMING 82003-0985

CLARENCE A. BRIMMER
CHIEF JUDGE

TELEPHONE:
(307) 634-6072
FTS: 238-2463

March 13, 1992

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

Re: **Proposed Amendments to Sentencing Guidelines**

Gentlemen:

I have reviewed the Synopsis of Proposed 1992 Amendments to the Federal Sentencing Guidelines and offer the following comment.

Expanded Availability of Non-prison Sentencing Options:

I recommend adoption of Amendment 29 to include those combinations of options which provide the most sentencing discretion. Many defendants with a top guideline of 12 months or less are the type of defendants whom the Court would have placed on straight probation, or given the suggested term of "shock incarceration" prior to guideline implementation. Under the present system, the Court has wrestled with cases in which the guidelines required incarceration or sentencing options the Court would not otherwise impose. At the same time, these cases have not met the departure standard and a sentence outside the applicable guidelines has begrudgingly been avoided. Many of these offenders have some resources in place with some chance for reform under the guidance of the probation office. This Court is in agreement, under the theory of "shock incarceration" any term too distant from the clang of the cell door gives rise to diminishing returns.

Acceptance of Responsibility:

I recommend adoption of Amendment 23, Option 3, which provides for an additional 1 point reduction in the offense level, based on admission of relevant conduct beyond that required to form a factual basis for the offense of conviction. I oppose Option 4 which would require that a defendant forfeit eligibility for any offense level reduction by exercising a constitutional right to trial.

Role in the Offense:

I believe the entire Role guideline should be eliminated. In the case of a defendant acting alone, there is no opportunity for a role reduction in contrast to a similar defendant who happens to be involved in a similar offense with the prescribed number of codefendants. It is a certainty that any Role enhancement recommended in the presentence report will be challenged and assessing culpability within a hierarchical structure envisioned by the guidelines is not realistic. This Court believes that a defendant's role and relative culpability can be reflected in selecting an otherwise applicable guideline range.

Plea Bargaining Policies:

Amendment 35, Part (A), is highly recommended. Thorough plea agreements setting forth all guideline relevant facts would forestall many objections to the presentence report which remain in effect at the time of sentencing.

Sincerely yours,

CLARENCE A. BRIMMER,
Chief Judge

CAB:cjt

#7.

NEW YORK COUNCIL OF DEFENSE LAWYERS
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March 26, 1992

VIA FACSIMILE

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

Attn: Mr. Michael Courlander
Public Information Specialist

Dear Mr. Courlander:

The New York Council for Defense Lawyers respectfully submits this letter to supplement our testimony before, and prior written submission to, the Sentencing Commission. Our earlier comments did not address Proposed Amendments 1(A) and 1(B), which deal with Relevant Conduct. Our views on those proposals are as follows:

In general, we continue to have concerns about the relevant conduct provision and the breadth of its application, which we believe can lead to unintended results and insufficient distinction between major and minor actors in complex schemes. We therefore support the proposed amendments, which attempt to clarify and limit the scope of relevant conduct that must be considered under the Guidelines.

At the same time, we believe that further clarification is necessary, and we therefore propose that the Commission make explicit that the relevant conduct considered by the sentencing court must be limited to the reasonable scope of the individual defendant's involvement in the scheme.

We thank the Commission for the opportunity to be heard on these proposals.

very truly yours,

Frederick P. Hafetz

FPH/gpm

#38

Natural Resources Defense Council

1350 New York Ave., N.W.
Washington, DC 20005
202 783-7800
Fax 202 783-5917

March 2, 1992

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

re: Proposed Amendments to Sentencing Guidelines -- Environmental Crimes (57 Fed. Reg. 90, January 2, 1992)

Dear Members of the Commission:

The Natural Resources Defense Council (NRDC), Friends of the Earth, and the National Audubon Society are pleased to submit the following comments on proposed amendments to the Sentencing Guidelines that affect environmental offenses. (57 Fed. Reg. 90, January 2, 1992.) Collectively, these organizations represent approximately one million members and supporters nationwide who advocate stronger laws and stricter enforcement of laws designed to protect human health and the environment.

We were disappointed that the Commission elected last year not to submit to Congress proposed sentencing guidelines for organizations convicted of environmental crimes.[1] Moreover, we believe that the existing sentencing guidelines for individuals convicted of environmental crimes contain more comprehensive flaws than are addressed in the January 2, 1992 proposal. Based on research conducted by NRDC in connection with a law review article in the George Washington Law Review,[2] we concluded that sentences imposed for environmental crimes are well below the level sufficient to deter these crimes in the future.

Consequently, we question whether it is appropriate to address a single, isolated issue outside of the context of the broader review necessary to address environmental crimes adequately. We understand that the Commission is in the process of creating an advisory committee to assist the Commission in such a review, and request that the nonprofit environmental advocacy community be

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[1] See Comments of NRDC et al. on Sentencing Guidelines for Organizations, dated April 9, 1990 and January 10, 1991, which we ask to be incorporated herein by reference.

[2] "Environmental Crimes: Raising the Stakes," 4 G. Wash. L. R. 781 et seq. (April 1991). Copies of this article are enclosed for the Commission's convenience.

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212 Merchant St., Suite 203
Honolulu, Hawai'i 96813
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Fax 808 521-6841

represented in this process, so that an adequate diversity of interests is considered.

If the Commission proceeds with its proposed changes at this time, however, we have the following comments:

Sections 2Q1.2 and 2Q1.3

We oppose the proposed addition of language at the end of sections 2Q1.2(b)(4) and 2Q1.3(b)(4). The existing guidelines do not result in double-counting because subsections (b)(1) and (b)(4) address different types of aggravating conduct or effects.

The baseline offense levels for both 2Q1.2 and 2Q1.3 apply to any crimes involving mishandling of environmental pollutants, including not only releases, but reporting, recordkeeping, equipment and facility maintenance, etc. Other portions of these sections add or subtract from the baseline levels based on different indicators of conduct or harm. Subsections (b)(1) address the result of the conduct, which is release of pollutants into the environment. Subsections (b)(2) address the nature of the conduct, which is release without a permit or in violation of a permit.

It is true that, in some cases, no offense has been committed unless the release occurred without or in violation of a permit. In other cases, however, such as the discharge of DDT under the Clean Water Act, an offense has been committed independent of permitting requirements, because the discharge is prohibited altogether. Ironically, under the current system the release of a pollutant that is prohibited entirely receives a lower offense level than the release of a pollutant which may be released if permitted (and in accordance with that permit). Moreover, we believe that releases without any permit warrant higher upward adjustments (for example 6 levels) than releases in violation of a permit, because in the latter case the defendant showed some intent to act within the regulatory system. To address these issues comprehensively, a different hierarchy than either the existing guideline or the proposed revision appears appropriate:

1. Baseline offense for any violation involving pollutants;

2. Increase offense levels based on environmental result:

    a. where the violation resulted in a release to the environment (maintaining the current distinctions between hazardous and other pollutants, and between continuous, repetitive or single releases) (b)(1);

b. where the release resulted in a substantial likelihood of death or serious bodily injury (b)(2);[3] and

c. where the release resulted in disruption of utilities, evacuation or costly cleanup ((b)(3)).

3. Increase offense levels based on conduct, scaled according to the nature of the conduct:

a. highest increase for discharge of pollutants that are prohibited entirely;

b. next highest increase for discharge without a required permit;

c. next highest increase for discharge in violation of a permit;

d. next highest increase for monitoring, recordkeeping or reporting violations with intent to conceal substantive offense; and

e. no additional increase for simple monitoring, recordkeeping or reporting violations.

Particularly if the Commission adopts the proposed amendment to address double counting in 2Q1.2(b)(4), however, we strongly support the proposal to increase adjustments by four levels each in sections 2Q1.2(b)(1)(A) and (B) (as well as 2Q1.3(b)(1)(A) and (B)).[4] For the reasons articulated in our previous comments and in the enclosed law review article, particularly the data on the adequacy of sentences that have been imposed to date for persons and organizations convicted of environmental crimes, increased offense levels are needed to address environmental crimes appropriately relative to other types of offenses. This proposed change also would more properly reflect the difference in severity between environmental offenses that result in releases of toxic and other pollutants, and other types of offenses (such

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[3] In addition, this category should be expanded, or a separate provision should be established, to address serious harm to the environment -- such as loss of fish or wildlife.

[4] This would increase the adjustments under 2Q1.2(b)(1)(A) and 2Q1.3(b)(1)(A) to 10 levels, and the adjustments under 2Q1.2(b)(1)(B) and 2Q1.3(b)(1)(B) to 8 levels.

as recordkeeping, reporting, maintenance of equipment and facilities, etc.).

Section 2Q2.1

We support the proposal to expand the coverage of the guideline addressing Specially Protected Fish, Wildlife and Plants. We also understand the Commission's desire to specify the types of fish and wildlife subject to increased offense levels under 2Q2.1(b)(3)(B), to include the Marine Mammal Protection Act, the Endangered Species Act, and the Convention on International Trade in Endangered Species. However, we believe the proposed list is incomplete. Other statutes designed to protect defined populations (and for which criminal sanctions exist) include the Migratory Bird Treaty Act and the Wild Free-Roaming Horses and Burros Act. (It is possible that other statues and treaties should be listed as well.)

Thank you for the opportunity to comment on these proposed changes. We look forward to the Commission's more comprehensive review of sentencing guidelines for environmental crimes.

Very truly yours,

Robert W. Adler

Robert W. Adler
Senior Attorney

United States District Court
For the District of Oregon
United States Courthouse
620 S.W. Main
Portland, Oregon 97205

Chambers of
James A. Redden
Chief Judge

#40

March 5, 1992

The Honorable William W. Wilkins, Jr.
United States Sentencing Commission
1331 Pennsylvania Avenue NW, Suite 2400
Washington, D.C. 20004

Dear Judge Wilkins:

I write simply to express my agreement with the comments made by Katherine Zimmerman, Deputy Chief Probation Officer, United States District Court of Oregon. They were contained in her letter of February 28, 1992, addressed to you. We trust that you and the Commission will give them due consideration.

Very truly yours,

James A. Redden
Chief Judge

JAR:jp
CC: The Honorable Vincent L. Broderick
David R. Looney
Katherine Zimmerman

United States District Court
Eastern District of Michigan
Detroit 48226

Julian Abele Cook, Jr.
Chief Judge

March 3, 1992

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1440
Washington, D.C. 20004

Dear Commission Members:

I write to you in response to your request for the views of the judges within the Eastern District of Michigan regarding proposed amendments to the sentencing guidelines. Many of our opinions are substantively the same as those that we expressed to you last year.

In order to glean a consensus of thought among my colleagues, a deliberative process was adopted and followed. Initially, I asked our Probation Department to examine the proposals and submit their reactions to our Probation and Pretrial Services Committee for its consideration. Following a lengthy and thorough discussion of the issues, our Probation and Pretrial Committee incorporated some of, and made several modifications to, the comments that had been originally submitted to it by the Probation Department staff. Copies of these comments have been enclosed for your examination and evaluation.

The Committee also made the following recommendations which, if adopted, will be forwarded to your Commission for its consideration:

1. The time limitations of the comment period do not allow a sufficient length of time for serious discussion and comment by the affected parties.

2. The judges of the Eastern District of Michigan support those amendments proposed by the Judicial Conference of the United States.

3. The judges also support Amendment 34 which allows consideration for departure in cases of defendant cooperation.

4. The Sentencing Commission should give greater consideration to those amendments which increase the discretion of the sentencing judge as that discretion has been shifted to the prosecutor in many cases under guideline sentencing.

5. The Sentencing commission should consider a moratorium on submitting new amendments as the process of sentencing becomes more complicated and confusing each time new amendments take effect.

Finally, permit me to offer a constructive suggestion for your consideration. It is our general belief that the format which has been used by your Commission to elicit comments from the bench and bar to the proposed amendments to the sentencing guidelines makes them somewhat difficult to comprehend. Thus, we urge you to consider the development of a different and "reader friendly" format whereby (1) the old material could be easily distinguished from the new material, and (2) the reasons and justifications for the proposed changes to the sentencing guidelines could be outlined in a better manner.

Thank you.

Very truly yours,

JULIAN ABELE COOK, JR.
Chief Judge
United States District Court

JAC:pf

U.S. Department of Justice

Washington, D.C. 20530

MARCH 16, 1992

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

Dear Judge Wilkins:

This is in response to the publication by the Sentencing Commission of proposed amendments to the sentencing guidelines. At the public hearing on the proposed amendments, we testified and submitted a written statement on a number of important issues. However, our statement did not address all areas of concern. The following addresses other areas of significant concern to the Department.

Amendment 1(A) §1B1.3. Relevant Conduct

Amendment 1(A) more clearly defines relevant conduct and moves language regarding jointly undertaken activity from the commentary to the guideline. We generally support the proposed revision of the guideline in that we believe it will add clarity to the provision. However, the proposed commentary changes are problematic in several respects.

First, the Commission proposes to provide new guidance on what constitutes jointly undertaken activity. The proposal states that the court may consider any explicit or implicit agreement. However, it then indicates by way of example that a factor to be considered in determining what qualifies as jointly undertaken criminal activity is whether the defendant "benefited directly, or expected to benefit directly, from the conduct of others that occurred prior, contemporaneous, or subsequent to the defendant's joining the criminal activity ...." Application Note 1. This concept of direct benefit appears in several other places in the proposed commentary and is the only explicit example provided of a relevant conduct factor to be considered in reaching a determination concerning the scope of jointly undertaken activity.

We are concerned that the proposed language will frequently make the scope of jointly undertaken criminal activity turn on too narrow a standard -- whether there has been direct benefit to the defendant. Courts may construe the direct benefit language

to require monetary gain to the defendant. However, benefits may accrue to the defendant in indirect ways. For example, the defendant's employer or organization may gain from the offense. In savings and loan fraud many executives have engaged in large-scale fraudulent transactions designed to deceive federal regulators into believing that their institutions were solvent when they were not. The benefit of the unlawful activity may be indirect to the organization in the form of averting regulatory action, rather than direct in the form of profits either to the organization or the defendant. A further example of indirect benefits can be seen in antitrust conspiracies where unlawful conduct by an individual defendant may benefit his or her organization or employer through increased profits and the individual only indirectly through continued employment. The same is true of drug cartels, in which a low-level participant may benefit the drug conspiracy through his jointly undertaken criminal activity to make illegal sales and himself only indirectly through continued participation in an ongoing organization or protection from competitors not involved in the defendant's organization. We urge deletion of the direct benefit concept from the commentary.

We also recommend that illustration g in Application Note 1 be revised because it currently indicates that a street-level drug dealer who knows of other dealers in the area who share a common source of supply with him is not engaged in a jointly undertaken criminal activity with them. It may be true in some circumstances that such a street-level dealer is not jointly engaged with other dealers, but this is not necessarily the case. We recommend that the second sentence be revised to read:

> The defendant is not accountable for the quantities of drugs sold by the other street-level drug dealers if they merely shared a common source of supply and there is no other evidence of joint activity.

The remainder of the illustration should be deleted because it may suggest that sharing of resources and profits is the only scenario in street-level drug dealing that qualifies as jointly undertaken activity. We think it is preferable to delete these examples than to attempt to give a more complete list because the courts may read too much intent into the failure of the illustration to include a particular scenario.

In addition, it would be helpful to include in the commentary an indication that while the changes are meant to clarify the scope of relevant conduct, they are not intended to provide a windfall to the leaders or organizers of an illegal activity. The latter may direct others in ongoing criminal activity but not actually jointly undertake any direct participation in any particular criminal act. It would appear that this type of criminal involvement should be covered by

proposed §1B1.3(a)(1)(A), rather than (B), which discusses jointly undertaken criminal activity. However, this application to the leader or organizer of a criminal activity should be clarified.

Another useful addition to the commentary would be an example related to unlawful gang-related activities. Such an example could foster appropriate uniformity in sentencing in gang-related crimes.

Amendment 1(B) §1B1.3. Relevant Conduct

This amendment adds an application note to describe "common scheme or plan" and "same course of conduct." While we generally favor the amendment, there are several problems. First, we believe it would be ill-advised to include a specific time period, such as the 120 days included in the proposal, as applicable to the term "same course of conduct." The proposed language recognizes the difficulty with any specific time period and states that the 120-day period is only a general and not absolute standard. Nevertheless, we can envision conduct by sophisticated offenders aimed at avoiding the consequences of treatment under the specified time period as well as unnecessary disputes over the exact timing of the conduct.

Finally, we also recommend amendment of the application note to address conduct that preceded the statute of limitations period. Because the issue is not now clear, the commentary should state: "Conduct that is part of the same course of conduct or common scheme or plan as the offense of conviction is relevant for purposes of sentencing under §1B1.3(a)(2) even though it occurred prior to the statute of limitations period for the offense of conviction."

Amendment 2(B) §1B1.8. Use of Certain Information

The proposed amendment would provide that when a defendant agrees to cooperate with the government by providing information about his own unlawful activities and as part of the agreement the government agrees that self-incriminating information provided will not be used against him, then the information shall not be used in determining the applicable guideline range. Currently, a defendant must provide information about the unlawful activities of others to receive the benefit of this provision.

We object to the proposed amendment. In most cases it will encourage pleas only from defendants who fear that the government eventually will learn of their other criminal conduct from coconspirators or others. Such persons would seek to escape punishment by confessing early and would have little incentive to provide information about the unlawful activities of others. We

see no reason to reward a defendant by excluding incriminating evidence in the guideline calculation simply because he tells the government what he has done. The acceptance of responsibility guideline addresses this concern.

Amendment 3 §1B1.12. Juveniles

Amendment 3 adds a new policy statement regarding persons sentenced under the Federal Juvenile Delinquency Act. It provides that the guidelines do not apply but that they may be used as a starting point in sentencing the juvenile. It further provides that sentences for juveniles that are above the range that would apply to an adult should be justified by specific reasons but that sentences below the range "may be appropriate."

As written, the policy statement seems to be an invitation to sentence juveniles at lower than the guideline sentence that would apply to an adult offender convicted of the same offense. The justification seems to be the offender's youth. However, many juveniles are close to adult age when they commit offenses, and others engage in conduct that constitutes a serious offense when committed by an adult. We believe that the policy statement should take a more neutral approach and provide that the guidelines should be used as a starting point but that a sentence above or below the range that would apply to an adult may be appropriate in a particular case. The policy statement should encourage justification for sentencing outside the range in either direction.

Amendment 4(A) §2A3.2. Criminal Sexual Abuse of a Minor; §2A3.4. Abusive Sexual Contact

The proposed amendments add cross references to the guidelines for criminal sexual abuse of a minor and abusive sexual contact. The proposed cross references would require application of the guidelines for more serious sexual abuse offenses if the offense involved such conduct. We favor the proposed amendments since they foster a real-offense approach to sentencing. However, there is a technical problem with current guideline §2A3.1 and the proposed amendments that should be corrected.

Under current statutes there is no longer a federal offense described as "assault with intent to commit criminal sexual abuse." The conduct described by this phrase is now encompassed within the crime of aggravated sexual abuse under 18 U.S.C. §2241(a) and the crime of sexual abuse under 18 U.S.C. §2242(1). Both of these statutes include sexual abuse accomplished by force or threat and attempts to commit sexual abuse by force or threat. In recognition of this, the offense under 18 U.S.C. §113(b) of "assault with intent to commit any felony" now specifically

excludes felonies under chapter 109A, which are the sexual abuse felonies set forth in 18 U.S.C. §§2241 and 2242.

For this reason we suggest that the title to guideline §2A3.1 be revised to omit the phrase "assault with intent to commit criminal sexual abuse." A title such as "**Criminal Sexual Abuse and Aggravated Criminal Sexual Abuse or Attempt to Commit Such Acts**" would include the same conduct, more accurately reflect the current statutes, and be parallel to the titles for §§2A3.2 and 2A3.3. We also suggest that the now obsolete phrase "assault with intent to commit criminal sexual abuse" be omitted from the text of the proposed guideline amendments where it appears.

Chg. title of 3.1

Amendment 5 §2B1.1; 2F1.1. Fraud, Theft and Embezzlement

Proposed amendment 5 would change the larceny and fraud tables, guideline §2B1.1 and §2F1.1, by eliminating the specific offense characteristic of "more than minimal planning" and building the two-level increase into the loss tables. The proposal also provides three alternative loss tables. The Commission also requests comment on conforming changes to other "loss tables," specifically noting the tax loss table in guideline §2T4.1.

We strongly oppose the elimination of the two-level upward adjustment for fraud offenses for "more than minimal planning." The Department prosecutes many fraud cases sentenced under guideline §2F1.1 in which there is no dollar loss associated with the crime. These cases arise under 18 U.S.C. §1028, for example, involving false identification documents. In other cases, such as antitrust or fraud charging mislabeling or other types of misrepresentation, it is impossible to assign a figure for economic loss.

Losses are extremely difficult to document and are thus unaccounted for in many cases due to defendants' successful efforts to hide the scope of illegal activity. Losses are frequently underestimated in odometer and food and drug fraud cases, for example, because of the effort required to quantify them. These characteristics are shared by many fraudulent schemes which involve poor records and an obscure paper trail but include many victims.

In addition, the Department often prosecutes individuals involved in financial or other fraud schemes and property crimes which simply do not result in large monetary losses but which, by virtue of the defendants' involvement in repeated transactions over an extended period to time, would fall within the definition of "more than minimal planning." Particularly if a defendant is caught early in a fraud scheme before substantial losses are amassed, it may be impossible to establish a significant loss

from the fraud, but eminently feasible to show the extent of "planning".

Moreover, as a conceptual matter, we agree with the background to guideline §2B1.1 that "[p]lanning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof." These factors often occur in public corruption cases, and warrant application of a specific offense characteristic apart from the dollar value of the money involved in the scheme. Simply stated, complex schemes to defraud often warrant harsher treatment than simple ones. The flexibility in application that may result from this additional characteristic is desirable in allowing the government and the court to distinguish between complex and simple schemes that often require different sentences even if similar amounts of loss are involved. The extent of planning of a fraudulent scheme is an excellent measure of a defendant's culpability. Thus, we urge that the "more than minimal planning" specific offense characteristic be retained.

In our experience the "more than minimal planning" adjustment has not been difficult to apply in practice. If "more than minimal planning" is not always applied uniformly by the courts, we recommend clarifying commentary and more examples, rather than elimination of the enhancement.

Although the Commission's proposed loss tables purport to take into account the elimination of the two-level increase for "more than minimal planning," a careful review of the tables shows that they do not fully incorporate this adjustment, particularly at the lower and middle sections of the table. At most, the new tables seem to be approximately one level higher than the current tables in mid-range loss amounts. This effectively represents a one-level <u>reduction</u> over current guideline calculations. Many cases, such as food and drug and odometer fraud, for example, which typically involve losses less than $20,000 and which in the past have virtually always received increases for "more than minimal planning," would lose one offense level under the structure of the new loss tables. The lower end of the loss table is also often implicated in corruption cases where the dollar amount may not be large or readily determinable. Such cases warrant <u>increased</u> sentences, not the decreases that apparently would result from the proposed amendment.

The tables also appear to contain a slower increase in levels in the moderate range of frauds -- $200,000 to $3,000,000. In our view, these proposed tables fail to punish fraud adequately in the moderate range, the most common sort of fraud.

The Department opposes adoption of any of the three "alternative" loss tables. The first loss table set out in the proposed amendment appears to build the two-level increase into the table as quickly as possible, while the three alternative tables do not seem to raise offense levels at all, despite the elimination of the "more than minimal planning" adjustment. Thus, these alternatives require greater losses than the first proposed loss table to reach similar offense levels, an undesirable result.

Moreover, we strongly favor the one-level increase tables as opposed to the broader two-level increase alternative. By broadening the range of the loss between offense levels and providing that the offense levels increase in increments of two, the two-level table reduces the impact of the table on many of those defendants at the lower end of the table. In our experience there has been only limited litigation over the difference between one loss level and the next. To the contrary, by increasing the amount of the loss by two offense levels at a time, alternative table three could result in an <u>increase</u> in litigation over precise dollar amounts.

A large number of the Department's tax cases fall at the lower end of the tax loss table. Thus, any change in the larceny and fraud tables which might impact on the tax loss table and reduce the impact at the lower end of the scale would adversely affect our criminal tax enforcement effort. Accordingly, we strongly urge the adoption of tables with one-level rather than two-level increments for tax as well as for fraud offenses.

With respect to the Commission's request for comments on comparable changes to other loss tables (and, specifically, the §2T4.1 tax table), we urge that if the larceny and fraud tables are increased, the tax table also be increased. There is no reason why tax and other comparable offenses should be treated any less seriously than larceny and fraud offenses.

<u>Amendment 9 §2N2.1. Food and Drugs</u>

The Commission has proposed two options for amending the food and drug guideline. The first converts an instruction currently in an application note to a cross reference regarding offenses committed in furtherance of other offenses. The second option expands the current guideline, which currently provides a base offense level of 6 and no specific offense characteristics. The second option provides enhancements for prior convictions under the Federal Food, Drug and Cosmetic Act, violations of a judicial or administrative order, and public health risks. In addition, it includes the cross reference in Option 1.

We urge the Commission to adopt Option 2 with the modification recommended below. A major purpose of the Federal

Food, Drug and Cosmetic Act is to protect the public health by insuring pure foods and drugs. Although violations of the Act may cause a risk of injury or illness, the current guideline, §2N2.1, fails to recognize this risk. The creation of a public health risk by a violation of a statute aimed at preserving the public health should not require the government to argue for an upward departure; this factor should be built into the guideline. Without a specific offense characteristic recognizing the health risk created by the improper distribution of medical drugs, foods, or biological products, the guideline fails to assure a sentence that would serve the punishment, deterrence, and other purposes of sentencing.

The proposed guideline also recognizes that defendants with prior food and drug convictions should receive an enhanced sentence, as should those who violate a judicial or administrative order. We believe this feature is necessary because the Federal Food, Drug and Cosmetic Act (FFDCA) treats second offenses that would otherwise be misdemeanors as felonies. However, a defendant with a prior misdemeanor conviction under the FFDCA is unlikely to score above criminal history Category I. Thus, the enhancement for prior FFDCA convictions would not result in double counting, except in rare cases.

While we urge the Commission to adopt Option 2, we recommend a modification in the proposed cross reference (which is identical in both options). It arguably would change existing law in a manner adverse to the effective prosecution of FFDCA offenses. The Commission indicates that the cross reference was added in an effort to make the language of guideline §2N2.1 conform to that of other guidelines; it does not appear that an adverse impact on cases involving fraud was intended.

The FFDCA distinguishes between misdemeanors and felonies on the basis of intent rather than on the basis of other acts associated with the offense. Violations committed with "intent to defraud or mislead" are felonies under 21 U.S.C. §333(a)(2). The same violations committed with less than this level of intent are misdemeanors under the FFDCA. The current food and drug guideline is only intended to apply to regulatory misdemeanors. Felony cases require application of other relevant guidelines. Application Note 2 to §2N2.1 currently accomplishes this result by providing as follows:

> If the offense involved theft, fraud, bribery, revealing trade secrets, or destruction of property, apply the guideline applicable to the underlying conduct, rather than this guideline.

Because intent to defraud or mislead is an element of a felony violation, numerous courts have held that the fraud guideline, §2F1.1, applies to food and drug felony cases. In

upholding the use of the fraud tables for FFDCA felonies, two courts of appeals have specifically relied on the commentary of §2N2.1 cited above. United States v. Cambra, 933 F.2d 752, 755 (9th Cir. 1991); United States v. Arlen, 947 F.2d 139, 146-47 (5th Cir. 1991).

The new amendments (in both options) propose replacing the cited commentary with the following language:

> If the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline, apply that other offense guideline if the resulting offense level is greater than that determined above.

This new language would arguably require proof that the violation being sentenced was committed in furtherance of a separate and distinct fraud in order for the fraud guideline to apply. Under this interpretation of the new language, the fraudulent intent constituting an element of the violation being sentenced would not be sufficient for the fraud guideline to apply. The effect of this new language would, therefore, be to add an onerous burden for the government, because the fraud guideline may be held to apply only if the government proved involvement in a collateral fraud. The proposed cross reference to §2N2.1 would arguably take away the favorable court decisions cited above.

To avoid what appears to be an unintended result in converting an instruction in commentary to a cross reference in the food and drug guideline, we propose the following cross reference:

> If the offense involved fraud, apply §2F1.1 if the resulting offense level is greater than that determined above. If the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline, apply that other offense guideline if the resulting offense level is greater than that determined above.

Such a change would preserve for guideline purposes the present reference to fraud as an element of a food and drug felony offense.

Amendment 10 §2Q1.2. Mishandling of Hazardous or Toxic Substances
Amendment 11 §2Q2.1. Fish, Wildlife, and Plants

Enclosed are detailed comments prepared by our Environment and Natural Resources Division regarding Amendments 10 and 11.

Amendment 12 §2S1.3; §2S1.4. Money Laundering and Monetary Transaction Reporting

Amendment 12 would significantly change the treatment of violations of 26 U.S.C. §6050I, which requires persons engaged in a trade or business who receive $10,000 or more in cash in one transaction (or a series of related transactions) to report the receipt of those funds by filing form 8300 with the Internal Revenue Service. Sentencing for the willful failure to file a form 8300 (26 U.S.C. §7203) would be transferred from guideline §2S1.3 to §2S1.4 and the filing of a false form 8300 (26 U.S.C. §7206(1)) transferred from guideline §2T1.3 to §2S1.4. These changes create a number of problems which raise serious concerns. In our view, the better approach would be to sentence these violations under guideline §2S1.3. Set forth below is our proposed guideline language for your consideration.

Upon reflection, we question the premise underlying the proposal that "[c]ertain violations of 26 U.S.C. §7203 and 7206 are more closely comparable to violations covered by §2S1.4 . . . than to the guidelines presently referenced to these violations." Rather, we believe that violations relating to form 8300 are more similar to currency transaction report (CTR) violations (reporting requirements for financial institutions under 31 U.S.C. §5313, now sentenced under guideline §2S1.3) than to currency and monetary instrument report (CMIR) violations (covered under §2S1.4). The CTR and form 8300 provisions are complementary: a financial institution engaging in a cash transaction greater than $10,000 must file a CTR; a trade or business receiving more than $10,000 in cash must file a form 8300. In both cases it is a criminal offense to structure or to attempt to structure a transaction for the purpose of evading the reporting requirements. CMIR requirements, in contrast, are imposed on a person (as opposed to a financial institution or a business) who transports more than $10,000 in cash into or out of the United States, and there are no structuring provisions with respect to CMIR violations.

We strongly support raising the base offense level for the willful failure to file a form 8300 from 5 to 9, as proposed. The present base offense level of 5 in guideline §2S1.3 for willful failure to file a form 8300 is much too low to properly reflect the provisions of the Anti-Drug Abuse Act of 1988 (Pub. L. 100-690), which increased the maximum term of imprisonment for failure to file a form 8300 to five years (26 U.S.C. §7203). (Other violations of 26 U.S.C. §7203 are punishable by not more than one year in prison.) As presently drafted, willful failure to file a form 8300, without more, is sentenced at the same level under guideline §2S1.3 as any other willful violation of 26 U.S.C. §7203 is under guideline §2T1.2 when there is no tax loss. Thus, whatever approach the

Commission decides to adopt, it is critical that the base offense level be raised to at least 9.

We also support raising the offense level for filing a false form 8300 from 6 to 9, as proposed. It is important, in our view, that failure to file form 8300 and filing a false form 8300 be assigned a higher offense level than under the current guidelines. While the filing of false forms 8300 is a problem, the failure to file forms 8300 is as large a law enforcement problem.

The proposed amendment would also result in a decrease in the offense level for willful failure to file a form 8300 from 13 to 9 if the defendant structured transactions to evade reporting requirements. The base offense level is 13 under guideline §2S1.3 if the defendant structured. There is no similar provision in guideline §2S1.4. Because 26 U.S.C. §6050I explicitly includes structuring as one of the activities prohibited by the section, we do not believe this provision can be eliminated.

Our proposal below would include both the willful failure to file form 8300 and the filing of a false form 8300 in guideline §2S1.3. It provides a base offense level of 9 for both offenses, consistent with the Commission's proposal in amendment 12. This amendment would also retain the base offense level of 13 presently found in guideline §2S1.3 if the defendant structured transactions to evade reporting requirements.

§2S1.3 <u>Failure to Report Monetary Transactions; Willful Failure to File Form 8300; Filing False Form 8300; Structuring Transactions to Evade Reporting Requirements</u>

(a) Base Offense Level:

(1) 13, if the defendant:

(A) structured transactions to evade reporting requirements; or

(B) knowingly filed, or caused another to file, a report (other than a Form 8300) containing materially false statements; or

(2) 9, if the defendant either failed to file a Form 8300 or filed a false Form 8300; or

(3) 5, otherwise.

In order to avoid confusion, we suggest that language be included in the commentary to make clear that offenses under the structuring provision in section 6050I(f)(1) are to be sentenced at offense level 13.

We recognize that the above proposal allows certain inconsistencies in the treatment of CTR's and Forms 8300 to remain. Since the Commission did not propose guideline amendments in a manner that would permit correction of all inconsistencies this amendment cycle, we recommend that the Commission address these further inconsistencies next year.

Amendments 13 and 14 §2T1.1-4. Tax Offenses

The Department supports proposed amendment 13, a series of amendments which will dramatically impact sentencing in criminal tax cases by consolidating the tax guidelines and ensuring that the amount of loss calculations are the same for all guidelines in the chapter. Tax loss computations should be simpler and more uniform under the new approach, and use of the "applicable tax rate," rather than the 28% (or 34% for corporations) will give a closer approximation of "tax loss" should tax rates changes. In addition, the specific inclusion of new guideline §2T1.1(a)(2) (providing an alternative level of 6 where the offense is not tax-loss driven) should be helpful in such cases.

As a related change to the above proposal, we suggest that the Commission renumber the tax guidelines to eliminate the gaps that will ensue from the deletion of guidelines §2T1.2, §2T1.3 and §2T1.5.

While the proposed change to guideline §2T1.4, involving the creation of one two-level specific offense characteristic by combining guideline §§2T1.4(b)(1) and (b)(2), will adversely impact on a small number of our tax cases, we do not object to it. The Commission's proposal is careful to continue to limit the inapplicability of the §3B1.3 (Abuse of Position of Trust or Use of Special Skill) adjustment to only the second prong of the proposed specific offense characteristic (two-level adjustment if the defendant was in the business of preparing or assisting in the preparation of tax returns), thus continuing the availability of such an adjustment when the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income, as is the case under the current guidelines.

The proposed changes in guideline §2T1.9 are designed to clarify the conditions under which the specific offense characteristics of guideline §2T1.9 are applicable and to clarify the relationship between the loss calculation under guideline §2T1.4 and §2T1.9. We have no objections to these proposals, but believe that some other changes are necessary.

First, we recommend that the Commission delete the phrase "as applicable" from guideline §2T1.9(a)(1). That phrase has caused confusion as sentencing courts have struggled to determine whether guideline §2T1.1 (Tax Evasion) or §2T1.4 (Aiding, Assisting, Counseling, or Advising Tax Fraud) applies. In some situations, the view has been expressed that neither guideline applies and use of a base offense level of 10 is appropriate.

In fact, use of the phrase "as applicable" is inappropriate as neither of the offenses covered by guideline §2T1.1 (26 U.S.C. §7201) and §2T1.4 (26 U.S.C. §7206(2)) is applicable to the type of conspiracy covered by guideline §2T1.9. That guideline covers conspiracies to defraud the United States by impeding and impairing the Internal Revenue Service. The object of such a conspiracy is not the violation of a particular statutory provision, such as 26 U.S.C. §7201 or §7206(2). (Indeed, if the object of a conspiracy is to violate a particular provision of the Internal Revenue Code, the sentence would appear to be more properly imposed under §2X1.1.) Consequently, to direct a court to determine whether guideline §2T1.1 or §2T1.4 applies is to require it to engage in a hopeless exercise. The most a sentencing court should be directed to do is to select the guideline (§2T1.1 or §2T1.4) for the underlying offense which most nearly approximates the harm which would have resulted had the conspirators succeeded in impeding and impairing the Internal Revenue Service. Language should be added to the Commentary to guideline §2T1.9 to guide the sentencing court in this regard. The deletion of "as applicable" and the insertion of additional commentary language will make clear that a court is not required to find that either guideline §2T1.1 or §2T4.1 applies in order to refer to those guidelines in calculating the base offense level under guideline §2T1.9.

We also suggest that the phrase "fraudulent tax <u>schemes</u>" be added to proposed Application Note 4 after "the marketing of fraudulent tax shelters." Not all fraudulent tax schemes are tax shelters, and in our view "schemes" is a broader and more appropriate term.

The Department considers proposed amendment 14, the enhancement for tax offenses related to illegal narcotics activity, an important priority and urges its enactment in this amendment cycle. We note that if the Commission adopts proposed amendment 13, which would combine several of the tax guidelines and eliminate guideline §2T1.2, §2T1.3 and §2T1.5, this drug amendment would have to be made only to guideline §2T1.1(b)(1) and §2T1.4(b)(1).

<u>Amendment 15 §3A1.4. Terrorism</u>

Amendment 15 would provide a Chapter Three enhancement of three levels for any felony, whether committed within or outside

the United States, that involves or is intended to promote international terrorism. We strongly support this provision and urge the Commission to amend the guidelines to increase the penalties for terrorist actions. Such actions involve, for example, explosives, kidnapping, and weapons offenses, passport violations, murder, and robbery. This change in the guidelines is needed because the current "terrorism" departure, §5K2.15, does not require the courts to take terrorism into account in sentencing.

Amendment 16(B) §3B1.1. Aggravating Role; §3B1.2. Mitigating Role

A number of changes are proposed regarding role in the offense. Our major concern is that many of the changes proposed may create more problems than they solve. Because the proposals try to provide a great deal of guidance on relatively minor points, they will generate much litigation and may not achieve the purpose of reducing unwarranted disparity. In short, we believe that the Commission may be trying to achieve too much in these proposals and that this is an area in which judicial interpretation of broader standards is appropriate.

An example of the attempt to provide too much direction is the proposed language specifying that an enhancement for role in the offense should not apply if the defendant, who otherwise would merit a mitigating role reduction, exercised limited supervision over a limited number of participants. For example, an offloader of a single shipment who supervised other offloaders should not receive an enhancement for aggravating role, according to the proposal. The amendments also provide that a minor role adjustment would be appropriate for a person who qualifies for a minimal role adjustment but for his supervision of other participants.

We oppose this amendment. A manager of others should neither generally qualify for a reduction nor be barred from the increases provided. The suggestion that the offloader would otherwise be a minimal participant assumes that specific categories of offenders by "job description" should dictate applicability of the adjustments for role in the offense. However, the nature of the task performed is only one factor to be considered in our view. If the defendant supervises others, he is not "otherwise" a minimal participant, regardless of the tasks he performs. A drug organization can only operate with a hierarchy. A person with leadership responsibility in the hierarchy, even low-level leadership, is more culpable than a lone player, not less culpable, as the proposal indicates.

The current guideline allows the judge to determine to what extent an offloader qualifies for an enhancement or a reduction without specific direction. We believe that the provision should

continue to operate as it now does and that appropriate arguments will be made to the courts to help guide their application of the relevant adjustments.

Amendment 17(A) §3B1.1. Aggravating Role

Amendment 17(A), concerning aggravating role in the offense, may bring about unintended results. For example, the proposal provides that for a three-level increase the defendant must have been a "manager or supervisor of at least four other participants in a criminal activity." The current guideline provides that the defendant must have been a manager or supervisor and the activity must have involved four others. Direct supervision of four others is not currently required. Thus, under the proposed revision it may be more difficult to prove that a defendant's activity warrants a three-level enhancement than it is under the current guideline. Even the proposed four-level increase for organizers or leaders does not require supervision of a specified number of other participants, but rather organization of the criminal activity that involved four others. The reason for the change in language in the three-level enhancement is not clear.

Another problem is that the proposal deletes language that currently makes the enhancement applicable if the criminal activity was "otherwise extensive," regardless of the number of participants. We oppose this change. There are many circumstances in which a defendant recruits only a few people but operates through a larger network of unknowing participants, such as in the fraud example in current Application Note 2. The impact of this change would be particularly great in white-collar offenses in which the defendant uses the unknowing services of others. We see no reason to delete the current "otherwise extensive" language, and no reason is offered. We assume that it reflects an attempt to provide clear-cut rules in this area, and we believe that the attempt is flawed. Judges can identify "otherwise extensive" criminal activities and should be allowed to do so.

We also oppose the proposed addition of language to Application Note 1 providing that if an undercover agent is recruited by a defendant to participate in illegal activity, and that agent brings in additional undercover agents, only the first would be counted as a participant. This addition is inappropriate in cases in which the defendant asks the undercover agent to obtain others to assist in the offense or where it is necessary to bring in others by virtue of the function requested by the defendant of the undercover agent.

Amendment 18 §3B1.2. Mitigating Role

Amendment 18 would delete the current three-level decrease for roles between minor and minimal. We urge the Commission to

retain this feature because of the need to recognize that roles are not clear-cut in many cases.

In addition, Amendment 18 would provide significantly more favorable treatment to many defendants. For example, proposed note 7 would practically guarantee a role reduction for drug transporters. We believe such persons are critical to drug operations and the ultimate success of their distribution activities. No built-in reduction should be guaranteed for them. Moreover, the proposed commentary in Amendment 18(B) on the appropriateness of downward departure for minimal participants is also unwise. It will invite a great degree of disparity for similarly situated defendants. The guidelines provide an appropriate reduction for minimal participants. An invitation to depart downward will erode the guidelines in this area.

The Commission has asked whether a defendant who otherwise merits a mitigating role adjustment should be prevented from receiving it where he has not been held responsible for a greater quantity of controlled substances than that in which he actually trafficked. We strongly urge the Commission to adopt a rule against mitigating role adjustments in such a case. Some courts grant a role reduction while others do not in the case of a courier whose relevant conduct is the quantity of drugs he is actually carrying because no greater amount can be proven (despite the belief that the defendant is part of an organization). Attached is a proposal that would clarify how such a rule would operate. We believe that this change recognizes that a role reduction should not be possible when the measure of the defendant's involvement in the offense is not increased by the conduct of others. That is, he is not a minor or minimal participant as to his own conduct. Such a defendant should be treated like an individual who is not part of an organization and be held responsible for what he transports without mitigation for role in the offense.

<u>Amendment 19 §2D1.1. Limitations on Sentence for Drug Defendants Who are Minor or Minimal Participants</u>

Amendment 19 proposes several alternative limitations on the sentences applicable to minor or minimal participants in controlled substance offenses. We strongly oppose the creation of these artificial limitations on sentence. We understand that the concern is that low-level participants, including couriers, are viewed by some as receiving excessive sentences. As explained above, however, we strongly believe that a defendant should be held responsible at the very least for the quantity of drugs he or she possesses or deals in directly. With the limitations proposed, a courier may receive a sentence that would reflect only a portion of the quantity he or she transports. Thus, the guidelines would create an incentive for minor or minimal participants to deal in, or facilitate dealing in, large

quantities of controlled substances not reflected in the sentence. In addition, the proposals would decrease the incentive for low-level participants to provide substantial assistance in the investigation or prosecution of others. At a time when drug trafficking and associated violent crime threaten the well being of our nation, such a sentencing result would be extremely ill-advised.

Moreover, a number of the "caps" proposed would produce initial offense levels that would be overridden by applicable mandatory minimum sentences. As a result, offenders involved in drug offenses of very different magnitudes would receive the same sentence -- namely, the mandatory minimum. This scheme would thwart the goal of proportionality in sentencing and create additional tension between currently applicable mandatory minimum provisions and the guidelines.

If, despite our objections, the Commission decides to adopt some form of limitation as proposed, it should at the very least assure that the limitations adopted provide guideline sentences no lower than the 10-year mandatory minimum level provided by statute for large-quantity offenses when such offenses involve substances subject to mandatory minimum provisions. The Commission should also assure that a defendant's sentence is not limited to a level that does not reflect the full extent of his personal involvement in the offense. In addition, the limitations should apply only to minimal participants who are in Criminal History Category I.

Amendment 22 Chapter Three, Part D. Multiple Counts

The Commission has solicited comment on amendment of the multiple count rules. We believe several amendments are needed.

The multiple count rules present problems in their failure to increase the sentence for certain harms that result in conviction. This failure has become an increasing problem in cases in which counts are grouped because one count embodies conduct that is treated as a specific offense characteristic in the guideline applicable to another of the counts. Guideline §3D1.2(c). The problem arises when counts are grouped under this rule but the count that has such a specific offense characteristic carries a lower offense level than the offense level applicable to the group of closely related counts.

For example, the tax evasion guideline, §2T1.1(b)(1), includes a specific offense characteristic that provides that if the defendant failed to report or to correctly identify the source of income exceeding $10,000 from criminal activity, a two-level increase results. Assuming there were also a count of conviction for drug offenses, the grouping rule cited above would operate to group the tax evasion and drug counts. The offense

level for the count of conviction relating to the drug offenses is likely to exceed the offense level for the tax evasion count. Therefore, the offense level for the group of closely related counts would be that for the drug offense, and the tax evasion count would drop out of the guideline calculation. The grouping rule in effect nullifies the tax evasion count for sentencing purposes, and a defendant convicted of both drug and tax offenses is sentenced no more severely than a defendant convicted of a drug offense alone.

The basis for the grouping of the two counts was that the tax evasion offense level was increased because of the illegal drug activity. This grouping rule protects against double counting when the offense guideline including the specific offense characteristic relating to another count of conviction is the highest offense level of the group of closely related counts. However, by operating to prevent double counting in some circumstances, it prevents the counting of an offense at all in other circumstances. Defendants who commit two distinct offenses should be punished more severely than those who commit only one.

The adoption of Amendment 14, which would provide greater enhancements than currently available for illegal drug activity or money laundering, will serve to alleviate the problem of disappearing impact for tax offenses in many narcotics/tax prosecutions. However, it will not eliminate it in all such cases, and will have no added effect on other offenses. Moreover, if Amendment 14 is not adopted, the problem will remain in most, if not all, cases in which tax and drug offenses are grouped.

We recommend an amendment of guideline §3D1.4 to provide that where offenses are grouped under §3D1.2(c) (because one offense is treated as a specific offense characteristic of another offense), the combined offense level should be increased by the number of offense levels assigned to the specific offense characteristic to the extent the latter is not reflected in the offense level for the group of closely related counts.

Another problem under the guidelines results from the operation of the guideline relating to the determination of the combined offense level, §3D1.4. This guideline instructs the user to disregard any group of closely related counts that is nine or more levels less serious than the group with the highest offense level. Thus, when counts of conviction include serious offenses and significantly less serious ones, the lesser ones do not contribute toward the sentence. A tax count and a drug count (not grouped under the grouping rule discussed above under the current guidelines because the amount of income produced from the drug activity did not exceed $10,000) would produce a sentencing range identical to a drug count alone if the offense levels for the two offenses were nine or more levels apart. Similarly, a

drug count and a theft count relating to a relatively small theft would result in a sentencing range no different from the range that would result from the drug count alone if the two offense were nine or more levels apart. The guidelines should not, in effect, encourage criminal activity by failing to punish it even if it is less serious than the major count of conviction. The less serious offense may carry a substantial offense level and should affect the sentencing range.

To address this problem, we recommend that the Commission amend guideline §3D1.4 by deleting subsection (c) and by amending subsection (b) to read as follows:

> Count as one-half Unit any Group that is 5 or more levels less serious than the Group with the highest offense level.

This amendment would assure that all groups of closely related counts of conviction contribute toward the sentence. Groups that are 9 or more levels less serious than the group with the highest offense level would count toward the combined offense level to the same extent that groups that are 5 to 8 levels less serious now count -- that is by one-half unit.

Another problem with the multiple count rules is the absence of grouping rules for fines where one of the counts of conviction carries a fine not established by guideline §5E1.2 -- such as an antitrust offense -- and another count has a fine established by guideline §5E1.2. -- such as a fraud offense. The antitrust guideline, §2R1.1, sets fines as a percent of the volume of commerce, not as a function of offense level, for both individuals and organizations. The multiple count rules in Chapter Three only address how to group offense levels, not how to group fines when the fines for some counts or groups are based on offense levels and the fines for others are not. This issue has arisen in cases involving individual defendants but will also arise in cases involving organizations.

For example, when an antitrust and fraud count are grouped together, as typically occurs when bid-rigging and mail fraud counts based on the rigged bids are charged in the same indictment, the guidelines provide that the offense level for the group is the offense level for the most serious of the counts. However, the guidelines provide no direction on whether to impose a fine according to the offense that has the highest offense level, or the highest fine provided by any count to be grouped. We believe that the Commission should direct the latter result in this situation.

Amendment 23 §3E1.1. Acceptance of Responsibility

The Commission has proposed a number of changes to the guideline on acceptance of responsibility. Our general view is that there is not a sufficient basis for rewriting the guideline.

We oppose Option 2, which would provide a three-level reduction for defendants whose offense level is 30 or greater. This approach would grant a greater benefit to defendants convicted of the most serious offenses. The guideline system establishes proportional increases and reductions. If offenders at high offense levels need a greater percentage reduction than those at low offense levels, the integrity of the entire system of enhancements and reductions is called into question. We believe this proposed change would be an unwise step for the Commission to take.

We also oppose Option 3. First, we disagree with the proposal to provide an explicit downward adjustment for acceptance of responsibility for a nolo plea. The distinguishing feature of a nolo pleas is that the defendant who enters one declines to accept responsibility for the offense. We believe it is important to encourage guilty pleas, rather than nolo pleas, and providing a reduction for the former but not the latter will foster this result. We also oppose the proposed three-level reduction. It will have the effect in many cases, particularly in white collar offenses, of simply increasing the commonly granted two-level adjustment for acceptance of responsibility to a three-level adjustment. Finally, we oppose rewarding a defendant who goes to trial to preserve legal issues. Such a defendant should enter, or at least seek to enter, a conditional plea under Rule 11, Federal Rules of Criminal Procedure. Moreover, proposed Application Note 2 would allow an acceptance-of-responsibility reduction for a defendant who challenges the government on an issue that directly addresses determining "factual guilt" (i.e., absence of intent) as an example of a reason for proceeding to trial unrelated to determining guilt. Such a defendant does not warrant the reduction for acceptance of responsibility any more than one who proceeds to trial with the intent of showing that he was not the perpetrator of the crime.

We also oppose Option 4 on many of the same grounds noted above with regard to Option 3. In addition, we object to it because it allows a three-level reduction for defendants who proceed to trial. This reduction would fail to encourage guilty pleas.

If any changes are made, we believe they should be limited to commentary changes discussing the effect of conditional pleas as a means for a defendant to preserve legal issues. In addition, addressing the issue of acceptance of responsibility

for relevant or related conduct is also an appropriate modification.

Amendment 27 §§4B1.1 and 4B1.2. Career Offenders

Amendment 27 proposes a number of changes to the career offender guidelines that would substantially erode their effect. We oppose these revisions. The career offender guidelines are mandated by the Sentencing Reform Act, which requires the Commission to assure that the guidelines specify a term of imprisonment at or near the maximum term authorized for any defendant 18 years or older convicted of a felony crime of violence or controlled substance felony who has previously been convicted of two or more such prior felonies. 28 U.S.C. §994(h). In some cases the results are harsh, but the present guideline accurately reflects the will of Congress that persons who fit this description be subject to a sentence at or near the highest sentence allowed by law. We believe that the career offender provision serves not only the punishment and incapacitation purposes of sentencing, but also the goal of general deterrence.

Most of the proposals in Amendment 27 seek to avoid the requirements of the career offender statute cited above. For example, under Amendment 27(A), Option 1, the maximum term of imprisonment to which the defendant should be subject to sentencing under the career offender provision would be artificially reduced. The proposed amendment directs that the statutory maximum for purposes of the career offender provision is the maximum term authorized for the offense of conviction before the maximum has been increased by a sentencing enhancement statute applied because the defendant has one or more prior convictions. We strenuously oppose this proposal since the maximum term of imprisonment authorized must be the level authorized for the defendant being sentenced, not another defendant with a different criminal background. To the extent there is a need for clarification, we recommend adoption of Option 2.

We also oppose Amendments 27(B), (D), (E), and (F). Amendment (B) would count a prior offense under the career offender provisions if it was punishable by imprisonment for more than two years. While we do not have strong policy objections to this proposal, we are concerned that it would violate the applicable statutory provision. A felony for purposes of title 18, United States Code, is an offense punishable by more than one year of imprisonment. See 18 U.S.C. §3559(a)(5). This provision was enacted as part of the Sentencing Reform Act, along with the career offender provision, cited above. We believe that when Congress used the term "felony" in the career offender provision, 28 U.S.C. §994(h), it meant an offense punishable by more than one year of imprisonment (at least for any federal offense).

We also oppose Amendment (D), which seeks comment on whether the Commission should identify certain categories of crimes of violence that would be considered "lesser" crimes of violence for purposes of the career offender guideline. Such offenses should not be excluded as predicate offenses. Moreover, modifying the career offender provision to provide lower sentences for offenders convicted of such crimes is problematic because many of the sentences now provided are "near" the statutory maximum, rather than "at" it. That is, lowering sentences would result in sentences less than "near" the statutory maximum, particularly after the reduction for acceptance of responsibility. Lowering these sentences for a lesser category of persons who qualify as career offenders could seriously undermine the applicable statute.

Amendment (E) would allow courts to count two prior felony convictions as only one for purposes of the career offender guideline if, although not consolidated for trial or sentencing, they could have been consolidated for trial as joinable offenses. Similar but unconnected offenses may be joined under Rule 8, Federal Rules of Criminal Procedure. Thus, for example, an offender convicted of two separate bank robberies would have these count as only one prior conviction under the proposed amendment. However, such a defendant is precisely the type Congress included in the career offender provision, which is aimed at those with two or more prior convictions. The Commission should reject this proposed artificial limitation on the career offender guideline.

Amendment (F) would count prior convictions only if they resulted in conviction and sentencing prior to the next qualifying offense under the career offender guideline. This treatment of prior offenses would provide a windfall to defendants who commit several criminal acts before they are sentenced and is inconsistent with the career offender statutory provision.

Amendment 28(A) Chapter Five Part A. Criminal History Category Zero

We strongly oppose the creation of a criminal history Category Zero. It would potentially revise the guidelines in a substantial way and alter the Commission's previous judgments about appropriate sentencing levels for all crimes. With respect to white collar offenders, who are unlikely to have a prior criminal history, a new Category Zero would seriously undermine the sentences currently available and send an unfortunate message to would-be offenders that their criminal activity will be tolerated to a greater extent than it has been under the guidelines.

Amendment 30 §5E1.2. Fines for Individual Defendants

Amendment 30 would delete the current provision authorizing a fine up to the statutory maximum when the applicable statute authorizes a fine greater than $250,000 or a fine for each day of violation. In place of the statutory maximum for such offenses, the proposed amendment would substitute specified dollar amounts.

We strongly oppose this amendment. Where applicable statutes authorize fines higher than $250,0000 or fines for each day of violation, Congress seems to have expressed the view that fines take on a special importance as a sentencing tool. The current guideline reflects the intent of Congress that fines be available in substantial amounts for such offenses as certain environmental violations, bank fraud, major fraud against the United States, and certain controlled substance offenses. We have not been aware of any particular problems that exist with the current guideline structure in this regard. Moreover, the Commission has provided no explanation of how it chose the maximum guideline fine levels proposed for these and other offenses. In our view the current guidelines correctly treat these offenses as unusual ones in which Congress has deemed high fines appropriate and in which judges should have discretion to impose a fine, above a minimum set forth, based on factors particular to the case. The Commission has provided guidance on what factors should influence this discretion in guideline §5E1.2(d) and (e). Finally, reducing the currently available statutory maximum to an arbitrary dollar level sends a negative message to the public with regard to especially serious offenses.

Amendment 33 Chapter Five Part H. Specific Offender Characteristics

The Commission has proposed a number of revisions to policy statements. We opposed the proposal regarding "lack of youthful guidance" and "history of family violence" in our statement before the Commission at the public hearing. We also oppose the other proposed amendments.

The first change is to permit ordinarily irrelevant offender characteristics to be considered for departure purposes if such factors, "alone or in combination, are present to an unusual degree and are important to the sentencing purposes in the particular case." We strongly oppose this amendment, which could seriously erode the guidelines by inviting departures for almost any offender characteristic. If such a policy statement were in place, a determination by the Commission that it had adequately considered a particular factor and that departure on the basis of this factor is inappropriate would have no meaning. In short, the amendment invites the return of unwarranted disparity in sentencing.

We oppose proposal (B) for several reasons. First, it allows departures for "young and naive" defendants and in our view could cause many of the same problems that departures based on "lack of youthful guidance" would cause. Many offenders are young and naive but, nevertheless, know and understand the basic prohibitions provided in the criminal law. Moreover, the suggestion that home confinement may be the appropriate punishment for such young defendants is misguided. These defendants are precisely the ones who may require a traditional form of punishment because of the failure of the home environment to prevent their unlawful conduct.

Finally, proposal (D) asks whether the Commission should authorize downward departures where a court finds that the defendant's advanced age (e.g., 60 or older) has reduced the defendant's risk of recidivism, provided the defendant serves a substantial portion of his sentence, is not a major drug trafficker, and has no current or past history of violent offenses. Incapacitation and recidivism are not the only sentencing considerations. Reducing a sentence on the basis of a supposed reduced risk of recidivism overlooks the punishment and general deterrence purposes of sentencing articulated in the Sentencing Reform Act. For example, in many white collar cases a major goal of sentencing is general deterrence. We believe that fear of imprisonment is a significant deterrent for many white collar offenders, regardless of age, who may otherwise consider unlawful activity. In addition, many antitrust defendants are over age 60 and have participated in ongoing offenses for years, along with other generations of individuals. The older offenders are often the most culpable of the co-defendants prosecuted. The goals of punishment, deterrence, and incapacitation are critical for such offenders. Finally, leaders of drug cartels may learn of the benefits of employing older persons for lesser roles, just as they have exploited children. The proposed exclusion for "major drug traffickers" would not apply to such low-level drug participants.

Amendment 35(C) Chapter Six. Sentencing Procedures and Plea Agreements

The Commission has asked for comment on whether it should amend the guidelines to provide that conduct on which a defendant is acquitted but which has been established by a preponderance of the evidence may be used in (1) determining the offense level, (2) selecting a sentence within the guideline range, and (3) as a basis for upward departure. We recommend in favor of an amendment authorizing all such uses. The fact of acquittal should not by itself exclude consideration of the conduct in question. A jury's finding that the government did not prove the existence of a fact beyond a reasonable doubt should not bar the government from proving that fact under the lower preponderance standard at sentencing. Most courts of appeals have held that

judges at sentencing may rely on evidence of a defendant's conduct relating to charges on which the defendant was acquitted at trial. United States v. Mocciola, 891 F.2d 13, 16-17 (1st Cir. 1989); United States v. Rodriguez-Gonzalez, 899 F.2d 177, 180-182 (2d Cir.), cert. denied, 111 S. Ct. 127 (1990); United States v. Ryan, 866 F.2d 604, 608-609 (3d Cir. 1989); United States v. Isom, 886 F.2d 736 (4th Cir. 1989); United States v. Juarez-Ortega, 866 F.2d 747, 749 (5th Cir. 1989); United States v. Duncan, 918 F.2d 647, 652 (6th Cir. 1990), cert. denied, 111 S. Ct. 2055 (1991); United Stats v. Fonner, 920 F.2d 1330, 1332-1333 (7th Cir. 1990); United States v. Dawn, 897 F.2d 1444, 1449-1450 (8th Cir.), cert. denied, 111 S. Ct. 389 (1990); United States v. Averi, 922 F.2d 765 (11th Cir,. 1991); but see United States v. Brady, 928 F.2d 844 (1991). Of course, if the acquitted conduct relates to a separate offense that is excluded from consideration under relevant conduct because the offense in question is sentenced on an offense-of-conviction, rather than a real-offense basis (such as robbery), the acquitted conduct should generally not increase the sentence.

Amendment 37 §1B1.5. Interpretation of References to Other Offense Guidelines

Guideline §1B1.5 provides that a sentencing guideline's reference to another guideline refers to the entire guideline, including the base offense level plus all applicable specific offense characteristics and cross references. The Commission has asked for comment on whether the commentary to this provision should be amended to clarify how the guidelines are to be applied when a Chapter Two offense guideline references another guideline.

Guideline §1B1.5 does not describe how the commentary pertaining to the initial Chapter Two guideline is to be treated even though failure to follow an interpretation in guideline commentary could constitute an incorrect application of the guideline subject to appeal. For example, guidelines §2E5.2 (theft from an employee benefit plan) and §2E5.4 (theft from a labor union) simply cross reference and apply guideline §2B1.1 for larceny and theft generally. The application notes for the former guidelines expressly direct that the Chapter Three upward adjustment for abuse of position of trust "will apply" if the defendant is a fiduciary of a benefit plan and "would apply" if the defendant is a union officer. However, no such explicit direction is given in the guideline or commentary for §2B1.1 (larceny generally), to which §§2E5.2 and 2E5.4 refer. The initial guideline commentary's direction clearly should be given effect. Yet, the commentary notes for §1B1.5 direct simply that Chapter Three adjustments are "to be determined in respect to that other [i.e., the cross referenced] offense guideline." §1B1.5, Application Note 2. Consequently, we recommend an amendment which provides that the commentary in the initial

guideline also should be followed unless clearly inconsistent with the scheme of the cross-referenced guideline.

We appreciate your consideration of these important matters and would be pleased to offer our assistance to the Commission in its efforts to address our concerns.

Sincerely,

Paul L. Maloney
Senior Counsel for Policy
Criminal Division

Enclosures

COMMENTS OF THE ENVIRONMENT & NATURAL RESOURCES DIVISION

I. Proposed Amendment 10: Section 2Q1.2 Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification

Proposal: Section 2Q1.2(b) is amended by inserting the following at the end: "Do not apply this adjustment if an adjustment from (b)(1) applies."

RECOMMENDATION: Reject the proposed amendment and analyze this issue in an overall review of environmental guidelines 2Q1.2 and 2Q1.3.

The proposed amendment is intended to address concerns about "double-counting" in Part 2Q1.2 of the Sentencing Guidelines, which governs most environmental crimes involving hazardous substances. The term "double-counting" is used in this context to refer to the use of an element of an offense as a specific offense characteristic. The argument is made that if an essential element of an offense is also included as an offense characteristic enhancement, it is double counted since as an element of the offense, it is already accounted for as part of the base level offense. We find this argument flawed in several respects. First, the methodology complained of here, called "double-counting," occurs throughout the sentencing guidelines.[1] Unless the Commission intends to eliminate this methodology throughout the guidelines, addressing it only in the context of environmental crimes has no apparent justification. Second, "double-counting" does not occur in every offense under Part 2Q1.2. The proposed amendment erroneously presumes that every violation involving a release into the environment also involves a permit violation. To the contrary, a significant number of environmental crimes involving releases into the environment do not also involve permit violations.[2]

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[1] For example, the use of false information to obtain explosives is covered by guideline 2K1.3, but the use of false information is also a specific offense characteristic for that guideline. Criminal sexual abuse under 18 U.S.C. § 2241 requires use of force or threat of force, yet those factors constitute a specific offense characteristics under § 2A3.1(b)(1).

[2] In Parts 2Q1.2 and 2Q1.3 the Commission has covered a broad array of environmental crimes. Some of these crimes involve actual releases, but not permits; some involve permits, but not releases; some include both factors; and some involve neither. The following violations are examples of each category:

1. The knowing discharge of a flammable pollutant into a sewer system in violation of the Clean Water Act, Act, 33 U.S.C. §§ 1317(d) and 1319(c)(2)(A), would

(continued...)

There are other concerns with this proposal as well. First, the proposed amendment provides an approach that is at best inartful: it would lower offense levels in many cases where "double-counting" may be absent; it would retain higher offense levels in many cases where "double-counting" may be present. We therefore recommend that the Commission reject the proposed amendment, and suggest that the advisory group chaired by Commissioners Nagle and Gelacak consider the various arguments concerning double-counting as part of their review of the guidelines governing environmental crimes.

Second, if the Commission were to adopt the proposed amendment, adjusted offense levels in cases involving release of hazardous pollutants would decrease because the (b)(4) permit enhancement would no longer apply -- unless the Commission offset that decrease by raising the (b)(1) enhancement for release of

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[2](...continued)
constitute a release not requiring a permit. Offense characteristic (b)(1) would apply; (b)(4) would not.

2. The knowing storage of hazardous wastes without a permit in violation of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d)(2), would not involve a release. Offense characteristic (b)(4) would apply; (b)(1) would not.

3. The knowing removal of asbestos during demolition without wetting it first would be a violation of the Clean Air Act, 42 U.S.C. § 7413(c)(1), even though it would involve neither a permit nor a release. Neither (b)(1) nor (b)(4) would apply.

4. The knowing disposal of a hazardous waste in violation of the Resource Conservation and Recovery Act would involve a permit violation. Both (b)(1) and (b)(4) would apply.

All of these violations are felonies. Other examples could easily be drawn from each of the four categories. More environmental prosecutions fall into the fourth category, but that reflects the fact that releases without permits or in violation of permits are viewed as more serious and, therefore, higher priority cases. The fact that (b)(1) and (b)(4) do not apply together in every case is significant in judging whether they constitute improper double-counting. Where two or more related characteristics do not apply to every violation covered by a guideline that situation does not constitute impermissible double-counting. See United States v. Goolsby, 908 F.2d 861, 864 (11th Cir. 1990).

hazardous pollutants. Likewise, if the Commission were to adopt the proposed amendment, adjusted offense levels in cases involving release of hazardous pollutants would be lower than adjusted offense levels in cases involving ordinary pollutants -- unless the amendments were duplicated in Part 2Q1.3. As a result, the Commission would need to adopt at least four amendments, not just one, to eliminate the permit enhancement in discharge cases without lowering adjusted offense levels and upsetting the overall balance of Part 2Q. These issues demand the review and analysis that only can occur as part of a thorough and informed review of Part 2Q.

Third, even from the perspective of whether it eliminates so called "double-counting" in the guidelines, the amendment is flawed, because it does not address all instances where "double-counting" may occur. Specifically, it eliminates only the permit enhancement in release cases. The possibility of "double-counting" would still exist where defendants commit permitting violations that do not involve a release into the environment. At the same time, the proposed amendment assumes that permit enhancement would never be appropriate in release cases. But a defendant who fails to obtain a permit so as to try to avoid all regulation may be more culpable than a defendant who exceeds a permit requirement. Likewise, a defendant who knowingly exceeds a permit requirement may be more culpable than a defendant without such knowledge. The proposed amendment therefore, reduces the penalty for some environmental violations, but serves no interest well in the debate over double-counting.

The proposed amendment would prohibit application of Section 2Q1.2(b)(4) (violation of a permit or failure to have a permit) whenever Section 2Q1.2(b)(1) (actual release of a contaminant to the environment) applies. In addition to seeking comment on the proposed amendment, the Commission has requested public comment as to whether (1) the enhancements under Section 2Q1.2(b)(1) should be greater and (2) any amendments to Section 2Q1.2 should be duplicated in Section 2Q1.3 (which governs most environmental crimes involving non-hazardous pollutants).

We urge that the Commission reject the proposed amendment to Part 2Q1.2 of the Sentencing Guidelines. We recommend that the advisory group chaired by Commissioners Nagle and Gelacak address this matter during its review of the environmental sentencing guidelines. We believe that analysis will demonstrate that the concerns about "double-counting" are unfounded, and that the proposed amendment is not an improvement. We look forward to working with the Commission as it undertakes the important task of reevaluating environmental guidelines 2Q1.2 and 2Q1.3.

II. <u>Proposed Amendment 11: Section 2Q2.1 Specially Protected Fish, Wildlife, and Plants; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife and Plants</u>

1. Proposed Amendment to Section 2Q2.1(b)(1)

Proposal: Section 2Q2.1(b)(1) is amended by deleting "involved a commercial purpose" and inserting in lieu thereof "was (A) committed for pecuniary gain or (B) involved a pattern of similar violations."

Additional Issue for Comment - Number 2: When the specific offense characteristic in section 2Q2.1(b)(1) is applicable, should the magnitude of the increase in levels be greater? If so, should there be a three-level or a four-level increase?

RECOMMENDATION: Section 2Q2.1(b)(1) is amended by inserting "pecuniary gain or" immediately after "involved."

Our recommendation retains the existing language in Section 2Q2.1(b)(1), yet sweeps up a portion of the proposal as well. By doing so, we seek to avoid the under-inclusion that has plagued this specific offense characteristic. By combining both pecuniary gain and commercial purpose in one subsection, we hope to avoid any narrow interpretations of this specific offense characteristic that miss the mark.

We have not included here proposed subsection (b)(1)(B), "a pattern of similar violations." As discussed, infra, we recommend adoption of "more than minimal planning" as a new specific offense characteristic in subsection (b)(4) and recommend that this phrase be incorporated there.

By combining the phrases "commercial purpose" and "pecuniary gain" into one specific offense characteristic, offenses properly covered by it will include both sport hunters who use the services of paid guides to hunt big game animals illegally or those who illegally kill or injure wildlife found depredating domestic animals or crops. Both are recurring problems. Like other offenses now falling within this specific offense characteristic, these, too, are driven by the pursuit of gain or profit, and thus, properly should be subject to this aggravating factor.

We are not recommending any additional offense level increases for this characteristic in place of the current two-level increase. Any increase now may unduly weight this characteristic. The other proposals, if adopted, provide more balance. This is not to say, however, that this characteristic is unimportant. In fact, most offenses occur within the ambit of "commercial purpose" and are driven by the desire for pecuniary gain. Live wildlife and wildlife products are becoming increasingly scarce and correspondingly more valuable. Sophisticated networks of illegal international trade exist today that were nonexistent ten years ago. For instance, black or

grizzly bears are poached routinely now to supply gall bladders to foreign dealers who pay exorbitant prices for them. Similarly, aviculturists and bird fanciers have created a huge demand for parrots and macaws that is satisfied by clandestine worldwide smuggling schemes.

It is not surprising then, that the primary law enforcement agency enforcing federal wildlife statutes (and most of the offenses covered by Section 2Q2.1), the U.S. Fish and Wildlife Service, states that one of its primary objectives is "to uncover major commercial activities involving illegal trade of protected wildlife and wildlife products." U.S. Fish and Wildlife Service, Division of Law Enforcement, FY 1988 Annual Report, p. 1. The U.S. Fish and Wildlife Service ("Service") further states that "the Service considers the most serious violations to be large-scale commercialization of wildlife." FY 1988 Annual Report at 2. Next, the Service finds that "another serious category of wildlife violations is the illegal importation of wildlife into the United States for commercial purposes." Ibid.

Congress, too, has recognized the harm caused by a commercial activity, and uses it as one means to distinguish felony from misdemeanor offenses. See, e.g., Lacey Act Amendments of 1981 ("Lacey Act"), 16 U.S.C. 3373(d)(1)(B); Migratory Bird Treaty Act, 16 U.S.C. 707(b).

2. Proposed Amendment to Section 2Q2.1(b)(2).

Proposal: Section 2Q2.1(b)(2) is amended by inserting "(A)" immediately before "involved" and by inserting "or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants" immediately following "law."

RECOMMENDATION: Adopt the proposed amendment published by the Commission.

We find this amendment well-founded. It complements the quarantine provision and closes any loopholes that may exist. For instance, offenses involving contaminated products, like shellfish harvested from contaminated beds that cause various diseases in humans now would be included. Formerly, since no quarantine was required for such shellfish products, someone who intentionally harvested and later sold shellfish from contaminated beds was never subject to any aggravating sentencing factors based upon the risk of harm. As proposed, that omission would be rectified.

3. Proposed Amendment to Section 2Q2.1(b)(3)(B).

Proposal: Section 2Q2.1(b)(3)(B) is amended by deleting "a quantity of fish, wildlife, or plants that was substantial in

relation either to the overall population of the species or to a discrete subpopulation" and inserting in lieu thereof "(i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as set forth in 50 CFR 216.15), (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 CFR part 17, or (iii) fish, wildlife, or plants that are listed as endangered in appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 CFR part 23)".

RECOMMENDATION: Section 2Q2.1(b)(3)(B) is amended by deleting "a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to discrete subpopulation" and inserting in lieu thereof "any of the following types or amounts of fish, wildlife, or plants: species listed as endangered or threatened by the Endangered Species Act; species listed as Appendix I to the convention on International Trade in Endangered Species of Wild Fauna or Flora; depleted stocks of marine mammals; or a quantity of fish, wildlife, or plants that was significant in relation to the overall population of the species, to any subspecies, or to a distinct population segment."

This amendment involves a revision of an existing specific offense characteristic in Section 2Q2.1 that is troublesome. Section 2Q2.1(b)(3)(B) now states: "If the offense involved a quantity of fish, wildlife, or plants that was substantial either to the overall population of the species or to a discrete subpopulation, increase by 4 levels."

We believe the language in the original version of the guidelines was intended to include any offense involving fish, wildlife, or plants listed as endangered or threatened under the Endangered Species Act (as set forth in 50 CFR Parts 17, 222, or 227) or as "Appendix I" under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (the international treaty equivalent of an endangered listing implemented through the Endangered Species Act) (as set forth in 50 CFR Part 23), and offenses involving substantial quantities of other fish, wildlife, or plant species. While these were the broad categories sought to be included, neither the language of the specific offense characteristic nor the Commentary conveyed this message.

As a consequence, this specific offense characteristic has been narrowly interpreted and rarely applied. Prosecutors are reluctant to seek enhancement under this provision for offenses involving endangered, threatened, or Appendix I animals or plants, and the courts have followed suit. The gravamen of the provision as it is now written is that the offense must involve either a substantial number of animals, even when those animals

are endangered or threatened species, or the loss of a significant member of a nearly extirpated population. Therefore, population dynamics are important (often requiring the proof of expert witnesses) and the characteristic itself has been infrequently applied at sentencing. We know of only a handful of instances where it was used. One court applied it to a violation of the Endangered Species Act involving the unlawful killing of a grizzly bear in Wyoming, an area with a remnant population of grizzly bears. See United States v. Brad A. Baxendale, Nathan P. Sponsel and Keith M. Grant, No. CR 89-054-K (D. Wyo. Oct. 10, 1989). Another court did so only where the offense involved two New Mexico ridged-nosed rattlesnakes, a threatened species, illegally collected from a total worldwide population of 54. See United States v. William Frank Meyers, No. CR 5-89133-PVT (N.D. Cal., Nov. 1988) and United States v. John Jeffrey Boundy, No. 89-20104 RFP (N.D. Cal. Jan. 18, 1989). Finally, the enhancement has applied to the unlawful possession of a sexually mature female Kemp's Ridley sea turtle by a group of shrimp fishermen. See United States v. Hung Van Tran, Duc Quang Nguyen and Binh Van Nguyen, 765 F. Supp. 356, 358 (S.D. Tex. May 17, 1991), appeals docketed, Nos. 91-2605, 2606, 2572 (5th Cir. 1991).

This four level enhancement, however, has not been uniformly applied even when the same or similar animal species were involved. For instance, it was not sought where a defendant was convicted of illegally collecting over 100 green and loggerhead sea turtle eggs from nests on the beach at Jupiter Island, Florida because the experts available would not conclude that this number was "substantial" (but would have found it "significant"). See United States v. James Edward Bivens, Case No. 88-14016-CR-PAINE (S.D. Fla., Aug. 21, 1989).

Now, virtually all violations of the Endangered Species Act that do not involve a commercial purpose, particularly those where endangered or threatened animals are killed illegally, are offenses for which the guidelines provide no enhancement. This interpretation misses the mark and cannot be the one intended for that specific offense characteristic. Our recommended revision permits the sentencing court to rely in many instances on administrative determination already made under conservation statutes about the conditions of a particular species rather than reduce the sentencing hearing to a battle of expert opinions about population dynamics.

Furthermore, the term "substantial" itself should be replaced. We urge that the term "significant" be used as a substitute. The new term permits the specific offense characteristic to be applied where the offense involves less than a "substantial" quantity, but nonetheless is properly characterized as "significant." As now used, the term "substantial" denotes the relationship of the quantity involved in the offense to a known population. Unfortunately, not all

wildlife populations are quantified and experts often are unable to state an opinion when such information is unavailable.

The term "significant," as used in § 2Q2.1(b)(3)(B), would include a quantity that is likely to make a difference to the ability of a species or a subpopulation of a species to sustain itself at or near maximum sustainable quantities. Thus, a quantity may be significant either because it is a substantial portion of the overall population or discrete subpopulation (i.e., formerly described as "substantial") or because the individual animals involved were qualitatively important to the species' ability to sustain itself. For example, killing one or two adult males or females of a given species may be significant even though a quantitatively "substantial" proportion of the total population or discrete subpopulation is not involved.

Finally, arguments for enhancement of offenses involving endangered, threatened, or Appendix I species are equally compelling for depleted stocks of marine mammals protected by the Marine Mammal Protection Act. See 16 U.S.C. 1362(1), 1372(b), and 50 C.F.R. Parts 18 or 216. Offenses involving animals from such depleted stocks should be eligible for enhancement as well under this provision.

Our recommendation incorporates minor editorial changes into the proposal by deleting citations to the Code of Federal Regulations and rewording the description of the subsection's coverage. The citations to the Code of Federal Regulations were incomplete, potentially confusing or restrictive, and therefore troublesome. The Commentary itself identifies the source statutory provisions and should be sufficient.

4. Proposed Amendment to Section 2Q2.1(b).

Additional Issue for Comment - Number 1: Should an additional specific offense characteristic be added, providing for a two-level increase if the offense involved more than minimal planning? If so, should the increase be an alternative to, or in addition to, the increase for the specific offense characteristic in section 2Q2.1(b)(1)?

RECOMMENDATION: Section 2Q2.1(b) is amended by inserting the following as paragraph (b)(4).

> **(4) If the offense involves more than minimal planning or a pattern of similar violations, increase by 2 levels.**

We recommend that the Commission add "more than minimal planning" as part of another specific offense characteristic, a recommendation that draws upon a number of other guidelines for inspiration. Such a 2-level enhancement for more than minimal

planning appears in guidelines found in Chapter 2, Parts B (Offenses Involving Property) and F (Offenses Involving Fraud and Deceit). This enhancement recognizes that beyond the actual amount of loss, the severity of the offense requires us to look at whether or not the crime was an isolated one of opportunity or was sophisticated or repetitive. As you know, the term "more than minimal planning" is defined in the Commentary to Section 1B1.1. Of course, the adjustments found in Chapter 3 of the guidelines, such as defendant's aggravating or mitigating role in the offense are unaffected and would remain as separate adjustments following a determination of whether or not a specific offense characteristic, such as "more than minimal planning," applies to the offense.

As the Commentary to Section 2F1.1, the fraud and deceit guideline, states:

> The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents . . . are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in [offenses] involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.

This commentary is equally applicable to offenses under Section 2Q2.1. Therefore, the guideline found there also needs to distinguish, for instance, between the opportunistic one-time smuggler who stashes contraband wildlife items in a bag before crossing the border and the ring of sophisticated wildlife traffickers who smuggle their live contraband wildlife into the U.S. through a worldwide network.

Similarly, the hunter who shoots an eagle because he happens to see it while hunting ducks and the profiteer who slaughters an eagle to supply the black market with a carcass, feathers and talons (worth less than $2,000) engage in a qualitatively different crime. Section 2Q2.1 as now promulgated (unlike Section 2F1.1) fails to draw that distinction and treats each of these offenders alike.

We also recommend moving the phrase "pattern of similar violation" from paragraph (b)(1) to paragraph (b)(4). As you know, there are proposals to delete "more than minimal planning" as a specific offense characteristic elsewhere. See 57 Fed. Reg. 90, 94. While we support its inclusion here, if the phrase should be deleted from the guideline vernacular, then a "pattern of similar violations" standing alone can act as a substitute. While we would prefer the combination of the two, since the terms

are not mutually inclusive, our proposal provides the Commission with the flexibility to deal with the "more than minimal planning" specific offense characteristic without undermining Section 2Q2.1.

5. Proposed Revisions to Commentary

Proposal: The Commentary to section 2Q2.1 is amended by inserting in the appropriate place the following:

> "Application Notes:
>
> 1. An offense 'committed for pecuniary gain' includes market transactions, barter transactions,and activities designed to increase gross revenue or reduce losses (e.g., when a farmer destroys migratory birds to prevent their consumption of cereal grains).
>
> 2. For purposes of subsection (b)(2), the quarantine requirements include those set forth in 9 CFR part 92, and 7 CFR chapter III.
>
> 3. For purposes of subsection (b)(3)(A), 'market value' may be determined from any reliable information available."

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

> **The term "commercial purpose" in Section 2Q2.1(b)(1) includes, but is not limited to: all activities involving the actual or intended purchase or sale of fish, wildlife, or plants; all activities involving the actual or intended take, receipt, acquisition, possession, transportation, or transfer of fish, wildlife, or plants in the pursuit of gain or profit; and all conduct facilitating such activities. Museums, zoological parks, and scientific or educational institutions open to the general public for a fee or donation, whether or not established, maintained, or operated as a governmental service or privately endowed and organized are included.**
>
> **The term "pecuniary gain" includes market transactions, barter transactions, and activities designed to increase gross revenue**

or reduce losses (e.g., when a farmer destroys migratory birds to prevent their consumption of cereal grains).

If the Commission adopts our recommendation to include both commercial purpose and pecuniary gain in subsection (b)(1), then both terms should be defined in the Commentary. We recommend adoption of the proposed definition of "pecuniary gain" and offer an equally broad definition of "commercial purpose."

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

> **The federal quarantine laws and regulations to which paragraph (b)(2) applies are set forth, inter alia, in Title 9, Code of Federal Regulations, Part 92 and Title 7, Code of Federal Regulations, Chapter III. State quarantine laws are applicable as well.**

Our recommendation adopts much of the proposed language, but further specifies that quarantine laws need not necessarily be federal ones. State quarantine laws also qualify for considerations as well. Since the statutory provisions cited do not include quarantine laws per se, a brief description of the applicable quarantine laws referred to in Section 2Q2.1(b)(2) also should avoid any confusion about the kinds of quarantine laws incorporated here.

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

> **"Market value" may be determined at sentencing from any reliable information available and is not limited to the fair market value or bargained for price of the fish, wildlife, or plants. It may include replacement of restitution costs, or acquisition and preservation (i.e., mounting) costs and requires a case-by-case determination. So-called "contingent valuation methods" measuring aesthetic or non-use loss, however, are inappropriate to measure market value.**

We agree that there is a need to address "market value" determination in the Commentary, but find the proposal falls far short of exploring the intricacies presented by that phrase.

Both the courts and prosecutors alike often become exasperated when they try to determine "market value" under the

guidelines. For example, in United States v. Asper, 753 F. Supp. 1260, 753 F. Supp. 1289 (M.D. Penn.)(Dec. 13, 1990), aff'd 941 F.2d 1203 (3rd Cir. 1991), a two-week sentencing hearing was required to establish the applicable guideline sentencing range, including a determination of the market value of mounted wildlife trophies under Section 2Q2.1. We hope that our proposed commentary to the guideline will avoid the need for a lengthy sentencing hearing to determine market value.

Neither Section 2Q2.1 of the sentencing guidelines, not its accompanying commentary, defines the term "market value." However, Section 2Q2.1(b)(3)(A) specifically references Section 2F1.1 (Fraud and Deceit) to determine the appropriate level for adjustment of the offense level. Paragraph 7 of the commentary to Section 2F1.1 references yet another guideline, Section 2B1.1 (for the definition of value). Paragraph 2 of the commentary to this Section 2B1.1 provides in part:

> "Loss" means the value of the property taken, damaged, or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim . . . . (emphasis added)

Similarly, Paragraph 8 of the commentary to Section 2F1.1 indicates that the amount of the loss need not be exact or precise, "The district court need only make a reasonable estimate of the range of loss given the available information." Paragraph 8 of the commentary to Section 2F1.1 concludes by stating, "The offender's gross gain from committing the fraud is an alternative estimate that ordinarily will understate the loss."

In United States v. Wilson, 900 F.2d 1350 (9th Cir. 1990), the Ninth Circuit held that where market value is difficult to ascertain, a district court may use any reasonable method to measure the loss under Section 2F1.1 and is not limited to a strict market valuation of loss:

> A strict market approach measures only the gain to the defendant while virtually ignoring the harm suffered by the victim. See United States v. Verkwitt, 619 F.2d 649, 658 (7th Cir. 1980) . . . . In light of these considerations and the Guidelines' provision for other methods of valuation, we reject a strict market valuation approach under the Guidelines and reiterate that "where goods

> have no readily ascertainable market value, any reasonable method may be employed to ascribe an equivalent monetary value to the items." Drebin, 557 F.2d at 1331 (quoting United States v. Lester, 282 F.2d 750, 755 (3rd Cir. 1960), cert. denied, 364 U.S. 937, 81 S.Ct. 385, 5 L.Ed.2d 368 (1961)).

900 F.2d at 1356. (emphasis added). Accord, United States v. Pennington, 940 F.2d 670 (9th Cir. 1991) (court not bound by price paid by wildlife enforcement agent for eagles; court may use any reasonable method to measure the loss). See also United States v. Pemberton, 904 F.2d 515 (9th Cir. 1990) (rejecting defendant's argument that appropriate measure of value of stolen drawings he illegally possessed was what drawings were worth to him - zero).

Thus, the commentaries to sections 2B1.1. and 2F1.1 of the Guidelines and Wilson, Pemberton and Pennington point to the conclusion that the district court is not bound by the bargained for price or the value to the defendant in determining the amount of the loss or market value. The district court should be free to determine the amount of the loss or market value from any reliable information. The court should have considerable latitude to consider such values as liquidated damages, replacement costs, restitution, or other civil monetary values established by the states under various conservation laws. Also, guided hunts for trophy or other game animals themselves raise a host of unique valuation issues and the court should be free to consider the defendant's guide fees, license fees, transportation, lodging, shipping and taxidermy costs when determining market value.

Market value, however, cannot be determined using aesthetic loss. These values, often expressed as contingent or non-use values, would ask the court to determine value without resort to some quantifiable measure. Mere diminution in the aesthetic value of the environment is insufficient for determining market value.

Proposal: The commentary to section 2Q2.1 captioned "Background" is amended by deleting "involved a commercial purpose" and inserting in lieu thereof "was committed for pecuniary gain," and by deleting "species exceeded $2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete subpopulation of the species" and inserting in lieu thereof "fish, wildlife, or plants exceeded $2,000, or involved certain endangered, threatened, or depleted species."

RECOMMENDATION: The Commentary to Section 2Q2.1 captioned "Background" is amended by inserting "pecuniary gain or"

immediately following "involved" and immediately before "a commercial purpose" and by inserting "or where the offense involved more than minimal planning or a pattern of similar violations "immediately following "as required by law" and by deleting "species exceeded $2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete subpopulation of the species" and inserting in lieu thereof "fish, wildlife, or plants exceeded $2,000, or involved certain endangered, threatened, protected, or depleted species".

The proposal and our recommendation are nearly identical. Our recommendation, however, captures the broader coverage we propose for subsection (b)(1) and a new subsection (b)(4).

III. Issue for Comment 22: Chapter Three, Part D -- Multiple Counts

RECOMMENDATION: Section 3D1.2 is amended by inserting "Section 2Q2.1" in the appropriate place on the list found in Section 3D1.2(d).

Under Section 3D1.2(d), when the offense is one that requires grouping of multiple counts, then all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction are used to determine a defendant's relevant conduct. Section 1B1.3(a)(2). Under Section 3D1.2(d), counts are grouped together, "when the offense level is determined largely on the basis of the total amount of harm or loss . . . or some other measure of aggregate harm . . . ." (Emphasis added). Section 2Q2.1 is neither specifically included nor excluded from the operation of that subsection; therefore, "a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level." Section 3D1.2(d).

Section 2Q2.1 should be listed as offense for grouping under Section 3D1.2(d) because the offense level is in fact largely determined by some measure of aggregate harm. Section 2Q2.1 is modeled after Section 2F1.1., an offense specifically listed for grouping under Section 3D1.2(d). Both have a base level of six (6) and derive additional offense levels through a specific offense characteristic based upon monetary amounts. See Sections 2F1.1(a), (b)(1), 2Q2.1(a), and (b)(3)(A). The only difference between these two specific offense characteristics is that one focuses upon "loss" and the other upon "market value." Id.

Unfortunately, this interpretation is not uniformly shared at sentencing when the guidelines are applied. When significant "market values" are involved, then a correspondingly significant portion of the total offense level results from that specific offense characteristic and, the offense level is then "largely determined" by the aggregate harm or loss. Conversely, this analysis has been used with low market values near or at the threshold levels for additional offense levels to claim that the offense level is no longer determined largely on the basis of aggregate market value; since the basis offense level itself comprises more than half of the total offense level. This ambiguity can be eliminated simply by stating that Section 3D1.2(d) applies to Section 2Q2.1.

Such an interpretation will insure nationwide uniformity and comport with most recent interpretations of relevant conduct. As the Fifth Circuit has noted:

> One of the clear purposes of § 1B1.3 of the guidelines is to include different transactions that are relevant to the charged conduct, particularly if they are part of a "common scheme or plan." United States v. Woolford, 896 F.2d 99, 104 (5th Cir. 1990). To accord with this purpose, we have consistently interpreted relevant conduct broadly. See, e.g., United States v. Paulk, 917 F.2d 897, 883-94 (5th Cir. 1990); United States v. Mourning, supra, 914 F.2d at 706.

United States v. Smallwood, 920 F.2d 1231, 1237 (5th Cir.), reh'g denied en banc, 927 F.2d 602 (5th Cir. 1991).

The Fifth Circuit also recently cited with approval several other circuit court opinions describing the interplay between the sections focusing on relevant conduct:

> For a general explanation of the interplay between sections 1B1.3(a) and 3D1.2(d), see United States v. Blanco, 888 F.2d 907, 909-11 (1st Cir. 1989). See also United States v. White, 888 F.2d 490, 497 (7th Cir. 1989) ("Putting § 1B1.3(a)(2) together with § 3D1.2(d) produces the conclusion that when the Guidelines provide tables that cumulate the amount sold or stolen, any acts that "were part of the same course of conduct or common scheme or plan as the offense of conviction" should be included in the computation of the amount on which the offense level depends, whether or not the

defendant was convicted of selling or stealing these additional amounts.").

United States v. Ponce, 917 F.2d 841, 843 n.1 (5th Cir. 1990), cert. denied, ____ U.S. ____ (1991).

A summary of our recommendations for Section 2Q2.1 is attached along with a "redlined" copy of Section 2Q2.1 with our proposed changes. Enclosures 1 and 2.

Enclosures

ENCLOSURE 1

RECOMMENDATION: Section 2Q2.1(b)(1) is amended by inserting "pecuniary gain or" immediately after "involved."

RECOMMENDATION: Section 2Q2.1(b)(2) is amended by inserting "(A)" immediately before "involved" and by inserting "or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants" immediately following "law."

RECOMMENDATION: Section 2Q2.1(b)(3)(B) is amended by deleting "a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to discrete subpopulation" and inserting in lieu thereof "any of the following types of amounts of fish, wildlife, or plants: species listed as endangered or threatened by the Endangered Species Act; species listed as Appendix I to the convention on International Trade in Endangered Species of Wild Fauna or Flora; depleted stocks of marine mammals; or a quantity of fish, wildlife, or plants that was significant in relation to the overall population of the species, to any subspecies, or to a distinct population segment."

RECOMMENDATION: Section 2Q2.1(b) is amended by inserting the following as paragraph (b)(4).

> (4) If the offense involves more than minimal planning or a pattern of similar violations, increase by 2 levels.

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

> The term "commercial purpose" in Section 2Q2.1(b)(1) includes, but is not limited to: all activities involving the actual or intended purchase or sale of fish, wildlife, or plants; all activities involving the actual or intended take, receipt, acquisition, possession, transportation, or transfer of fish, wildlife, or plants in the pursuit of gain or profit; and all conduct facilitating such activities. Museums, zoological parks, and scientific or educational institutions open to the general public for a fee or donation, whether or not established, maintained, or

operated as a governmental service or privately endowed and organized are included.

The term "pecuniary gain" includes market transactions, barter transactions, and activities designed to increase gross revenue or reduce losses (e.g., when a farmer destroys migratory birds to prevent their consumption of cereal grains).

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

The federal quarantine laws and regulations to which paragraph (b)(2) applies are set forth, inter alia, in Title 9, Code of Federal Regulations, Part 92 and Title 7, Code of Federal Regulations, Chapter III. State quarantine laws are applicable as well.

RECOMMENDATION: The Commentary to Section 2Q2.1 is amended by inserting in the appropriate place the following:

"Market value" may be determined at sentencing from any reliable information available and is not limited to merely the fair market value or bargained for price of the fish, wildlife, or plants. It may include replacement of restitution costs, or acquisition and preservation (i.e., mounting) costs and requires a case-by-case determination. So-called "contingent valuation methods" measuring aesthetic or non-use loss, however, are inappropriate to measure market value.

RECOMMENDATION: The Commentary to Section 2Q2.1 captioned "Background" is amended by inserting "pecuniary gain or" immediately following "involved" and immediately before "a commercial purpose" and by inserting "or where the offense involved more than minimal planning or a pattern of similar violations "immediately following "as required by law" and by deleting "species exceeded $2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete

subpopulation of the species" and inserting in lieu thereof "fish, wildlife, or plants exceeded $2,000, or involved certain endangered, threatened, protected, or depleted species".

RECOMMENDATION: Section 3D1.2 is amended by inserting "Section 2Q2.1" in the appropriate place on the list found in Section 3D1.2(d).

ENCLOSURE 2

2. CONSERVATION AND WILDLIFE

§ 2Q2.1. Specially Protected Fish, Wildlife, and Plants; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense involved *pecuniary gain or* a commercial purpose, increase by 2 levels.

(2) If the offense *(A)* involved fish, wildlife, or plants that were not quarantined as required by law, *or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants,* increase by 2 levels.

(3) (If more than one applies, use the greater):

(A) If the market value of the fish, wildlife, or plants exceeded $2,000 increase the offense level by the corresponding number of levels from the table in § 2F1.1. (Fraud and Deceit); or

(B) If the offense involved [a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation] *any of the following types or amounts of fish, wildlife, or plants: species listed as endangered or threatened by the Endangered Species Act; species listed as Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora; depleted stocks of marine mammals; or a quantity of fish, wildlife, or plants that was significant in relation to the overall population of the species, to any subspecies, or to a distinct population segment,* increase by 4 levels.

(4) *If the offense involved more than minimal planning or a pattern of similar violations, increase by 2 levels.*

Commentary

Statutory Provisions: 16 U.S.C. §§ 668(a), 707(b), 1174(a), 1338(a), 1375(b), 1540(b), 3373(d); 18 U.S.C. § 545. For additional statutory provision(s); see Appendix A (Statutory Index).

Background: This section applies to violations of the Endangered Species Act, the Bald Eagle Protection Act, the Migratory Bird Treaty Act, the Marine Mammal Protection Act, the Wild Free-Roaming Horses and Burros Act, the Fur Seal Act, the Lacey Act, and to violations of 18 U.S.C. § 545 where the smuggling activity involved fish, wildlife, or plants. Enhancements are provided where the offense involved *pecuniary gain* a commercial purpose, where the fish, wildlife, or plants were not quarantined as required by law, *or where the offense involved more than minimal planning or a pattern of similar violations.* An additional enhancement is provided where the market value of the [species exceeded $2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete subpopulation of the species] *fish, wildlife, or plants exceeded $2,000, or involved certain endangered, threatened, protected, or depleted species.*

For purposes of subsection (b)(1), the term "commercial purpose" all activities involving the actual or intended purchase or sale of fish, wildlife, or plants; all activities involving the actual or intended take, receipt, acquisition, possession, transportation, or transfer of fish, wildlife, or plants in the pursuit of gain or profit; and all conduct facilitating such activities. Museums, zoological parks, and scientific or educational institutions open to the general public for a fee or donation, whether or not established, maintained, or operated as a governmental service or privately endowed and organized are included. The term "pecuniary gain" includes market transactions, barter transactions, and activities designed to increase gross revenue or reduce losses (e.g., when a farmer destroys migratory birds to prevent their consumption of cereal gains).

The federal quarantine laws and regulations to which paragraph (b)(2) applies are set forth, inter alia, in Title 9, Code of Federal Regulations, Part 92 and Title 7, Code of Federal Regulations, Chapter III. State quarantine laws are applicable as well.

"Market value" may be determined at sentencing from any reliable information available and is not limited to merely the

fair market value or bargained for price of the fish, wildlife, or plants. It may include replacement or restitution costs, or acquisition and preservation (i.e., mounting) costs and requires a case-by-case determination. So-called "contingent valuation methods" measuring a aesthetic or non-use loss, however, are not appropriate methods to measure market value.

Proposed amendment to § 3B1.2:

§ 3B1.2(c) No mitigating role adjustment under this section shall be applied to a defendant whose offense level is determined in part by reference to the drug quantity table in § 2D1.1 or the chemical quantity table in § 2D.11 where the relevant conduct for the drug or chemical amounts consists only of the drugs or chemicals in the defendant's actual possession.

Commentary

1. This section applies only when a defendant is convicted of an offense for which the drug quantity table in § 2D1.1 or the chemical quantity table in § 2D1.11 is applicable and the relevant conduct consists exclusively of the amount of drugs or chemicals in the defendant's actual possession. Because the actual possession of drugs or chemicals is essential to drug or chemical trafficking, no mitigating adjustment is available to the defendant when the relevant conduct of the drug or chemical amounts consists of only the drugs or chemicals in the defendant's actual possession. This provision prevents a mitigating adjustment for a courier or mule when the only drug or chemical amounts which can be proved are the amounts in the actual possession of the defendant, regardless of the number of other participants.

2. This provision should not result in a mitigating adjustment for other participants simply because actual possession of drugs or chemicals is limited to one person. For example, if two persons agree to carry drugs or chemicals between cities; but, at the time of arrest, only one of the persons is in actual possession of drugs or chemicals, the defendant in constructive possession is not entitled to a mitigating adjustment. Similarly, when one person provides the money to purchase drugs or chemicals intended for later distribution, that person is not entitled to a mitigating role adjustment simply because the drugs or chemicals are discovered in the actual possession of another person. In the examples, each defendant is equally culpable and neither deserves a mitigating adjustment.

3. When the relevant conduct for the drug or chemical amounts consists of drug or chemical amounts greater than the amount in the defendant's actual possession, a mitigating role is possible. In no event, however, may a defendant receive a mitigating adjustment which lowers the offense level below that applicable for the amount of drugs or chemicals in the defendant's actual possession

Reason for Amendment: This amendment clarifies that a courier or mule cannot receive a mitigating adjustment when the amount of drugs or chemicals within the scope of relevant conduct is only the amount of drugs or chemicals in the defendant's actual possession.

UNITED STATES DISTRICT COURT

#28

WESTERN DISTRICT OF TEXAS
PROBATION OFFICE

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March 2, 1992

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U.S. Sentencing Commission
1331 Pennsylvania Avenue, NW
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Washington, D.C. 20004

RE: **PROPOSED AMENDMENTS TO SENTENCING GUIDELINES**

Dear U.S. Sentencing Commission:

The following are comments regarding the Proposed Amendments to the Sentencing Guidelines memo distributed by Mr. Chamlee on January 29, 1992:

1. Expanding the availability of non-prison sentencing options is encouraged. Option 1 on page 3, which eliminates the requirement that defendants must serve at least one-half of the minimum guideline range in prison under the "split sentence" provision is believed to be an appropriate adjustment to the guidelines.

2. Acceptance of Responsibility as it now stands is actually an acknowledgement of guilt. It is believed that this acknowledgement should include an admission of involvement in the offense of conviction and relevant conduct as noted in Amendment 23, Option 1 on page 5. In addition, a one level reduction for demonstrations of acceptance is also believed appropriate because some defendants take affirmative steps to demonstrate acceptance of responsibility and do not just acknowledge their guilt. Option 2 on page 6 is also believed an appropriate adjustment to the sentencing guidelines An increased reduction for acceptance of responsibility for an offense level higher than 30 appears very reasonable.

3. A redefinition of a career offender appears appropriate. A concern in this office involves younger defendants who are arrested, convicted, and sentenced to periods of imprisonment for drug distribution offenses involving very small quantities of controlled substances. A third conviction in federal court results in a career offender guideline which results in a

seemingly excessive period of imprisonment of 17 years plus. Can this be what Congress intended? Street dealers are a menace to society, but their careers in crime are many times a result of drug addiction and a poor socio-economic upbringing. Career offender guidelines would seem more appropriate for the violent offender or the upper echelon drug distributor whose "successful" career has been the result of large scale drug distribution.

4. In response to Amendment 5 on page 14, it is believed that the removal of the "more than minimal planning" adjustment would be a disservice to probation officers. This is a practical and realistic specific offense characteristic. Increasing the offense levels based on the loss tables is likewise recommended. Recently, the president of a non-profit agency was convicted of accepting bribes totaling over $150,000, was given a lesser sentence (18 months) than a street dealer who was sentenced to 24 months for sales totaling less than two ounces of heroin.

5. Amendment 8 on page 14 is supported in its entirety. However, the increase for previous convictions need not be deleted. An enhancement for possession of firearms is believed especially appropriate due to the increased danger of violence when alien traffickers possess weapons.

6. Amendment 28, (Part A) on page 16, which discusses the establishment of a new category zero criminal history is again encouraged. A Chapter 4 two level reduction for a Category 0 criminal history level could provide for a more lenient guideline imprisonment range for an offender who has no previous arrests or convictions, i.e., no prior involvement in the criminal justice system.

7. Finally, it is believed that Judicial Conference Recommendation Number 5 on page 5 of Appendix A is unnecessarily re-opening the door to disparity in sentencing.

Thank you for your time in reviewing these comments. They are brief but to the point. Sentencing guidelines, when not circumvented by the defense attorney, the U.S. Attorney, and/or the court, appear to be generally satisfying the purposes of sentencing as outlined in 18 U.S.C. § 3553.

Sincerely,

Michael C Fisher

Michael C. Fisher
Senior U.S. Probation Officer
Guideline Specialist

MCF/vsg

cc: Honorable Vincent L. Broderick
c/o The Research Division
Federal Judicial Center
1520 H Street, NW,
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H.H. Whitehill
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
PROBATION OFFICE

#34

THOMAS J. WEADOCK, JR.
CHIEF PROBATION OFFICER

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BOSTON 02109-4561

February 24, 1992

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

Dear Sir:

Enclosed please find comments which have been made concerning the proposed amendments to the Guidelines. The packet which was forwarded did not contain pages 12 through 20 and 22 through 33. Additionally, it appears that there should have been additional information after page 40.

Very truly yours,

Gregory J. Wollaston
U.S. Probation Officer

By the defendant

criminal activity, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit or implicit (tacit) agreement, including any agreement fairly imputed to the defendant by his conduct and that of other participants in the criminal activity. For example, where a defendant benefited directly, or expected to benefit directly, from the conduct of others that occurred prior, contemporaneously or subsequently to the defendant's joining the criminal activity, such conduct ordinarily may be imputed to be within the scope of the criminal activity the defendant agreed to jointly undertake.

The concept of reasonable foreseeability has no bearing on conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes. The concept of reasonable foreseeability is considered only in relation to the conduct of other participants that is in furtherance of the jointly-undertaken criminal activity.".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 1 in the fifth (formerly second) paragraph by deleting "'would be otherwise accountable'" and inserting in lieu thereof "is accountable";

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 1 in example (a) by deleting "boat" wherever it appears and inserting in lieu thereof in each instance "ship"; by deleting "any claim on his part" and inserting in lieu thereof "his claim"; and by inserting the following additional paragraph:

"Because the defendant aided and abetted the unloading of the marihuana shipment, no determination of the reasonable foreseeability of the acts of others in unloading the shipment is required. If it were found that the defendant's actions, in this example, did not constitute aiding or abetting the importation of the entire shipment, the defendant appropriately would still be accountable for the entire one-ton quantity because the facts of the case (nine other off-loaders, marihuana in bales) clearly establish that a one-ton quantity of marihuana was reasonably foreseeable.".

A to him,

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 1 in example (e) in the last sentence by deleting "if" and inserting in lieu thereof "because"; by inserting "(i.e., the importation of the single shipment of marihuana) that" immediately following "criminal activity"; and by deleting "(i.e., the importation of the single shipment of marihuana)".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 1 by inserting, immediately after example (e), the following additional paragraphs:

"Where the defendant enters an ongoing conspiracy, as in this example, the scope of the specific criminal activity that the defendant agreed to undertake, and thus the defendant's accountability for prior acts of other conspirators, must be determined. One factor that appropriately may be considered in determining the scope of the criminal activity undertaken by the defendant, particularly in a conspiracy that involves repeated conduct (e.g., a series of drug sales over time), is the benefit or expected benefit to the defendant. Where the defendant benefits directly, or expects to benefit directly, from the prior conduct, such conduct ordinarily will be within the scope of the defendant's criminal activity. Where there is no direct benefit, such conduct ordinarily will not be within the scope of the defendant's criminal activity.

f. Defendant J knows about her boyfriend's ongoing drug trafficking activity, but agrees to participate in this activity on only one occasion. Defendant J is held accountable only for the drug quantity involved on that one occasion.

g. Defendant K is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as the defendant sells. The defendant is not accountable for the quantities of drugs sold by the other street-level drug dealers, even if all share a common source of supply, because he is not engaged in a jointly-undertaken criminal activity with them. In contrast, Defendant L, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant L's behavior meets the criteria for a jointly-undertaken criminal activity. Therefore, Defendant L is accountable for the quantities of drugs sold by the four other dealers during the course of his agreement with them.".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 2 by deleting the first sentence.

Reason for Amendment: This amendment clarifies the operation of this guideline. Material is moved from the commentary to the guideline itself and rephrased for greater clarity, the discussion of the scope of this provision in the commentary is expanded, and additional examples are inserted. The

Illustration of Section 1B1.3 as amended by Proposed Amendment 1

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

conduct under this provision. The conduct of others that was not in furtherance of the jointly-undertaken criminal activity, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit or implicit (tacit) agreement, including any agreement fairly imputed to the defendant by his conduct and that of other participants in the criminal activity. For example, where a defendant benefited directly, or expected to benefit directly, from the conduct of others that occurred prior, contemporaneous, or subsequent to the defendant's joining the criminal activity, such conduct ordinarily may be imputed to be within the scope of the criminal activity the defendant agreed to jointly undertake.

The concept of reasonable foreseeability has no bearing on conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes. The concept of reasonable foreseeability is considered only in relation to the conduct of other participants that is in furtherance of the jointly-undertaken criminal activity.

In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant ["would be otherwise accountable"] is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

Illustrations of Conduct for Which the Defendant is Accountable

* * *

a. Defendant A, one of ten off-loaders hired by Defendant B, was convicted of importation of marihuana, as a result of his assistance in off-loading a [boat] ship containing a one-ton shipment of marihuana. Regardless of the number of bales of marihuana that he actually unloaded, and notwithstanding [any claim on his part] his claim that he was neither aware of, nor could reasonably foresee, that the [boat] ship contained this quantity of marihuana, Defendant A is held accountable for the entire one-ton quantity of marihuana on the [boat] ship because he aided and abetted the unloading, and hence the importation, of the entire shipment.

occasion.

g. Defendant K is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as the defendant sells. The defendant is not accountable for the quantities of drugs sold by the other street-level drug dealers, even if all share a common source of supply, because he is not engaged in a jointly-undertaken criminal activity with them. In contrast, Defendant L, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant L's behavior meets the criteria for a jointly-undertaken criminal activity. Therefore, Defendant L is accountable for the quantities of drugs sold by the four other dealers during the course of his agreement with them.

2. ["Such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction," as used in subsection (a)(2), refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that were part of the same course of conduct or common scheme or plan as the offense of conviction.]

* * *

(B). Proposed Amendment: The Commentary to §1B1.3 captioned "Application Notes" is amended by inserting the following additional notes:

"8. 'Common scheme or plan' and 'same course of conduct' are two closely-related concepts.

Shaded to highlighted

(A) Common scheme or plan. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other, and linked by common evidence. Factors that appropriately are considered in this determination include common victims, common accomplices, common purpose, and similar modus operandi. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; i.e., the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), and similarity of modus operandi (the same or similar computer manipulations were used to execute the scheme). Offenses may meet the criteria of a common scheme or plan whether or not they fall within the time frame that

comma not needed

would also qualify them as part of the same course of conduct.

(B) **Same** course of conduct. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors appropriate to consider in this determination are the time interval between the offenses and the similarity of the offenses. As §1B1.3(a)(2) applies only to offenses of a character that would be grouped under §3D1.2(d), such offenses will be similar in character (e.g., a series of thefts, a series of thefts and forgeries, or a series of drug sales). As a general -- but not absolute -- standard, offenses that are similar in character and are committed at intervals of 120 days or less appropriately are considered as part of the same course of conduct. Note that in the case of a series of such offenses committed at intervals of 120 days or less (e.g., a series of four thefts each 90 days apart) all the offenses ordinarily would be considered part of the same course of conduct even though the total time from the first to last offense may have exceeded 120 days.

Due to the nature of tax offenses, a different time interval between offenses is ordinarily appropriate for this determination. For example, a failure to file income tax returns for consecutive years, or the filing of fraudulent income tax returns in consecutive years, ordinarily would constitute the same course of conduct because such returns are required only at yearly intervals. The determination of the same course of conduct or common scheme or plan in tax cases is addressed in Application Note 3 of the Commentary to §2T1.1 (Tax Evasion).

Although the term 'same course of conduct' may also be used in connection with dissimilar offenses committed within a short span of time (e.g., a 'spree' in which a defendant assaults a neighbor, steals a car, and unlawfully possesses a controlled substance within a period of several hours appropriately might be considered the same course of conduct), this facet of the term has no applicability to cases under §1B1.3(a)(2) because §1B1.3(a)(2) only applies to offenses of a similar character.".

Reason for Amendment: This amendment provides guidance as to the scope of the terms "same course of conduct" and "common scheme or plan."

§1B1.8. Use of Certain Information

(I)	More than $10,000,000	add 16
(J)	More than $30,000,000	add 18
(K)	More than $80,000,000	add 20.

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft
§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery
§2F1.1. Fraud and Deceit

6. Proposed Amendment: Section 2B1.1(b) is amended by renumbering subdivision (7) as (8), and by inserting the following as subdivision (7):

"(7) If the offense affected a financial institution, increase by 4 levels.".

Section 2B4.1(b) is amended by renumbering subdivision (2) as (3), and by inserting the following as subdivision (2):

"(2) If the offense affected a financial institution, increase by 4 levels.".

Section 2F1.1 is amended by renumbering subdivision (5) as (6), and by inserting the following as subdivision (5):

"(5) If the offense affected a financial institution, increase by 4 levels.".

Reason for Amendment: This amendment would increase the sentences for financial institution fraud, theft, and bribery over the entire range of offense levels, including those at the lower and middle levels, in addition other enhancements already in these guidelines. Under this amendment, embezzlement of $5,000 from a financial institution, for example, would have an offense level four levels higher than embezzlement of the same amount from an individual or from another type of institution. The purpose of this amendment would be to reflect the increases by Congress during the past several years in the maximum terms of imprisonment from 20 to 30 years for violations of title 18 bank fraud and embezzlement offenses.

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

7. Issue for Comment: The Commission requests comment 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

of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.".

Reason for Amendment: This amendment clarifies a situation in which a defendant is not ordinarily eligible for a reduction under §3B1.2 (Mitigating Role), and moves existing language from the Introductory Commentary of Chapter Three, Part B, to the Commentary in §3B1.2.

(B). Proposed Amendment: The Commentary to §3B1.1 is amended by inserting the following additional note:

"4. When a defendant, who otherwise would merit a mitigating role reduction under §3B1.2 (Mitigating Role), exercised limited supervision over a limited number of participants with equal or lesser roles, do not apply an adjustment from this section. For example, an increase in offense level under this section would not be appropriate for a defendant whose only function was to offload a single large shipment of marijuana, and who supervised other offloaders of that shipment. Instead, consider such circumstances in determining the appropriate reduction under §3B1.2 (Mitigating Role). See also Application Note 4 of the Commentary to §3B1.2 (Mitigating Role).".

The Commentary to §3B1.2 is amended by inserting the following additional note: , (comma

"4. When a defendant who otherwise would merit a mitigating role reduction under §3B1.2 (Mitigating Role), supervises a number of participants with equal or lesser roles, a lesser reduction than otherwise appropriate ordinarily is warranted. For example, in the case of a defendant who would have qualified for a minimal role adjustment but for his supervision of other participants, an adjustment for minor role, rather than minimal role, would be appropriate.".

Reason for Amendment: This amendment clarifies that a defendant who otherwise merits a mitigating role, and who supervises a limited number of participants of equal or lesser roles, is not subject to an aggravating role enhancement. Instead, such circumstances may be considered in determining whether a mitigating role reduction is appropriate under §3B1.2.

17(A). Proposed Amendment: The Introductory Commentary to Chapter Three, Part B is amended by deleting the first sentence of the second paragraph and inserting in lieu thereof:

"In the case of a criminal activity involving more than one participant, §3B1.1 or §3B1.2 may apply. When a criminal activity involves only one participant, or only participants of roughly equivalent culpability, neither §3B1.1 nor §3B1.2 will apply.".

Section 3B1.1 is amended by deleting "follows:" and inserting in lieu thereof "follows (Apply the greatest):".

Section 3B1.1(a) is amended by deleting "five or more participants, or was otherwise extensive" and by inserting in lieu thereof "at least four other participants".

Section 3B1.1(b) is amended by deleting "(but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive" and inserting in lieu thereof "of at least four other participants in a criminal activity".

A Section 3B1.1(c) is amended by deleting "other than described in (a) or (b)" and inserting in lieu thereof "that involved at least one other participant".

The Commentary to §3B1.1 captioned "Application Notes" is amended in Note 1 by deleting the second sentence and inserting in lieu thereof the following additional paragraphs:

"In addition, for the purposes of this guideline, 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 (e.g., if two persons were recruited to assist in transporting marihuana, they would be deemed participants even if they were undercover law enforcement agents and, thus, not criminally responsible for the offense). However, 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.

Terminology leaves a great deal to interpretation as to what constitutes a "significant" role

Furthermore, for purposes of this guideline, a participant includes any person recruited to play a [[significant]] role in the offense, even though their lack of awareness that an offense was being committed is a bar to their criminal liability (e.g., a person recruited to drive the getaway car from a robbery who is unaware that a robbery is to be committed; or a person expressly hired to collect money for charitable purposes, who is unaware that a fraud is being perpetrated). Persons such as postal employees, messengers, or taxi drivers who are performing their normal duties, and are not otherwise criminally responsible for their conduct, are not included under this paragraph.".

What is meant by this

The Commentary to §3B1.1 captioned "Application Notes" is amended

A Objections to application of 3B1.1(a) or 3B1.(b) will be made since the amendment to 3B1.c has no upper limits. The wording not more than 30 other participants could clarify the situation.

by deleting Note 2.

Section 3B1.4 is deleted in its entirety.

Reason for Amendment: This amendment clarifies the definition of participant to include the defendant and other persons who are criminally responsible. "Participant" also includes, in most cases, law enforcement officers, and those who are not criminally responsible for their conduct in the offense but who play a role in furthering the offense, even if unwitting. The amendment also deletes §3B1.4, which is untitled, and is inconsistent with the remainder of the guideline format. The substance of the Commentary to §3B1.4 is more appropriately placed in the Introductory Commentary to this Part.

Illustration of Chapter Three, Part B, as amended by Proposed Amendment 17(A)

PART B - ROLE IN THE OFFENSE

Introductory Commentary

* * *

[When an offense is committed by more than one participant, §3B1.1 or §3B1.2 (or neither) may apply.] In the case of a criminal activity involving more than one participant, §3B1.1 or §3B1.2 may apply. When a criminal activity involves only one participant, or only participants of roughly equivalent culpability, neither §3B1.1 or §3B1.2 will apply. Section 3B1.3 may apply to offenses committed by any number of participants.

§3B1.1.Aggravating Role

Based on the defendant's role in the offense, increase the offense level as [follows:] follows (Apply the greatest):

(a) If the defendant was an organizer or leader of a criminal activity that involved [five or more participants or was otherwise extensive] at least four other participants, increase by 4 levels.

(b) If the defendant was a manager or supervisor [(but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive] of at least four other participants in a criminal activity, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal [other than described in (a) or (b)] that involved at least one other participant, increase by 2 levels.

participants in a criminal organization may receive increases under §3B1.1 (Aggravating Role) while others receive decreases under §3B1.2 (Mitigating Role) and still other participants receive no adjustment.]

(B). Proposed Amendment to §3B1.1 (Aggravating Role): The Commentary to §3B1.1, captioned "Application Notes," is amended in Note 1 by inserting the following additional sentence as the first sentence:

"This adjustment applies only when the offense is committed by more than one participant.".

Reason for Amendment: This amendment clarifies that this adjustment is restricted to cases in which the defendant participates in the commission of the offense with at least one other person who is also criminally responsible for the commission of the offense.

18(A). Proposed Amendment: Section 3B1.2 is amended by deleting "In cases falling between (a) and (b), decrease by 3 levels.".

The Commentary to §3B1.2 is deleted in its entirety and the following notes are inserted in lieu thereof:

"1. This section applies only in the case of criminal activity involving more than one participant. "Participant" is defined in Note 1 of the Commentary to §3B1.1.

[[2. No mitigating role adjustment under this section shall be applied to a defendant who, in connection with the offense, threatened the use of force, possessed a dangerous weapon, or caused another person to threaten the use of force or possess a dangerous weapon.]]

3. Subsection (a) (Minimal Role) applies to a defendant who is [[plainly among the least culpable of the participants in the criminal activity]] [[plainly among the least culpable when compared to all other participants who typically participate in the particular type of criminal activity]]. [[It is intended that the downward adjustment for a minimal participant be restricted to a narrow group of defendants whose function in the criminal activity and whose culpability for the offense, relative to that of other participants, indicates that such defendants are plainly among the least culpable.]]

To receive a reduction under subsection (a) (Minimal Role), the defendant [[ordinarily]] shall have:
(a) only performed unskilled or unsophisticated tasks;
(b) no proprietary interest in the criminal activity, and

received no benefit from the criminal activity, other than a [[fixed-fee]] payment that is a small amount both absolutely and in comparison to the expected profit of those who have employed the defendant.

(c) no [[significant]] decision-making authority in the criminal activity;

[[(d) participated in the criminal activity [[on no more than one occasion]] [[for no more than a short period of time]] ; and

[[(e) no more than limited knowledge of the scope and structure of the criminal activity and of the criminal conduct of the more culpable participants.]]

[[Frequently, such defendants will have little or no knowledge of the scope and structure of the criminal activity or of the activities of the more culpable participants.]]

4. In a controlled substance trafficking offense (any offense for which the offense level is determined under §2D1.1) --

(a) "no proprietary interest" excludes (1) any defendant who owned any portion of the controlled substance; and (2) any defendant who financed any aspect of the importation, manufacture, cultivation, transportation, or distribution of the controlled substance;

(b) "no [[significant]] decision-making authority" excludes (1) any defendant who sold, negotiated the sale of, or determined the terms of a sale of the controlled substance, (2) any defendant who exercised [[significant]] decision-making authority with respect to the importation, manufacture, cultivation, transportation, or distribution of the controlled substance, and (3) any defendant who exercised control of the controlled substance for a significant period of time, such that the defendant [[had the ability to control]] [[was essential to]] the success of the criminal activity. In contrast, "no [[significant]] decision-making authority in the criminal activity" includes any defendant who did not exercise control over the controlled substance for any significant period of time, such that the defendant [[had the ability to control]] [[was essential to]] the success of the criminal activity. For example, a defendant who merely offloaded one ship, or permitted use of a residence in furtherance of the criminal activity did not exercise control over the controlled substance for any significant period of time.

5. Subsection (b) (Minor Role) applies to a defendant who is [[significantly less culpable than a defendant who carried out the same criminal activity without assistance]] [[substantially less culpable when compared to all other

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United States Attorney
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#37

February 27, 1992

Hon. W. Wilkins, Jr., Chairman
and Commissioners
United States Sentencing Commission
1331 Pennsylvania Ave, N.W.
Suite 1400
Washington, D.C. 20004

Re: Proposed Amendment to the Part 2Q1.2 Guidelines

Dear Chairman Wilkins & Commissioners:

On behalf of the Environmental Subcommittee of the Attorney General's Advisory Committee, I am enclosing comments opposing the proposed amendment to Section 2Q1.2 of the United States Sentencing Guidelines that was published in the January 2, 1992 Federal Register.

At a recent meeting of our Subcommittee, which was held on Monday, February 24, 1992, the proposed amendments were discussed. It was the unanimous opinion of all of the United States Attorneys who attended that we oppose these amendments. Although our opposition is consistent with the position being taken by the Department of Justice, we felt it important for you to understand the views of those who must implement these guidelines on a day to day basis.

As is more fully explained in the attached comments, the proposed amendments will only exacerbate problems that already exist in the application of these guidelines to environmental crimes. We urge the Commission to undertake a thorough re-evaluation of the Part Q Guidelines rather than adopt a piecemeal approach to amending the guidelines.

Thank you for your consideration. Please feel free to contact me if you have any questions about our position.

Sincerely,

DENNIS C. VACCO
United States Attorney

Chairman
Environmental Subcommittee
AGAC

DCV/taa

COMMENTS TO PROPOSED AMENDMENTS TO THE ENVIRONMENTAL GUIDELINES

Submitted by

Environmental Subcommittee

of the

Attorney General's Advisory Committee

On January 2, 1992, the U.S. Sentencing Commission published in the Federal Register a proposed amendment to Section 2Q1.2 of the environmental guidelines. The Sentencing Commission requested comments on three issues relating to this proposed amendment: 1) whether Section 2Q1.2 should be amended as proposed; 2) whether there should be an adjustment of the guidelines as they relate to offenses involving a discharge, release, or emission of a pollutant; and 3) whether Section 2Q1.3 should be amended to be consistent with the proposed amendment to Section 2Q1.2.

Critics of the Part Q environmental guidelines frequently complain that they provide neither uniformity nor consistent proportionality in sentencing - goals which were express purposes of the Sentencing Reform Act. The amendment as set forth in the January 2, 1992 Federal Register does nothing to remedy the problems encountered when attempting to apply these guidelines but instead will only exacerbate the problems. This proposed amendment is a patchwork attempt to "fix" the Part Q guidelines which would be better benefited by a thorough review. A piecemeal approach to revising the Part Q guidelines should be rejected and the Part Q guidelines should be re-evaluated in toto.

I. **Specific Comments as to the Proposed Amendment to Section 2Q1.2**

The proposed amendment consists of the addition of the following language at the end of the 2Q1.2(b)(4) specific offense characteristic: "Do not apply this adjustment if an adjustment from (b)(1) applies."

In other words, if the base offense level is increased pursuant to Specific Offense Characteristic 2Q1.2(b)(1)(A) or (B) due to the fact that the violation caused the release, discharge or emission of a hazardous or toxic substance or pesticide (on either an isolated or ongoing, continuous or repetitive basis) the base offense level cannot also be increased pursuant to Specific Offense Characteristic 2Q1.2(b)(4) because the conduct occurred without a permit or in violation of a permit condition. The stated reason for this proposed amendment is as follows:

> [I]n some cases, the "discharge, release or emission" is not a violation of law unless it occurs "without a permit or in violation of a permit." Accordingly, it has been contended that applying both of these subsections in the same case is inappropriate double-counting.

The articulated concern about "double-counting" reflects a misunderstanding of the total universe of crimes that are included as part of the Base Offense Level of Section 2Q1.2. Simply because it would not be illegal for someone to treat, store or dispose of hazardous waste unless they do so without a permit or in violation of the terms and conditions of a permit, does not mean that it is "double-counting" to apply both specific offense characteristics 2Q1.2(b)(1) and 2Q1.2(b)(4). Since the Base

Offense Level of this specific guideline is designed to cover conduct that encompasses varying degrees of seriousness -- including offenses that do no involve permits or permit conditions -- it is essential that the Specific Offense Characteristic stay in place until an overall re-evaluation of the guidelines is completed. To modify this provision now will result in inequities in the sentencing of less serious crimes that are encompassed as part of this guideline.

A. Legal Analysis

First, it must be remembered that the "base offense level" is not exclusively tied to elements of a specific crime. Rather, it is the threshold level - the "base" - for a group of different crimes that share some commonality. In the case of the 2Q1.2 guideline, the common link between the various statutory sections covered by this specific provision of the guideline is the fact that all of the listed crimes involve, in some way, the mishandling of hazardous or toxic substances and pesticides or recordkeeping requirements related to those types of substances.[1]

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[1] Other examples of crimes that are grouped together with the same base offense level but which have different elements of the offense are found in U.S.S.G. §2A2.2, the guideline provision that covers aggravated assault. Pursuant to 18 U.S.C.§113(c) it is a crime for anyone to assault another person within the maritime or territorial jurisdiction of the United States with a dangerous weapon. The use of a dangerous weapon is an element of this offense yet U.S.S.G. 2A2.2(b)(2) provides an enhancement to the base offense level if a dangerous weapon is used in the crime. Similarly, pursuant to 18 U.S.C. §114 it is a crime for anyone within the maritime or territorial jurisdiction of the United States to pour scalding water, corrosive acid or caustic substances on another person with the intent to maim that person. The act of pouring the liquid will necessarily cause some bodily injury, yet that factor is also listed as a specific offense characteristic

The 2Q1.2 base offense level encompasses offenses involving the actual unpermitted treatment, storage or disposal of hazardous waste resulting in actual contamination of the environment as well as offenses involving the failure to file required reports or maintain records which do not necessarily involve any unpermitted treatment, storage or disposal or any environmental contamination. In fact, the 2Q1.2 section covers offenses as diverse as the dumping of hazardous waste in violation of RCRA, the improper storage of PCBs in violation of TOSCA, to decanting bulk pesticides into unlabeled containers for distribution in violation of FIFRA, and the falsification of shipping manifests.

Section 2Q1.2 also includes offenses for which proof of the violation of a permit is a prerequisite for conviction as well as offenses for which there is no permit requirement at all. In short, the base offense level is simply the starting point. Every defendant convicted of a violation covered by 2Q1.2 starts with a Base Offense Level of 8, even though many of those crimes have different elements, some implicating a permit requirement and others that do not, that make up the individual offenses.

The Specific Offense Characteristics are designed to distinguish the various related but different crimes that are grouped in the 2Q1.2 subsection. These Specific Offense

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that enhances the base offense level. See also: 18 U.S.C. §842(a)(2) and U.S.S.G. §2K1.3(b)(1) - use of false information to obtain explosives; 18 U.S.C. §1465 and U.S.S.G § 2G3.1(b)(1) - transportation of obscene material for purposes of sale.

Characteristics identify factors that in some way may make the specific crime at issue more, or in some cases, less serious than other crimes that are grouped in the same Base Offense level and thus deserving of a sentence outside the applicable guideline range. It is important to realize that not every specific offense characteristic is applicable to every potential environmental criminal statute encompassed by these guideline sections.

In Chapter One of the Guidelines, the Commission addressed specifically the relationship between the base offense level and specific offense characteristics when dealing with regulatory crimes.

> The structure of a typical guideline for a regulatory offense provides a low base offense level (e.g. 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level.

U.S.S.G, Ch1, Part A, Subsection 4(f).

This structure is followed in the Part Q Guidelines. Specific Offense Characteristic 2Q1.2(b)(1) addresses a specific harm that will not occur in all of the offenses covered by this guideline, namely the actual discharge, release or emission of a hazardous or toxic substance or a pesticide into the environment. Environmental contamination is clearly more egregious than a recordkeeping violation or a violation that is corrected before there is an actual discharge or release.

Specific Offense Characteristic 2Q1.2(b)(4) addresses an entirely separate and distinct harm, namely the absence of a required permit or violation of a permit condition. The permit requirement is not an element in all of the regulatory offenses that are part of the Base Offense Level. This specific offense characteristic addresses an aggravating factor and regulatory concern that is different and distinct from the actual release or discharge of a contaminant into the environment that is addressed in 2Q1.2(b)(1).

Permits in the environmental regulatory framework are not simply paper exercises or licenses to pollute. They are designed to be the result of an administrative process aimed at preventing pollution and contamination before it occurs. This process includes the collection of the best available information, the evaluation of potential environmental and health risks of the proposed activity, and notice to, and input from, concerned citizens who may be affected by the permittee's activities. The permit process can also be viewed as performing the function of a safety net. Once a company or individual is in the permit system, the permittee is subject to reporting requirements and periodic inspections. The permit process is thus the mechanism used to monitor ongoing activities that have the potential for causing environmental damage with the goal of stopping unsafe practices before they escalate out of control. Individuals or companies who avoid the permitting process entirely deserve to have their sentences enhanced because by avoiding the permit process they

subvert the entire regulatory scheme. When this behavior results in actual environmental damage, it should be subject to the most serious sentences.

Violators who are convicted of violating the terms of their permit are also subject to an enhancement pursuant to subsection 2Q1.2(b)(4). Although the harm to the regulatory system by permit violators is different than those who simply avoid the system altogether, there is still a regulatory interest in assuring that those who apply for and receive permits actually comply with the limitations and requirements in the permit. Clearly, if a defendant actually has a permit and simply ignores its limitations, that factor reflects both knowing intentional conduct and a disdain for the regulatory process.[2] Thus, as has been previously stated, the permit factors addressed in 2Q1.2(b)(4) are a completely separate aggravating factors that are not addressed by the 2Q1.2(b)(1) Specific Offense Characteristic.

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[2] Some argue that the harm to the regulatory system by permit violators is not as egregious as the harm caused by those who avoid the system all together. However, the distinction between permit violators and those who avoid the system all together is not addressed by the proposed amendment.

Another argument that is sometimes made with respect to this subsection of the guidelines is that if a certain type of treatment or disposal activity is so bad that it would never be permitted by EPA, then this specific offense characteristic should not be applied. However, this interpretation of the guidelines would result in a lower base offense level for conduct that was so egregious that it would never be permitted than for conduct that would be allowed within a permit structure.

These are examples of a provision that could be re-evaluated if the Part Q guidelines were reviewed as a whole rather than in piecemeal fashion.

Nor is the structure of the Part Q Guidelines an anomaly when examined within the framework of other guideline sections. Rather the format is similar to guidelines that focus on other categories of crimes. Courts have addressed and rejected similar double counting arguments under other guidelines, for example, in United States v. Braxton, 903 F.2d 292 (4th Cir. 1990) the court rejected the defendant's argument that adding three levels because the victim was a law enforcement officer under 3A1.2 to a conviction for assaulting a federal officer in violation of 18 U.S.C. §111 "double-counted" the "federal officer" element of the underlying crime.[3]

If the application of both 2Q1.2(b)(1) and 2Q1.2(b)(4) constitutes double counting, then another example of "double counting" exists in the 2Q1.2 guidelines. Under the analysis which is the basis for the proposed amendment, it would also be double counting to decrease the final offense level pursuant to 2Q1.2(b)(6) in situations where the offense involved a simple recordkeeping or reporting violation only since the violation of falsification of records is wholly covered by the Base Offense Level.

Since subsections (b)(1) and (b)(4) address different regulatory concerns and different harms (i.e. aggravating factors), the application of both these factors to the same defendant does not constitute double counting. Although subsection (b)(4) may not be the perfect way to account for various aggravating factors that

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[3] Other examples are given supra at footnote 1.

legitimately call for enhancement of a sentence, the proposed amendment not only fails to improve on the existing Part Q guidelines, but will only create additional problems.

B. Practical Ramifications of the Proposed Amendment

The significance of this proposed Amendment is apparent when examining guideline calculations in some actual cases and factual scenarios.[4]

1. U.S. v. Anthony St. Angelo, Crim. No. WN-91-0173 (D. Md.)

Anthony St. Angelo was convicted by a jury of four counts of illegal disposal of hazardous waste at his furniture refinishing business which was located in Ijamsville, Maryland. From December, 1987 through March, 1990, St. Angelo directed employees to dispose of spent solvents that were used in the furniture stripping and refinishing business at three different locations liquid waste from the stripping process was sometimes mixed with sawdust and then put into a trash dumpster and sent to a municipal landfill. On other occasions, the spent solvents were mixed with sawdust and the sawdust was spread on the floor of the building to allow the solvents to evaporate. Liquid wastes were also poured down the hillside on the southeast corner of the property with such frequency that a spillway was created down the hill. This same liquid waste was also poured onto the ground in the northwest

[4] For purposes of this analysis, reference is made only to application of the Part Q Environmental Guidelines. Thus a particular defendant's Final Offense Level might change depending on factors such as whether defendant was given credit for acceptance of responsibility, was determined to be the leader of criminal activity, or used a special skill.

corner of the site. During the execution of a criminal search warrant in March, 1990, soil samples confirmed the presence of spent solvents and high levels of lead in one area of the site.

St. Angelo was not a stranger to the requirements for safe disposal of hazardous waste. He had previously been cited in 1984 by the state for hazardous waste violations when operating a similar business at a different location. At that time, he was told how to properly store his waste and that he needed to get a licensed hazardous waste hauler to remove the waste. Company employees testified that St. Angelo had looked into the cost of properly disposing of the waste but rejected that option since it was estimated that it would cost the company approximately $1600 a month to legally dispose of the waste that was generated by their operation. During the time period he was in operation, St. Angelo made various misleading representations to the state regulators concerning the nature of his business and the quantity and type of waste he was generating specifically to avoid regulation of his business and detection of his activity.

In short, the overall picture which emerged as a result of evidence presented at the trial was that St. Angelo (1) knew he was dealing with regulated hazardous waste; (2) knew the proper way to handle the waste but deliberately chose to act illegally to save money; and (3) affirmatively attempted to conceal his illegal disposal.

Under the current guidelines, St. Angelo's guideline sentence would be calculated as follows:

§2Q1.2(a) Base Offense Level	8
§2Q1.2(b)(1)(A) - continuous or repetitive discharge of a hazardous or toxic substance	6
§2Q1.2(b)(4) - involved disposal without a permit	4
FINAL OFFENSE LEVEL	18

Assuming that St. Angelo has a Criminal History Category of I, his guideline sentencing range would be between 27 and 33 months.

Under the proposed amendment, the district court would have the option of choosing to apply either §2Q1.2(b)(1) or §2Q1.2(b)(4) since, arguably, the amendment does not specify which specific offense characteristic must be used. If the court calculated the adjusted offense level using §2Q1.2(b)(1), St. Angelo's Final Offense Level would only be a level 14, which translates to a sentencing range of 15 to 21 months. If the sentencing judge were to decide to apply a two level "guided" downward departure pursuant to Application Note 4, St. Angelo's final offense level would be 12, which translates to a sentencing range of 10 to 16 months.[5] At this level St. Angelo would be

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[5] Due to the inherent flexibility that is built into the Part Q Guidelines in the Application Notes, St. Angelo's final offense level could vary from a level 14 (15 to 21 months) to a level 24 (51 to 63 months) under the current guidelines. If the amendment is adopted, the Final Offense Level could vary from a level 10 (6 to 12 months) to a level 14 (15 to 21 months). Where an individual is sentenced within the range of 15 to 63 months, (or under the proposed amendments, 6 to 21 months) depends almost solely on the personal view an individual district court judge has of the seriousness of the offense and culpability of the defendant. These Application Notes are thus an invitation to disparate sentences and will result in widely varying sentences from district to district.

eligible to receive a split sentence pursuant to §5C1.1(c)(3)(d)(2). If the court were to choose to apply §2Q1.2(b)(4), the adjusted offense level would only be a level 12 and if a "guided" departure pursuant to Application Note 8 were made, St. Angelo's adjusted offense level would be 10 (a range of 6 to 10 months) and he would be eligible for probation with conditions of confinement pursuant to §5B1.1(a)(2).

2. U.S. v. Marvin Mueller
Crim. No. 91-00204CR(4) (E.D. Mo.)

Marvin Mueller entered a plea of guilty to the illegal transportation of hazardous waste and the illegal disposal of hazardous waste from his dry cleaning establishment in Saint Louis, Missouri. Marvin had been in the dry cleaning business for nearly twenty years and ran an industrial chemical and solvents supply company for fifteen years. From on or about November 1987 until March 1989, Mr. Mueller illegally stored various waste materials in trailers alongside his dry cleaning business. After the City of Saint Louis fire inspectors finally surveyed his out buildings and noted that there were drums of chemicals stored in the trailers, Mueller contacted someone to "dispose"of these drums for him.

Although Mueller had an existing contract with the Safety Kleen Corporation to dispose of canisters from his dry cleaners, Mueller contacted John Hall and arranged with Hall to have the drums loaded onto a rental truck, taken to a remote area of a neighboring county and "dumped" there. All 23 barrels containing various dry cleaning waste materials were left abandoned on the

roadside. Many of these barrels were ruptured during the unloading or leaking after they were abandoned.

Laboratory analysis done by the Missouri Department of Natural Resources Laboratory showed that these drums contained wastes that met the ignitability characteristic for hazardous wastes.

Based upon his extensive experience in the dry cleaning and industrial chemicals business, Marvin Mueller (1) knew he was involved with materials that were regulated; (2) knew the proper way to dispose of these wastes and deliberately chose to act illegally to save money.

Under the current guidelines, Mueller's presentence guideline calculation should be:

§2Q.2(a)	Base Offense Level	8
§2Q1.2(b)(1)(B)	Discharge, Release, or Emission of a hazardous substance	4
§2Q1.2(b)(4)	Transportation, Treatment or Disposal without a permit	4
FINAL OFFENSE LEVEL		16

Assuming this defendant has a criminal history category of I, the guideline range would be twenty-one to twenty seven months. Without the four level enhancement pursuant to §2Q1.2(b)(4), Mueller's final offense level would only be a level 12, which would result in sentencing range of ten to sixteen months.[6] Thus, under the proposed amendment, if a defendant

[6] At the sentencing in this case, the district court applied a three level "guided" downward departure pursuant to §2Q1.2(B)(4), comment (n.8), and a two level adjustment for acceptance of

illegally stored hazardous waste without a permit, he would end up with the same sentencing range as at a defendant who actually causes a release of hazardous waste into the environment.

II. Comments on Future Amendments to the Part Q Guidelines

The single most significant factor that undermines certainty when computing a guidelines sentence under Part Q is the wide range of discretion and flexibility afforded to the sentencing court pursuant to the Application Notes that accompany the Part Q Guidelines. These Application Notes act as a broad invitation to the sentencing courts to depart with the result that the adjustments for aggravating factors that are identified as part of the Specific Offense Characteristics are undercut. The uncertainty created by the Part Q guidelines Application Notes makes it very difficult to conduct meaningful plea negotiations and frequently leads to lengthy and protracted sentencing hearings. In addition, and most importantly, as is illustrated by an examination of several cases, it is possible for defendants to receive widely varying sentences for comparable crimes.

In United States v. Wells 922 F.2d 54 (1st Cir. 1991), John Wells and his company, Wells Metal Finishing, Inc, were convicted of knowingly discharging excessive amounts of zinc and cyanide into the City of Lowell's sewer system for approximately two years between 1987 and 1989. At sentencing, the district court

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responsibility pursuant to §3E1.1(a). Thus Mueller's final adjusted offense level was level 11 with a sentencing range of 8 to fourteen months. The district court sentenced him to 4 months confinement and four months of house arrest.

assigned a base offense level of eight to the offense pursuant to U.S.S.G. § 2Q1.2. The court then looked to the Specific Offense Characteristics and increased the base offense level by six levels pursuant to §2Q1.2(b)(1)(A), since the crime involved a continuous or repetitive release of a hazardous substance.

The court also made a two-level upward adjustment pursuant to §2Q1.2(b)(3) finding that there was sufficient evidence to establish that a public utility, the Lowell Water Control Department, was disrupted by the defendant's conduct. As the First Circuit Court of Appeals noted, U.S.S.G § 2Q1.2(b)(3) requires a four level upward adjustment for disruption of a public utility, effectively making the district court's application of this subsection a two level downward departure. Since the district court did not make any specific findings to justify this two level departure, the First Circuit assumed that he had relied on Application Note 7 to §2Q1.2, which states:

> Depending upon the nature of the contamination involved, a departure of up to two levels either upward or downward could be warranted.

Finally, the district court reduced the offense level pursuant to §3E1.1 due to the defendant's acceptance of responsibility. Thus the final adjusted offense level was a level fourteen.[7] John Wells was sentenced to fifteen months imprisonment and one year of supervised release.

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[7] Although this crime involved an offense that violated the terms of the defendant's permit with the City of Lowell, no adjustment was made to the offense level pursuant to §2Q1.2(b)(4).

When compared to pre-guideline sentences, John Wells' sentence would be considered to be a stiff sentence. However, under the guidelines as presently structured, this defendant's sentence could have been much longer. A straight forward guideline computation would include a base offense level of 8 pursuant to 2Q1.2(a); an increase of 6 pursuant to 2Q1.2(b)(1)(A) for a continuous or repetitive discharge; and increase of 4 pursuant to 2Q1.2(b)(3) since the offense resulted in disruption of public utilities; and increase of 4 pursuant to 2Q1.2(b)(4) since the company's permit with the municipal government was violated. If the defendant was given credit for acceptance of responsibility, as Wells was, then the final adjusted offense level would have been 18, which would have resulted in a sentencing range of 27 to 33 months. Even if the four levels that are applicable since the crime constituted a violation of a permit are exclude, the adjusted offense level would be 16, with a sentencing range of 21 to 27 months, a significantly different sentence than the sentence Wells actually received.

Well's sentence can be compared to that received by the defendant in United States v. David Boldt, Crim. No. 88- 00084 (D. Mass. 1990) who was convicted of a very similar crime. Boldt, a manager for Astro Circuit Corporation, was convicted by a jury on two counts under the Clean Water Act for discharging electroplating wastes, at the rate of approximately 58,000 gallons a day, into the Lowell, Massachusetts sewer system. The company had been engaged in this activity from approximately May, 1984 to April, 1988. The

evidence established that Boldt was the chemical processing engineering manager from June, 1987 through January 1988 and supervised the discharges during this period. The district court sentenced the defendant to 48 hours of imprisonment, one year of probation and fined him $1,000. The district court made several downward departures when calculating the 2Q1.2 guidelines, for example refusing to enhance the sentence due to the repetitive discharges pursuant to 2Q1.2(b)(1)(A). The district court also departed based on his finding that Boldt was a "minimal participant" pursuant to U.S.S.G. §3B1.2(a) and had "accepted responsibility" for his crimes. The president of Astro Circuit, Robert McKiel had pled guilty to eleven felony counts under the Clean Water Act and was sentenced to one year, with eight months suspended, and placed on probation for two years. The vice-president was sentenced to nine months, with six months suspended and placed on probation for two years. These sentences are inconsistent with a straightforward guidelines calculation which should have been made as follows:

§2Q1.2(a) Base Offense Level	8
§2Q1.2(b)(1)(A) - continuous or repetitive discharge of a hazardous or toxic substance	6
§2Q1.2(b)(4) - involved disposal without a permit	4
FINAL OFFENSE LEVEL	18

Even if the court had made two level downward departures pursuant to Application Notes 4 and 7, the resulting guideline offense level should have been a level 14, which would translate to a sentencing range of fifteen to twenty-one months of imprisonment.

The sentences in these cases, involving repeated discharges of hazardous substance, can be contrasted with United States v. Irby, (No. 90-5113, 4th Cir. Sept. 13, 1991), in which the defendant Irby received more than double the term of imprisonment that Wells received for offenses that did not involve hazardous wastes. Mark Irby was the plant manager of a wastewater treatment plant who ordered the discharge of approximately 500,000 gallons of partially treated sewage sludge to local river on a weekly basis for approximately two years. Irby directed subordinates at the wastewater treatment plant to discharge the sludge during night time hours.

At sentencing, the district court assigned a base offense level of six to the offense pursuant to U.S.S.G. § 2Q1.3. The court then looked to the Specific Offense Characteristics and increased the base offense level by six levels pursuant to §2Q1.3(b)(1)(A), since the crime involved a continuous or repetitive discharge of a pollutant and by four levels since the discharges violated the terms of a permit. Thus, the adjusted offense level pursuant to the environmental guidelines was a level 16. The court also increased the offense level by 2 points pursuant to 3B1.1(c) because the defendant was a manager or supervisor of a criminal activity which brought the adjusted offense level to 18 resulting in a sentencing range of 27 to 33 months. Irby was sentenced to 33 months imprisonment to be followed by twelve months of supervised release.

Irby can be compared to United States v. Ted Osborne, Cr. 90-38 (E.D. Ky.). Osborne operated two small wastewater treatment facilities and pled guilty to one felony count under the Clean Water Act for the knowing discharge of sewage pollutants into a creek without a permit. The violations occurred between July 1989 and May, 1990. The district court departed from the guidelines because he concluded that the violations did not cause a significant harm. Osborne was sentenced to six months of home detention, two years of probation and fined $7,319. Although the magnitude and effect of Osborne's conduct may have been less significant than Irby's, it is still difficult to reconcile the very large disparity in their sentences given the general nature of both crimes.

Another example of how the Part Q guidelines can be interpreted differently by different courts is found by comparing the cases of U.S. v. William Ellen, U.S. v. Ocie Mills, and U.S. v. John Pozsgai[8]

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[8] The sentence imposed in the Pozsgai case has received considerable media attention as an example of the draconian nature of the environmental sentencing guidelines. However, in addition to factual distortions that are contained in many of the media accounts, it is important to note that the sentence in the Pozsgai case was a combination guideline and pre-guideline sentence. In fact, the sentence that the district court imposed on the non-guideline counts was longer than the sentence that he imposed on the guideline counts. At the sentencing hearing, the district court made it very clear that he imposed the sentence because of Pozsgai's flagrantly criminal conduct after seven separate notices from the U.S. Army Corps of Engineers and EPA. In addition, the sentencing court also noted that Pozgai had violated a Temporary Restraining Order issued by a federal district court judge and had committed perjury before a federal district court judge.

In U.S. v. William Ellen, the defendant was convicted on six felony counts under the Clean Water Act for illegally filling wetlands between October, 1988 and March 1990. During the trial it was established that 86 acres of wetlands were illegally filled despite the fact that Ellen was issued a cease & desist notice from the Army Corps of Engineers and received numerous other warnings from regulators and subcontractors.

Conservatively, Mr. Ellen's actions resulted in the illegal filling of at least 86 acres of very valuable and rapidly disappearing wetlands on Maryland's Eastern Shore. The unregulated filling that occurred at Tudor Farms under Mr. Ellen's supervision destroyed not only the wetlands themselves but also valuable habitat of a variety of animals, including the Delmarva fox squirrel and a bald eagle, two endangered species. One measure of the actual harm done to the site is the fact that the property owner, was required to conduct extensive restoration of the site in an attempt to minimize the adverse environmental impact of Mr. Ellen's conduct. The restoration and mitigation of the site cost close to one million dollars.

At sentencing, the district court arrived at an adjusted offense level of 12. This level was computed as follows:

2Q1.3 Base Offense level	6
2Q1.3(b)(1)(A) repetitive discharge	4
2Q1.3(b)(4) no permit	2
FINAL OFFENSE LEVEL	12

In this case, the district court gave Ellen two different "guided " departures. Relying on Application Note 4, the court applied Specific Offense Characteristic 2Q1.2(b)(1)(A) but made a 2 level downward guided departure because the pollutant was only dirt and because the court concluded that the damage to the marshland could be remediated by mechanical means and because, other than loss of habitat, there was no specific damage to human or animal health. The district court also applied Specific Offense Characteristic 2Q1.2(b)(4) and made and additional two level downward departure pursuant to Application Note 7 for primarily the same reasons that were the basis for the departure under §2Q1.2(b)(1)(A).[9]

In United States v. Mills, No. 88-03100-WEA (N.D. Fla. April 17, 1989), Ocie Mills and Carey Mills, a father and son, were convicted of five counts of unlawfully discharging pollutants into wetlands and one count of unpermitted dredging of a boat canal in navigable waters. The defendants had purchased the property after the prior owner had been issued a cease and desist order by the U.S. Army Corps of Engineers informing them that the area was a wetland which could not be filled. Despite receiving additional

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[9] If the 2Q1.3 Guidelines were to be amended consistent with the proposed amendment to the 2Q1.2 guidelines, Ellen's offense level would be 12 if no additional guided departures were made. Thus under this proposed amendment, Ellen would end up with the same guideline level as a defendant who committed a $20,000 to $30,000 fraud scheme which involved more than minimal planning.

With the two "guided" departures discussed above, Ellen's offense level would be 8, which translates to 2 to 8 months of imprisonment. This is comparable to the sentence a bank teller would receive for embezzling $10,000.

warnings, approximately nineteen truckloads of fill were dumped on a half acre of wetlands. A canal was also dredged without a permit and the dredge material was spread on the site. When the Mills were sentenced on April 17, 1989, they received both pre-guideline and guideline sentences. Ocie and Carey Mills were both sentenced to serve twenty one months of imprisonment to be followed by one year probation. In addition they were fined $5,000 each and to restore the site during their probationary period. The Mills' guideline calculations were as follows:

2Q1.3 Base Offense level	6
2Q1.3(b)(1)(A) repetitive discharge	6
2Q1.3(b)(4) no permit	4
FINAL OFFENSE LEVEL	16

In United States v. John Pozsgai, No. 88-00450-01 (E.D. Pa.) Poszgai was charged with dumping at least 443 truckloads of rock and concrete onto approximately 5 acres of wetlands without a permit between the summer of 1987 and the fall of 1988. Prior to purchasing the land which was the subject of the indictment, Pozsgai was warned that it was wetlands and that a permit was required before he could fill the wetlands. Pozsgai ignored this advice and subsequent warnings he received from both the U.S. Army Corps of Engineers and EPA. When Pozsgai continued to ignore these warnings, a Temporary Restraining Order was issued by a federal district judge ordering Pozsgai to cease and desist filling the wetlands. Pozsgai ignored this court order and was indicted in

September, 1988. He was convicted and on July 13, 1989. His guideline calculations were as follows:

2Q1.3 Base Offense level	6
2Q1.3(b)(1)(A) repetitive discharge	6
2Q1.3(b)(4) no permit	4
FINAL OFFENSE LEVEL	16

Pozsgai's resulting guideline range was 21 to 27 months. Pozsgai was sentenced to three years imprisonment on the pre-guideline counts and to 27 months on the guideline counts, the time to be served concurrently. to be followed by five years imprisonment. He was also fined $200,000 and ordered to restore the wetlands.

As is obvious from a review of these cases, the acreage involved in the Ellen case is far more extensive than the other two cases yet he received by far a much lower sentence than the other two who committed similar offenses and who were charged under the same statute.[10]

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[10] The sentence in the Ellen case, which involved discharges resulting in actual contamination of the environment can be compared to the case of U.S. v. Richard Pond. Pond was the superintendent of a wastewater treatment plant who falsified discharge monitoring reports and who failed to follow sampling protocols set forth as a condition of the wastewater treatment plant's NPDES permit. In this case, there was no evidence of actual discharges in violation of the permit limitations or of any environmental contamination. Pond's final offense level was a level 12 which translated to a sentencing range ten to sixteen months. He was sentenced to eight months of imprisonment to be followed by four months of home detention.

III. Conclusion

The 1980s was a decade that saw a dramatic increase in the overall number of environmental criminal prosecutions. Congress repeatedly expressed its intent that environmental crimes be treated as serious crimes and not mere regulatory annoyances. However, the sentences imposed in the majority of these cases reflected a reluctance on the part of many judges to impose significant periods of incarceration for violations of the environmental laws. With the advent of the federal sentencing guidelines, the expectations were that environmental criminals would actually be serving time in jail. A review of all of the cases which have been sentenced under these guidelines does not support this expectation. Environmental crimes are "serious" offenses and should be treated as such. Any structuring of the guidelines that results in sentences of probation or community confinement will undercut the deterrent effect of environmental criminal prosecutions.

Although we readily acknowledge that there are some problems with the implementation of the environmental crimes guidelines, the proposed amendment is a piecemeal approach that only exacerbates the problems. If promulgated, this amendment will result in some very bizarre and unfair sentences while not addressing some of the areas of the guidelines that do need to be changed. We strongly oppose this amendment and urge the Commission to undertake a overall re-evaluation of these guidelines in order to better effectuate the goals of honesty, uniformity and proportionality.

A PROPOSAL FOR AMENDING THE UNITED STATES SENTENCING GUIDELINES

Submitted by

The Project for Older Prisoners (POPS)
Professor Jonathan Turley, Director

The Project for Older Prisoners of George Washington University's National Law Center respectfully requests an opportunity to appear before the United States Sentencing Commission ("Commission") at its scheduled February 25, 1992, public meeting. On January 2, 1992, the United States Sentencing Commission invited public comment on proposed amendments to the federal sentencing guidelines, pursuant to 28 U.S.C. 994 (a), (o), (p), (x). The Commission asked for comment on "any aspect of the sentencing guidelines, policy statements and commentary, whether or not the subject of a proposed amendment." 57 Fed. Reg. 90 (1992). Among the issues for comment set forth in the Federal Register, the Commission listed a series of changes relating to the application of age as a relevant offender characteristic.[1] The Commission further invited comment on lower

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[1] Notice of Proposed Amendments, 57 Fed. Reg. 90 (1992). Among the issues for comment was:

> [D] Issue for Comment: The Commission requests comment on whether Chapter Five, parts H and K, should be amended to authorize a downward departure where a court finds that the defendant's advanced age (e.g., age 60 or older) has reduced the defendant's risk of recidivism, provided that the defendant (1) serves a substantial portion of his sentence, (2) is not a major drug trafficker, and (3) has no current or past history of violent offenses. Comment is also requested on how such a departure, if authorized, might be structured to provide for consistency in application.

sentencing procedures for cases of "extraordinary physical impairment."[2] The following proposals focus on the applicability of age and geriatric illness to the guidelines and policy statements of the Commission. Following a short statement of institutional identification, the proposal will discuss a range of options for the Commission in light of a growing scarcity of federal prison resources and the rapidly rising older prison population.

I. INSTITUTIONAL IDENTIFICATION

The Project for Older Prisoners (POPS) is a nationally recognized pro bono organization focusing on issues related to older and geriatric offenders. Founded by Professor Jonathan Turley in 1988 in New Orleans, POPS was developed to address a growing national problem: the aging of America's prison population. The number of older offenders has been rising exponentially in the United States due to longer sentencing and elimination of parole and pardon opportunities. In 1987, a

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[2] Notice of Proposed Amendments, 57 Fed. Reg. 90 (1992). Among the listed potential amendments is a new policy statement:

> Section 5K2.17. Extraordinary Physical Impairment (Policy Statement).
>
> If a defendant suffers from an extraordinary physical impairment, a sentence below the applicable guideline range may be warranted; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

conservative estimate of the number of prisoners over the age 55 was 20,000. By the year 2000, there will be over 125,000 older prisoners in this country. These prisoners occupy badly needed cell space and will on average cost much more to maintain than a younger prisoner.

Since its formation, POPS has become a national leader in developing new policies and legislation pertaining to the incarceration of older prisoners. With offices in New Orleans, Louisiana, and Washington, D.C., POPS works with prisons and legislators to adapt prison policies and facilities to better deal with the costs and needs of this emerging population. Among these policy changes are preventative medical care and alternative forms of incarceration. With the use of volunteer law students, POPS also evaluates particular prisoners to determine their likely recidivism. If a prisoner is statistically low risk, POPS locates housing and support for the prisoner before moving the case forward for a pardon or parole hearing.

POPS is composed primarily of law students working under Professor Turley's direct supervision. After learning of a particular prisoner, Professor Turley will usually interview the prisoner by telephone or in person. If the prisoner is a good candidate for release, a student is assigned to the prisoner to complete an extensive background report to help determine the prisoner's recidivist potential. This background material tracks recognized recidivist studies by focusing on high predictors like

age, chemical dependencies and criminal pattern. POPS has garnered a great deal of bipartisan political support precisely because the organization does not argue for the general release of older prisoners. POPS is highly conservative in actual recommendations for release and will often recommend for an alternative form of incarceration such as electronic bracelets or prison nursing homes, over actual release. Therefore, developing alternative forms of incarceration has been an emphasis in POPS legislation.

POPS comes before the Commission as a recognized leader on prison geriatric policy. After working with legislators and parole boards in various states, POPS hopes to assist the Commission in exploring the possible relevance of age and recidivism to the federal guidelines. As an organization centered on risk-assessment and the maximization of prison resources, POPS is closely aligned with the statutory purposes behind the creation of the Commission under 28 U.S.C. § 991(b)(1)(B)-(C) (1986). It is in that spirit that POPS offers the following assessment of the importance of age to the federal sentencing and prison system.

II. THE GRAYING OF THE FEDERAL PRISON POPULATION

As the Commission is aware, the federal prison population has been undergoing the most significant growth phase in its

entire history.[3] In 1986, there were 33,132 offenders confined in federal prisons.[4] By the end of 1990, the number of offenders in federal institutions increased to 59,123. This number is expected to grow to 100,000 by 1995, and to 127,000 by the turn of the century.[5] In 1990, the federal prison population increased by 10.7 percent, adding an additional 6,355 prisoners to an already overcrowded system.[6]

It is common knowledge that the average age in the country is rising and, as a consequence, public health care and support are being stretched to extreme limits. What is less commonly known is that the nation's prison population is experiencing an even greater demographic shift upward in terms of age. Older prisoners comprised only 11.3 percent of the federal prison population in 1986[7], a number which increased to 26 percent of the federal prison population by 1989. A projected one-third of

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[3] Moritsugu, Kenneth, Assistant Surgeon General and Medical Director, Federal Bureau of Prisons. Inmates Chronological Age vs. Physical Age. Forum on Issues in Correction, Record of the proceeding, "Long Term Confinement and the Aging Inmate Population", Page 41, December 7, 1990.

[4] Statistical Report for the Fiscal Year 1986. U.S. Department of Justice, Federal Bureau of Prisons.

[5] Quinlan, J. Michael, Director of the Federal Bureau of Prisons. Forum on Issues in Corrections. December 7, 1990.

[6] Cohen, Robyn L. Prisoners in 1990, Bureau of Justice Statistics Bulletin, May, 1991.

[7] Statistical Report for the Fiscal Year 1986. U.S. Department of Justice, Federal Bureau of Prisons.

the prison population will be 50 or older by the year 2010.[8] Overall, the number of prisoners in the federal system over the age of 50 has doubled in 5 years, increasing from 3,349 in 1986 to over 7,000 in 1991. It is estimated that approximately 17,000 federal prisoners will be over the age of 50 age by the year 2000.[9]

The stark reality of the graying of the federal prison population is that increasing resources must be expended to adequately care for the unique needs of older prisoners. The primary expense for incarcerating the older population has been rising medical and maintenance costs. Such costs for older prisoners are three times the cost for younger prisoners.[10] In 1986, the cost to maintain an older inmate in federal prison was estimated at an average of $39,486 a year.[11] In 1990, the average cost for the medical care and maintenance of inmates over the age of 50 was between $50,000 and $60,000 a year in some states.[12] Since 1980, individual inmate medical costs have

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[8] Moritsugu, Kenneth, Assistant Surgeon General and Medical Director, Federal Bureau of Prisons. Inmates Chronological Age vs. Physical Age. December 7, 1990.

[9] Id.

[10] Zorn, Eric. "Natural life" a crime itself, Chicago Tribune, Chicagoland; Pg 1; Zone: C, January 30, 1992.

[11] Benning, Victoria. Elderly Inmates Pack Prisons; Cause Concern about Cost, Care, Gannett News Service, May 17, 1990.

[12] Foster, Mary. Prisons' Costly Dilemma: Caring for elderly prisoners; Punishment: Younger, more dangerous men are released while aging inmates sentenced to life without parole cost the system millions, Los Angeles Times, Part A; Page 2; Column 1, May 6, 1990.

doubled, while in the same time period, prison budgets allocated towards health care have increased only three percent.[13]

Under the pressure of both expanding prison populations and rising health care costs, the American prison hospital system is barely able to keep pace with required and essential services. In 1990, ninety percent of the country's 600 prison hospitals were not certified as meeting the standards established by the institutional medical profession. Prison hospitals are forced to care for inmates in facilities that are scarcely adequate to serve half the number of current prisoners. On average, prisons are operating at sixty percent above capacity while the prison hospitals are operating with only sixty percent of the rated staff.[14]

Designed for young, healthy, dangerous prisoners, most federal facilities lack any specialized support for a geriatric population and thereby fuel higher medical and maintenance costs of preventable geriatric illnesses. To properly care for older inmates, the ideal geriatric unit would need to provide many costly services to the older inmate such as special diet and nutrition monitoring; special exercises for bone deterioration; modified work schedules; monitoring of special health problems; modification of the physical environment to facilitate walkers, wheelchairs, and other physical aids; and for some inmates,

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[13] Jonathan Turley, "Why Prison Health Care is a Crime", Chi. Trib., March 19, 1991.

[14] Id.

constant bed care and intensive medical supervision.[15]

Medical diagnosis and treatment also become more difficult for older prisoners, as the elderly are more likely to suffer side-effects from medicine and to be poor candidates for surgery.[16] Due to the fact that current prison medical and nursing staff have only a limited knowledge of the special needs of the elderly prisoner, inappropriate diagnosis and treatment efforts have a profound impact on expenditures as well as a noted increase in civil actions.[17]

Aging results in a myriad of changing physical, physiological, and mental needs of the inmate. As the inmate ages, his ability to produce antibodies to fight disease declines dramatically, his overall muscular strength is diminished, his kidney filtering capacity is reduced, and his blood pressure increases. These predictable physiological consequences of aging create difficult medical demands for the existing understaffed, underfunded system. These costs are exacerbated by increased accidents due to declining eyesight, arthritis, reduced coordination and balance, medicative disorientation, poor

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[15] Kratcoski, Peter C., "Federal Bureau of Prisons Programming for Older Inmates", Federal Probation, June 1989.

[16] Lipson, Steven, M.D., M.P.H., Medical Concerns for the Elderly, Forum on Issues in Corrections, Record of the Proceedings, Long Term Confinement and the Aging Inmate Population, December 7, 1990, Page 120.

[17] Id.

physical conditioning and mental depression.[18]

As the population and institutional costs of older offenders rise exponentially, the federal system will find it increasingly difficult, if not dangerous, to ignore this unique segment of its prison population. This is not to suggest the need for some categorical release policy for high cost older prisoners but rather a recognition of the peculiar offender characteristics presented by this insular group. Age is clearly significant but not determinative for sentencing. Only a balancing of age with recidivism can guarantee all of the institutional objectives expressed in the statutory mandate of the Commission. Few of these objectives, however, can be guaranteed for the future without a more comprehensive approach to the graying of the federal prison population.

III. PROPOSALS FOR CHANGES TO THE UNITED STATES SENTENCING GUIDELINES AND PRACTICES RELATING TO OLDER OR GERIATRIC OFFENDERS

A. Redefining the Relevance of Age and Recidivism under Chapter Five, Parts H and K.

In its Guidelines Manual, the Sentencing Commission

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[18] Moritsugu, Kenneth, Assistant Surgeon General and Medical Director, Federal Bureau of Prisons. Inmates Chronological Age vs. Physical Age. Forum on Issues in Correction, Record of the proceeding, "Long Term Confinement and the Aging Inmate Population," Page 42, December 7, 1990.

commented that

> Age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. Neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. Age may be a reason to go below the guidelines when the offender is elderly and infirm and where a form of punishment (e.g., home confinement) might be equally efficient as and less costly than incarceration.

United States Sentencing Comm'n, Guidelines Manual, § 5H1.1. This policy statement suggests that age alone is not a satisfactory basis for a downward sentence. Indeed, the fact that a prisoner is elderly does not provide absolute assurances that he or she is no longer a threat. When considered with other factors, however, age is a valuable predictor of recidivism: generally as age rises recidivism falls. To the detriment of the system, the policy guidelines do not adequately allow for recidivism to be factored into the sentencing decision. Presently, age may be considered as a reason to depart from the sentencing guidelines only when the offender is elderly and infirm and where another form of punishment might be used. A more equitable sentencing system and a more effective use of prison space would be accomplished if a downward departure from the sentencing guidelines were permitted when the offender is "elderly or infirm or where a form of punishment might be equally efficient and less costly than incarceration." By amending section 5H1.1 in this manner and establishing clear guidelines, sentencing judges would be given the discretion to use age in their sentencing decisions subject to strict recidivist standards. An older offender would not be sentenced to less than

the statutory requirement unless he or she satisfied all of the risk assessment guidelines.

An alternative section which could be amended to reach these objectives is Part K of Chapter Five of the guidelines. That section describes various circumstances which might suggest to a sentencing court that a departure from the sentencing guidelines is warranted. Section 5K1.1 allows for a downward departure where the defendant has provided substantial assistance in the investigation or prosecution of another. Other grounds for a downward departure include circumstances where the victim's conduct provoked the offense;[19] where the defendant committed the offense to avoid a perceived greater harm;[20] where the defendant committed the offense because of coercion, blackmail or duress;[21] or where the defendant committed the offense while suffering from reduced mental capacity.[22] Like diminished capacity, old age and low recidivism risk are personal characteristics of the defendant which warrant consideration at sentencing. An amendment could be crafted to state that, "if the defendant is elderly and has been determined to be at low risk for recidivism, the court may decrease the sentence below the applicable guideline range." This amendment would be in line with the underlying policies of

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[19] United States Sentencing Comm'n, Guidelines Manual, § 5K2.10 (Nov. 1991) (hereinafter [Guidelines]).

[20] Guidelines § 5K2.11.

[21] Guidelines § 5K2.12.

[22] Guidelines § 5K2.13.

Part K and allow for situations in which a reduced sentence better serves justice and the needs of the community.

Amending the guidelines to enable judges to consider the age of the offender would satisfy the policy requirements articulated in the Sentencing Reform Act. (See 18 U.S.C. §§ 3551-3673 (1990) and 28 U.S.C. §§ 991-998 (1990).) The possibility that age might impact sentences was recognized in the enabling statute creating the United States Sentencing Commission. In establishing categories of defendants as well as policy statements, the Commission was directed to consider whether any factor listed had "any relevance to the nature, extent, place or service, or other incidents [sic] of an appropriate sentence." Heading the list of factors to be considered was "age." (28 U.S.C. § 994(d)(1) (1990).) While the Commission chose not to establish a "category of defendants" to be given special sentencing consideration solely on the basis of age, the importance of age as one factor which might impact sentences has been manifest from the beginning, and the guidelines should be amended to allow age to be taken into account as it relates to recidivism.

Further policy guidelines are suggested in 28 U.S.C. § 991, which states that the purpose of the United States Sentencing Commission is to develop sentencing policies and practices which avoid

> unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and [which]

> reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.

28 U.S.C. §§ 991(b)(1)(B)-(C) (1986). Amending either Part H or Part K of Chapter Five to allow courts to consider early release for older, low-risk offenders is in line with the mandate against sentencing disparities. Under either proposed amendment, the older prisoner who has a low risk for recidivism but who is not physically ill will be treated similarly to the older, infirm prisoner who has committed the same crime. As the guidelines presently stand, the former would be ineligible for early release or alternative confinement, while the latter might have his sentence reduced. See, United States v. Doe, 921 F.2d 340 (1st Cir. 1990) (360 month sentence on a 54 year old man upheld despite the fact that, because of defendant's age, the sentence amounted to life imprisonment, because, at the time of sentencing, the defendant was neither elderly nor infirm).

The present guidelines also fail to reflect fully "the advancement in knowledge of human behavior as it relates to the criminal justice system," because they do not reflect the considerable data showing that older prisoners have a lower rate of recidivism. In this sense, the current guidelines do not adequately "take into account the nature and capacity of the penal, correctional, and other facilities and services available," nor do they "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." 28 U.S.C. § 994(g) (1990). An amendment to the

federal sentencing guidelines which allows age to be used as an indicator of recidivism will enable sentencing judges to give due weight to more of the policy considerations reflected in the Federal Sentencing Act by allowing them to take advantage of alternate forms of incarceration such as less restrictive facilities and home monitoring. Such alternative forms of incarceration are particularly effective for securing older prisoners.

Furthermore, the enabling statute indicates a preference for judicial discretion at the time of sentencing. Section 3553 allows a judge to consider not only the existence of aggravating and mitigating circumstances, but also mandates consideration of "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1); "the need for the sentence imposed to protect the public from further crimes of the defendant," 18 U.S.C. § 3553(a)(2)(C); the need "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," 18 U.S.C. § 3553(a)(2)(D); and "the kinds of sentences available." 18 U.S.C. § 3553(a)(3). Amending section 5H1.1 or Part K to provide judges with more opportunities to impose alternative sentences for older prisoners complies with clear relevance of offender characteristics when making sentencing decisions under the federal law. The Courts of Appeals have recognized the discretion granted to sentencing judges and upheld their authority to grant downward departures from the sentencing

guidelines. See, e.g., United States v. Rukick, 919 F.2d 95 (8th Cir. 1990) (reversed and remanded where district court erroneously underestimated its authority to consider a downward departure based on defendant's diminished capacity); United States v. Lara, 905 F.2d 599 (2nd Cir. 1990) (district court acted within its discretion in departing downward based upon defendant's personal characteristics that made him particularly vulnerable to in-prison victimization).

Full consideration of age as an offender characteristic is further supported by § 3577, which states that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." This concept is echoed in § 3552, which allows the court to order a study of the defendant if it desires more information than is otherwise available in order to determine the sentence. That the guidelines require courts to consider all relevant information prior to sentencing suggests that discretion at this stage of the proceedings is acceptable and, so long as it is used judiciously, may contribute to more balanced and equitable sentencing.

Permitting a judge to consider an offender's age without the burden of establishing infirmity will not enlarge the courts' discretion to the point of creating sentencing disparities. Infirmity of the offender and availability of alternative methods of punishment would still remain important in the determination

of a downward sentence, but they would not be determinative on the issue of recidivism. The offender's age will simply be used as a means to initiate a recidivism analysis. The discretion of the court in sentencing decisions, therefore, will not be so great as to conflict with the policies of the guidelines. Furthermore, § 3553(b)(2) would naturally continue to apply to any departure from the guidelines, requiring the court to articulate the specific reason for the imposition of the lesser sentence. A simple statement by the court saying, in effect, "the offender is old therefore he will not commit any more crimes," will not suffice as a satisfactory rationale under the proposed amendment anymore than it does now. An example of the importance of articulating the reasons for a downward departure from the sentencing guidelines can be seen in United States v. Carey, 895 F.2d 318 (7th Cir. 1990). In Carey, the court of appeals vacated a judgment by the district court which departed downward from the applicable sentencing range. The lower court stated that "the combination of the defendant's age (62) and the fact that he has had several operations as a result of a brain tumor are significant enough to allow the Court some flexibility in a downward departure." Id. at 324. The court of appeals held that "without more particularized findings and analysis we cannot conclude that the district court's reliance on Carey's age and physical condition in departing from the applicable sentencing range was reasonable." Id. An amendment to 5H1.1 or to Part K will not alter the requirement that a judge who departs from the

sentencing guidelines on the basis of age will have to clearly articulate his or her reasons for so doing.

Because age is one of the most reliable predictors of recidivism, its relevance in sentencing decisions cannot be overlooked. By amending section 5H1.1 or Part K to enable judges to consider old age independent of infirmity, the Commission can maximize resources by making use of less expensive, alternative forms of punishment. It will also provide more space in already overcrowded prisons for offenders likely to have a high rate of recidivism. Finally, sentencing disparities would be minimal, as age would be used as only one factor in a recidivism analysis, and judges sentencing decisions would remain subject to stringent scrutiny.

B. REDEFINING THE MEANING OF "EXTRAORDINARY AND COMPELLING" UNDER 18 U.S.C. § 3582(C)(1)(A)

While the focus of the listed issues for comments centered on amended parts H and K of Chapter 5, age can also be considered at a post-sentence reduction stage with a new policy statement from the Commission. Under the guidelines,

> the court may not modify a term of imprisonment once it has been imposed except that -
> (1) in any case -
> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(1)(A) (1990). A direct amendment could be drafted to allow a prisoner's advanced age and low risk of recidivism to constitute "extraordinary and compelling reasons" for a sentencing reduction.[23] Alternatively, rather than amend § 3582(c)(1)(A) directly, the Commission could, under § 994(a)(2)(C)[24] and § 994(t),[25] issue a policy statement declaring a combination of old age and a low likelihood of recidivism to be an "extraordinary and compelling" reason to

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[23] An amendment of 18 U.S.C. § 3582(c)(1)(A) could take several forms, including the addition of a clause qualifying "extraordinary and compelling" to include cases of old age when coupled with low risk assessments. Another approach might be to add a separate subsection to 18 U.S.C. § 3582(c)(1) which states that the court may reduce the term of imprisonment "if it finds that an older or geriatric offender's age and low recidivist predictor warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." While POPS is prepared to pursue such amendments, the current proposals will focus instead on a policy statement change that redefines "extraordinary and compelling."

[24] This section provides in part:

> (a) The Commission shall promulgate and distribute to all courts ...-
> (2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of-
> (C) the sentence modification provision set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18.

[25] The provision provides in part:

> (t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18 shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.

modify a term of imprisonment. It is expected that such a policy statement would include strict guidelines and commentary on the interpretation of "extraordinary and compelling," thereby limiting the discretion of the courts.

Before a court may modify a term of imprisonment under § 3582(c)(1)(A), it must first consider those factors listed in § 3553(a), which apply to the imposition of a sentence. This suggests that the court has a certain degree of discretion, even when modifying a term of imprisonment, to consider factors such as the personal characteristics of the defendant. Low recidivism, which is indicated in part by a prisoner's advanced age, should be considered a characteristic relevant to the early release of an older prisoner under § 3553(a)(1). It is particularly relevant to an overcrowded system burdened by high cost, low risk prisoners.

A new interpretation of § 3582(c)(1)(A) would also advance public safety, a policy underlying § 3553(c). Reducing a term of imprisonment on the basis of the prisoner's old age and low likelihood of recidivism is intended to ensure that only the least dangerous offenders are released at a time of limited resources. Furthermore, because a modification of a term of imprisonment might include placing low risk prisoners in alternative forms of incarceration, such as home confinement, the ultimate effect is to protect the public at the lowest cost, furthering the goals of the sentencing guidelines. The use of alternative means of punishment also satisfies the requirement of

§ 3553(a)(3), that courts consider the kinds of sentences available. Although a form of punishment other than imprisonment might not have been applicable at the time of sentencing, the offender's advanced age might bring added significance to that provision after a person has been incarcerated for a number of years.

Section 3553(a)(1)(D) states that when imposing a sentence, the court should consider that medical care is to be provided in the "most effective manner." Allowing for a reduction for some elderly offenders is the most direct means by which to satisfy this goal. Because elderly prisoners are most likely to suffer from health problems, removing them from conventional incarceration can dramatically reduce medical costs by placing older prisoners in settings equipped and experienced to deal with and prevent geriatric illness.

Finally, section 3553(a)(2)(A) provides that potential offenders be deterred from criminal conduct. The possibility of a reduced sentence for older prisoners will not detract from this important policy. Because prisoners will only have their terms reduced if they are both elderly and have a low risk of recidivism, sentences will be reduced only after the propensity or ability to commit a repeat offense has passed. Furthermore, a shortened term of imprisonment does not necessarily mean freedom. The possibility of home confinement, confinement to a prison nursing home, or a form of supervised release is still very real. Moreover, an amendment to section 3582 or the applicable policy

statements in no way suggests that all, or even a majority of older prisoners will go free. Only a few older prisoners who meet strict recidivist guidelines will be eligible for a reduction in the term of imprisonment, and only when courts act within the strict policy guidelines set down by this Commission.

CONCLUSION

The suggested proposals outlined above are direct measures that the Commission can take to develop a policy for older offenders. The relationship of old age and recidivism is well-documented and widely recognized. This body of knowledge will be essential to the federal system as it struggles with a rising population of older prisoners. Under its statutory mandate, the Commission is uniquely qualified to respond to the changing demographics of the prison population and to incorporate new ideas on the most efficient use of prison resources.

POPS stands ready to assist the Commission in exploring possible modifications to the federal sentencing laws, guidelines or policy statements considering the relevance of age and recidivism. Accordingly, POPS would be amenable to a joint short-term study with the Commission on the federal system and the aging prison population. In addition to the proposals discussed, this study could include an evaluation of a possible pilot program of electronic monitoring for older offenders that would reduce maintenance costs and relieve overcrowded

conditions. Such a study could also explore a possible guideline for risk-based releases for prisons under serious or chronic overcrowding conditions. While the federal system has utilized "rental cells" from state jurisdictions and has moved prisoners long distances to available cells, this practice has created a bidding practice for cell space that at least one federal judge has attempted to halt. Williams v. McKeithen, 1990 WL 265971 (M.D. La.; July 20, 1990) (No. Civ. A. 71-98-B) rev'd, 939 F.2d 1100 (5th Cir. 1991). The sentencing guidelines can create a "safety valve" for chronic conditions that would permit a selective release under 18 U.S.C. § 3582(c) or other provisions. While their application to older offenders is novel, these ideas are not new and can be found in various forms among the state systems. The viability of such approaches to the federal system should be of great interest and certainly merits greater attention by the Commission and this organization.

POPS appreciates this opportunity to address the Commission and looks forward to a full exchange of ideas on older offenders at the public hearing on February 25, 1992.

#26
RECEIVED
FEB 27 1992
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.

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

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.

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

GWH:bn

#45

THE NORTH CAROLINA ACADEMY OF TRIAL LAWYERS

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EXECUTIVE DIRECTOR
Marjorie Putnam

Lawyers Helping People

March 20, 1992

William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave, NW
Suite 1400
Washington, DC 20004

Dear Chairman Wilkins:

The North Carolina Academy of Trial Lawyers, an Association representing more than 3600 trial lawyers in North Carolina, through its Criminal Law Section, has carefully studied the proposed amendments to the guidelines, policy statements, and commentaries to the Federal Sentencing Guidelines published in the January 2, 1992, Federal Register for the 1992 amendment cycle. The Section has also established a dialogue with your Practitioners Advisory Group and has studied the Group's responses to the amendments for this cycle.

The North Carolina Academy of Trial Lawyers fully endorses the positions taken on each of the proposed amendments by the Practitioners Advisory Group. The Academy urges that the Commission adopt changes proposed in Amendments 1A, 2B, 16A, 16B, 17B, 18B, 33A, 33B, 33D, 34 and 35A. We also urge the adoption of Amendments 18A, 19 and 23, and support the options and modifications proposed by the Practitioners Advisory Group.

The Academy strongly urges that the Commission reject the changes proposed in Amendments 2A, 17A, 28B, and those pertaining to expungements in 25A.

The North Carolina Academy of Trial Lawyers thanks the Sentencing Commission for this opportunity to express its view on the proposed amendments and remains available for future consultation on these and any other matters.

Sincerely yours,

William F. Horsley
President, North Carolina
Academy of Trial Lawyers

Joseph B. Cheshire V
Chair - Criminal Law Section, North Carolina
Academy of Trial Lawyers

U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

April 10, 1992

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

Dear Judge Wilkins:

I am writing to provide you with the views of the Antitrust Division concerning proposals under consideration by the Sentencing Commission that would significantly increase the likelihood that defendants convicted of antitrust violations will avoid spending any time in prison. This result would be contrary to the intent of the Sentencing Commission, as set forth in Application Note 5 and the Background to §2R1.1, that antitrust offenders receive short but certain prison sentences and that alternatives to incarceration such as community confinement not be used to avoid imprisonment of antitrust offenders. The proposals to which I refer would expand Zone A offenses in Criminal History Category I from offense level 6 to offense level 8 and expand Zone B offenses in Criminal History Category I from offense level 10 to offense level 11. The substantial adverse impact of these proposals would be even greater should the downward adjustment under §3E1.1 for acceptance of responsibility be increased from two offense levels to three offense levels.

As you know, the Department of Justice has for many years been advocating the deterrence value of short but certain prison sentences for persons who commit antitrust violations. However, prior to the adoption of the Sentencing Guidelines many judges were not disposed to impose prison sentences for antitrust violations.

The initial antitrust sentencing guideline promulgated by the Sentencing Commission sent a mixed signal on the issue of imprisonment for antitrust offenders. As noted above, the Commission stated its strong support for the concept that short but certain prison sentences coupled with substantial fines were the proper punishment for antitrust violations. At the same time, offense levels for antitrust violations were set at levels where alternatives to incarceration, as provided in §5C1.1, would very often be available.

Once the initial Sentencing Guidelines were issued, the Department used the strong statements of support in the antitrust guideline to press for prison sentences for antitrust offenders. Most Antitrust Division prosecutions are resolved through plea agreements, and defendants were generally willing to enter into pleas that called for actual incarceration. Then, on June 25, 1990, the Eleventh Circuit issued its decision in United States v. Pippin, 903 F.2d 1478. This case holds that the statements made by the Sentencing Commission in support of incarceration for antitrust offenders in the Background and Application Notes to §2R1.1 do not limit the discretion of judges to impose alternative sentences on antitrust offenders whose offense levels would otherwise make them eligible for an alternative sentence under §5C1.1.

Of the approximately 68 individuals sentenced for antitrust violations since Pippin, 31 have received a sentence of incarceration, 24 have been sentenced to some form of alternative punishment such as home detention or community confinement in lieu of prison, 3 have received a fine plus community service, 3 have received a fine only, 5 have been sentenced to perform community service only, and 2 have received no punishment of any kind. Of the approximately 40 of these cases that involved sentences under the Sentencing Guidelines, 23 defendants received prison sentences while 17 received an alternative sentence or fine only. In other words, fewer than half of the antitrust defendants sentenced after Pippin have received prison sentences, and fewer than 60 percent of those sentenced under the Guidelines have been sent to prison. Clearly, many judges still remain reluctant to sentence antitrust defendants to prison unless required to do so.

The Department reacted to this continuing use of alternative sentences for antitrust offenders by recommending that the Sentencing Commission raise offense levels for antitrust violations. In its November, 1991 revisions to the Sentencing Guidelines, the Commission did increase offense levels for antitrust violations, both to make them more commensurate with other types of white-collar offenses and to decrease the availability of alternative sentences.

The changes now being considered by the Sentencing Commission to raise the offense levels that fall within Zone A and B and possibly to increase the downward adjustment for acceptance of responsibility are contrary to the changes to §2R1.1 adopted by the Commission last year and will, particularly in the short run, have a significant deleterious impact on antitrust sentencing.

First, they will encourage judges who favor alternatives to incarceration for antitrust offenders. In light of Pippin and the apparent continuing inclination of many judges to avoid sending antitrust offenders to prison despite the Commission's express statements to the contrary in §2R1.1, any action that expands the authority of judges to impose alternative sentences on antitrust offenders could well be perceived as an endorsement of this practice.

Second, the changes made to the antitrust guideline last year may raise offense levels only for antitrust offenses committed or continuing on or after November 1, 1991. See United States v. Michelle Bell, Crim. No. 91-2016 (N.D. Iowa, March 30, 1992). Under this assumption, and given the difficulty of detecting antitrust violations, most antitrust prosecutions over the next few years will not be subject to the new, November, 1991 antitrust guideline. Indeed, at least some cases are likely to be brought under the pre-November, 1991 version of §2R1.1 right up to the expiration of the 5-year statute of limitations period on November 1, 1996. However, unless the Sentencing Commission expressly directs otherwise, any changes designed to increase the availability of alternatives to incarceration and increase the downward adjustment for acceptance of responsibility will likely apply to all sentences imposed after November, 1992. Thus, for as long as 4 years defendants could be sentenced under the pre-November, 1991 antitrust guideline and the post-November, 1992 guidelines concerning alternatives to incarceration and acceptance of responsibility.

The implications of this possibility are startling. Since the adoption of the Sentencing Guidelines, 13 out of 47 individuals that have been sentenced under the Guidelines for antitrust offenses have received offense levels of 10 or less before adjustment for acceptance of responsibility. Assuming an increase in Zone A to offense level 8, not only would none of these 13 defendants--almost 28 percent of the total number of antitrust defendants sentenced under the Guidelines--have been required to spend a day in jail, none of them would even have been required to spend a day in a half-way house or home detention. Thirty-one out of the 47 individuals that have been sentenced under the Guidelines for antitrust offenses have received offense levels of 11 or lower before adjustment for acceptance of responsibility. Assuming a 3-level downward adjustment for acceptance of responsibility and an increase in Zone A to offense level 8, almost two-thirds of the total number of antitrust defendants sentenced under the Guidelines would have been eligible for straight probation.

The highest offense level ordinarily applicable to an antitrust defendant under the pre-November, 1991 guideline is a

13, which applies to a bid-rigger whose violation affects more than $50 million in commerce. Today, such a defendant faces a minimum of 12 months imprisonment. If he receives a 2-level downward adjustment for acceptance of responsibility, this defendant, according to §5C1.1(d), must still serve at least 4 months in prison under a Zone C split sentence at offense level 11.

Under the proposal being considered by the Sentencing Commission to expand Zone B to offense level 11, this same defendant, by accepting responsibility for the offense, would be eligible for an 8 month alternative sentence of home detention or community confinement in lieu of prison. In other words, no antitrust defendant that accepts responsibility for an offense would ever necessarily be required to spend a day in prison. A 3-level downward adjustment for acceptance of responsibility would result in an offense level of 10, which could result in an even lower Zone B sentence of 6 months alternative confinement.

This would be a giant step backward for antitrust enforcement. More than 4 years after adoption of the Sentencing Guidelines many judges still do not believe that antitrust violations merit jail sentences. These proposed changes would severely undercut, for years to come, the ability of the Department to incarcerate antitrust offenders. Thus, should the Sentencing Commission adopt proposals to expand Zone A and B sentences and/or to increase the adjustment for acceptance of responsibility, I urge the Commission in the strongest terms to explicitly limit the application of such amendments to antitrust offenders sentenced under the November 1, 1991 antitrust guideline.

Even in the long run, these proposed changes will reduce the impact of the November, 1991 antitrust guideline changes and make incarceration of antitrust offenders more difficult. The historic reluctance of judges to incarcerate antitrust offenders can only be strengthened by providing greater opportunities to impose alternative sentences in lieu of prison.

Sincerely,

James F. Rill
Assistant Attorney General

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
PROBATION OFFICE

JERRY T. WILLIFORD
CHIEF PROBATION OFFICER

2003 U.S. COURTHOUSE
75 SPRING ST., S.W.
ATLANTA 30303

REPLY TO:

2000 POWERS FERRY ROAD
SUITE 530
MARIETTA, GEORGIA 30067

April 23, 1992

Honorable William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1406
Washington, DC 20004

Re: Public Comment
Alternative Sentencing

Dear Judge Wilkins:

The federal prison population continues to increase at an alarming rate and much of the cost is unnecessary. Both dollars and human lives are wasted in a system which relies too heavily on incarceration to punish. Without argument, prison is an appropriate and necessary sanction for the dangerous or incorrigible. However, under current guideline application, prison sentences often represent neither a necessary deterrent nor serve to protect the community.

In the case of many non-violent first offenders, alternative sanctions could be employed to serve the traditional aims of sentencing. Offenders could be adequately punished in a manner which would simultaneously enhance their chances to be positive members of their community, victims could be made whole, and the cost to the taxpayer would be minimal. While there are creative and innovative options available which we have not had the fortitude to develop, there are some very fine options in place that are not utilized.

Prior to guidelines, the use of community service, electronic monitoring, and half-way houses were sometimes employed individually or in combination as an alternative to incarceration. The sentence fashioned for an offender was based on the severity of the offense, the offender's personal history, support systems and other factors articulated in the presentence report. The result was that sentences included sanctions which profited the community and allowed for restoration of the offender's dignity and preservation of his family.

The Commission is aware of the success and community support the U.S. Court, Northern District of Georgia, has enjoyed with its community service program. It seems unfortunate that the initiative taken by Commissioner Corrothers which proposed including alternative sanctions in the sentencing guidelines has been tabled with her resignation. It is frustrating as a criminal justice practitioner to have developed an effective community service program which enjoys broad Court and community support, and then have it principally ignored by the Commission. As a consequence of guideline practice in the Northern District of Georgia, the number of community service work hours accomplished dropped from 38,000 in 1988 to only 17,000 in 1991.

Attached are some recent newsletters and newspaper accounts which will bring the Commission file up to date on the Northern District's community service efforts and accomplishments.

Your invitation to have me make comment is appreciated, and though disappointed at this time, it is hoped these comments will have a positive result.

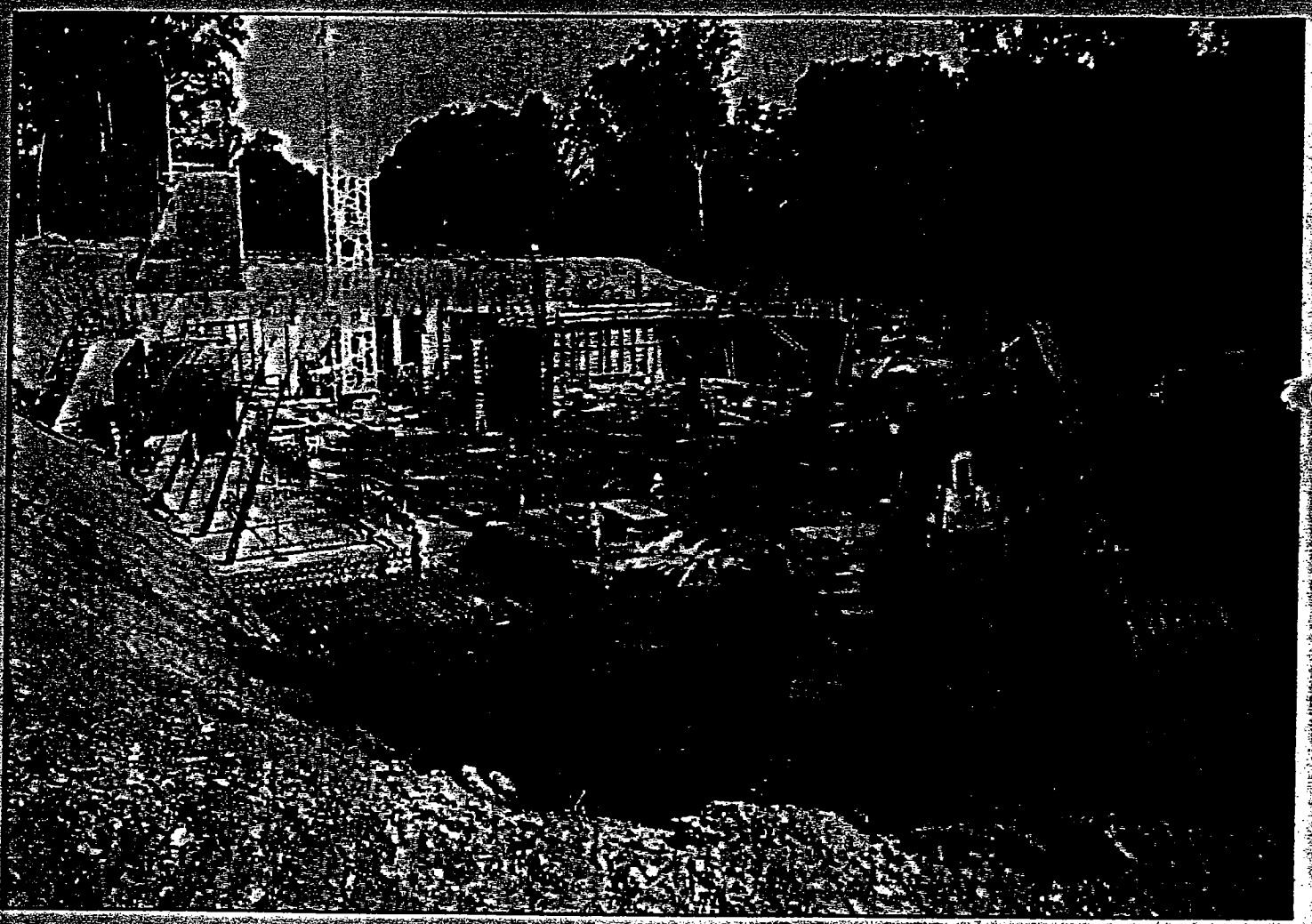
Sincerely,

Richard J. Maher
Supervising U.S. Probation Officer

RJM:dsr

DeKalb Extra

THE ATLANTA JOURNAL—CONSTITUTION Thursday, June 20, 1991



Dianne Laakso/Staff

Excavation for Fernbank's natural history museum (above) has produced enough dirt to fill in a lake bed and old swimming pool at the Georgia Mental Health Institute. Also, federal probationers were put to work on the project, further saving tax dollars.

Dirty job aids 3 institutions

By Dena Smith
Staff writer

It happened because of dirt.

By trucking loads of red Georgia clay up and down Ponce de Leon Avenue and Briarcliff Road, three institutions benefited:

▶ Fernbank got rid of the excavations from the construction of its $43 million natural history museum.

▶ The Georgia Mental Health Institute built a wildlife center and a garden area.

▶ And the U.S. Probation Office put its probationers to good use and helped save taxpayer dollars.

"It's been a win-win situation all the way around," said Mary Stimmel, coordinator of community relations for Fernbank. "We were able to assist with two worthwhile projects and at the same time help ourselves."

Work on the new museum, scheduled to open in the fall of 1992, created a huge hole in the ground and several mountains of dirt near the intersection of Clifton Road and Ponce de Leon.

Not only did Fernbank not want the mounds, the non-profit institution would have had to pay perhaps as much as $110,000 to remove the soil from the construction site.

But Richard Maher found an innovative use for the dirt.

"It was amazing," said Mr. Maher, a U.S. parole officer. "Our community service program needed soil to complete a wildlife and garden area on the property of GMHI."

At the state facility on Briar-

Please see DIRT, 5 ▶



Dena Smith/Staff

Workers help build a garden area at the Georgia Mental Health Institute on Briarcliff Road near the Fulton County line.

Dirt: Truckloads of benefits are spread around 3 agencies

▶ Continued from 1

cliff Road near the Fulton County line, the plan was to fill the bed of a small lake and, separately, a huge swimming pool to create the wildlife center and garden respectively.

The pool, once the property of the Coca-Cola Co.'s Asa Candler Jr., had been abandoned since the 1950s.

But the cost of buying dirt would have been $50 a load, Mr. Maher said, with as many as 250 loads needed to fill the pool, for a price tag of $12,500. Another 2,000 loads would have been needed to fill the lake bed.

That's where Fernbank came in. It was happy to get rid of the dirt from what will be the largest museum in Atlanta and the only natural history museum south of Washington, D.C.

Sixteen months from now, the 150,000-square-foot museum will center around a permanent display called "A Walk Through Time in Georgia," which will use the geographic areas in the state as a means of telling the history of the Earth. The museum also will offer 15,000-square-feet temporary exhibition space for touring shows.

Once Fernbank provided Mr. Maher with the dirt he needed for GMHI, he turned his attention to finding the right person to turn it into the wildlife center and garden.

As the project coordinator for the parole office's community service program, Mr. Maher screened each of those on probation in an attempt to combine the needs of the participating agency with the skills of the probationer.

"I think it's such a waste to use skilled people to pick trash up from along the side of the highway," said Mr. Maher.

"Why not allow the probationers to use the skills they have?" he asked. "The result is almost always a feeling of pride . . . for both the community and the probationer."

Dan, one of the probationers working at the GMHI site, said he felt grateful for the opportunity.

"I think it's great that we can do something to help beautify the community," said Dan, who did not want to use his last name. "I'm glad that I can give back something productive and long term that both me and the community can be proud of."

The community service program works only with non-profit

and government agencies.

"The program goes where there's a need in the community," said Constance Tumlin, a U.S. parole officer. "Some agencies call us, and we get in touch with other agencies that we feel we have something to offer them . . . a special skill."

At GMHI, the garden area will be rented out for weddings and other ceremonies, but its primary use will be for the enjoyment of patients and neighbors.

"The community at large will benefit from the wildlife center at no cost," said Ms. Tumlin.

The trees will attract birds and animals, including rabbits, foxes and other species, to the wildlife center. "It will also set up a natural barrier between the hospital and the community," she said.

Such projects are a boon fo everyone involved, from the gov ernment agencies to the taxpay ers, Mr. Maher said. And the u of probationers is the most con structive method for the stat and for those on probation, h said.

"The prison population i both state and federal institu tions is growing at an alarmin rate, one that requires an addi tion of some 900 beds per week t meet demands," he said.

"It is virtually impossibl from both an economic and poli ical perspective to accommodat the overload that exists in th prison system," Mr. Maher said "This overcrowding has reache crisis proportions, which pre sents a major problem for bot the criminal justice system an society as a whole."

Metro & State

SECTION F | The Atlanta Journal | ★★★★★ WEDNESDAY, DECEMBER 26, 1990

Work programs for non-violent felons shrinking



Michael A. Schwarz/Staff

Sentenced to 300 hours of community service, James Jordan tackles a project at the DeKalb Addiction Center.

Confinement gains favor over community service

By Michelle Hiskey
Staff writer

James Jordan's motto is, "Rehabilitation is where you find it," and on a recent chilly Saturday morning the convicted felon was hard at work remodeling a dilapidated pool house near the DeKalb Addiction Center.

"I'm an alcoholic and I have to be sober to come here," said the 45-year-old Smyrna man. Trained in construction, he was sentenced to prison and 300 hours of community service last year for selling a stolen interstate shipment of heavy equipment to an undercover FBI agent.

Jordan is one of hundreds of non-violent federal offenders who have worked for free on dozens of public service projects in the Atlanta area for the past five years, ranging from plaster work at the Fox Theatre to tutoring elementary students.

Many agencies that employ court-appointed laborers call them a godsend, and offenders say the work builds self-esteem, lets them learn or maintain job skills and sometimes leads to permanent work. But the program — a national model — is shrinking because of federal guidelines that require prison time for most offenses.

In fiscal year 1990, 136 offenders performed 24,960 hours of free labor, down 25 percent from a high of 33,000 hours by 95 offenders in 1988, according to Richard J. Maher, who heads the program for the U.S. Probation Office in Atlanta.

Mr. Maher said the "glue" of his program used to be a corps of mostly white-collar criminals who were required to do a year of full-time community service — about 2,000 hours each. Now, federal guidelines for most crimes recommend that inmates be sentenced to no

Please see **FELONS, F6** ▶



Program coordinator Rich Maher: Service sentences can do a lot of good.

Felons: Trend toward incarceration

▶ Continued from F1

more than 400 hours of public service. It is imposed instead of prison time only when the penalty is 16 months or less.

The federal prison population, meanwhile, is more than 50 percent over capacity and is expected to double by the end of the decade. Advocates of community service say it could relieve the burden.

"There's no reason why it shouldn't be an alternative to prison," said Mr. Maher, who envisions a huge labor force of offenders, patterned after the Depression-era Civilian Conservation Corps, tending to parks, hospitals, schools, roads, "you name it."

But the trend is toward incarceration, because the public wants criminals behind bars, said U.S. Attorney Joe D. Whitley.

"There are a lot of horror stories about how community service has been abused, where criminals have twiddled their thumbs for eight hours a day," he said. "The sentencing guidelines say that if you do the crime, you do the time."

The publicity surrounding those who have taken advantage of lenient sentences hasn't helped the program, said U.S. District Judge J. Owen Forrester, a strong supporter of community service.

"Every judge is going to have a Willie Horton; it's going to happen if you give community service or not," he said, referring to the Massachusetts murderer who raped a woman while on furlough. George Bush made Horton a symbol for softness on crime in the last presidential campaign.

Judge Forrester said community service, coupled with house arrest, can be as restrictive as — and far less costly than — time in a low-security prison.

"I've always considered it good for two reasons: it deprives an individual of freedom and makes them work, from which the community benefits," he said. "An awful lot of crime comes out of either poor self-image or lack of concern for other people, and community service, for a lot of people, is the first time in their life they've done something they're proud of."

Judge Forrester recalled sentencing the son of an officer at Fort McPherson, who had been convicted of vandalism, to community service. He was placed at the Fox Theatre, became interested in drama and enrolled in college to study acting.

The five-year program has been full of unexpected positives, said Mr. Maher. Offenders have been known to volunteer at agencies after their time is up — including a Gwinnett County developer who spent 500 extra hours building houses for Habitat for Humanity.

The first group helped clean insulation out of the Wren's Nest attic during mid-summer, 1985, and discovered a stack of letters the home's famous owner, author Joel Chandler Harris, had written.

The Atlanta program, which requires offenders to work at least 24 hours a month, is well-regarded nationally.

"In other parts of the country, the offender is on his own to find a placement," said Jud Watkins, who administers probation programs for the federal courts in the Southeast. Offenders in the Atlanta program were "properly assigned, monitored and followed up, and that can be a very rigorous sentence."

Offenders can choose to work on a highway crew, picking up trash, but few do. The program tries to match their skills to a community need, occasionally with an ironic twist.

A contractor who had cleared a field so a planeload of drugs could land was ordered, as part of his sentence, to use his heavy equipment for public good. He has been laying pipes for a lake behind the Georgia Mental Health Institute with the same machines.

Jordan works every Saturday at the DeKalb Addiction Center, where an old pool will be filled to make a garden.

"They have to put up with hundreds of alcoholics just like me here, and I want them to have a place where they can take a break," said Jordan. "But the thing I'm most proud of isn't the work. It's that I'm sober."

Some officials at agencies that employ the offenders say their initial qualms dissipated when they discovered how handy an extra pair of hands could be.

"There was a certain amount of distaste involved, but that was more than counteracted by the work that's been done here," said Rick Flinn, the director of restoration at the Fox Theatre. He has overseen, among others, an accountant, a carpet and drapery cleaner and a sculptor who remodeled plasterwork.

"If they were in jail, we'd all be paying thousands of dollars for these services," he added. "It's more effective in rehabilitating them than if they were sitting around with other criminals."

"I hate to see them cut the program back," said Ann Wood, the director of community resource development for the Georgia Mental Health Institute, where offenders are clearing a kudzu-clogged valley for a stream and garden. "It's like having extra staff people for the day."

The U.S. Sentencing Commission, which fashioned the stricter guidelines, has a committee researching alternative punishment that may recommend community service for more felons, said spokesman Paul Martin.

"In order to have more people qualify, ... programs have to be more restrictive," he said.

Placement program at a glance

The community service program in Atlanta involves 115 men and women with no prior record who have been convicted of non-violent federal crimes.

Some placements:

- A chef at an upscale Atlanta restaurant, convicted on drug charges, cooked for the Cerebral Palsy Center.
- A builder in Norcross who was convicted of income tax evasion worked as construction coordinator for Gwinnett County Habitat for Humanity and did 530 hours more than the 1,920 he was required to do in a year.
- A former athlete worked with Special Olympics in South Georgia and earned the "Volunteer of the Year" award.
- An accountant kept the books for the Fox Theatre.
- Doctors convicted of student loan fraud and dentists convicted of tax evasion worked in community clinics.
- A psychiatrist was assigned to a county jail to help treat prisoners.
- An artist restored a severely water damaged antique painting at the DeKalb Addiction Center.

Some projects:

- Restoration of circa-1895 greenhouses at the former Asa G. Candler Jr. mansion on Briarcliff Road, now home to the DeKalb Addiction Center.
- Concrete poured for an elevator shaft at the GlenCastle housing project and for foundations of brick historic markers in the Morningside neighborhood.
- Bird exhibits built at the Chattahoochee Nature Center.
- Work on renovation of the Wren's Nest. While taking insulation out of the attic, the first group of community service workers in Atlanta found a stack of letters Joel Chandler Harris wrote in 1865.
- Work on construction of the Phoenix House, the state's first residential facility for mentally ill, homeless people.
- Staff assistance at Jerusalem House, a place for homeless AIDS patients.

Source: U.S. Probation Office

The Atlanta Journal
THE ATLANTA CONSTITUTION

Today's editorial page is prepared by the editorial board of The Atlanta Constitution

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John W. Walter Jr.
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Punishing the criminal and the community

In metropolitan Atlanta, convicted criminals have built houses for Habitat for Humanity, worked on the restoration of the Fox Theater and helped out at Jerusalem House, a hospice for homeless AIDS patients. But offenders spend fewer hours now doing such valuable "community service" work. They mark time in federal prisons instead.

In 1987, harsh federal sentencing guidelines went into effect requiring most federal crimes to carry mandatory prison terms — including many non-violent crimes committed by offenders without previous criminal records. Federal judges have been restricted from using community service as a sentencing alternative for any crimes for which the penalty is more than 16 months. Nor may judges impose more than 400 hours of public service work in most cases.

As a result, federal prisons throughout the country are bursting at the seams. The federal prison population is more than 30 percent over capacity and is expected to double by the end of the decade.

In addition, the program run by the U.S. Probation Office in Atlanta — a national model for its efficiency and organization — is shrinking. There are fewer hours of free service performed for charitable organizations and government agencies. In 1988, 95 offenders performed 33,000 hours of free labor. In 1990, 136 offenders had performed only 24,960 hours of free labor.

The federal sentencing guidelines were another wrongheaded political response to the nation's crime problem, much of which was spurred by illegal narcotics. Politicians wanted to prove to their constituents they were not coddling criminals. So they decided to confine even non-violent, first-time offenders in prisons, which are costly to build and maintain.

Supposedly, prison time forces the criminal to pay the price for his or her crime. But confining non-violent offenders in prison instead of letting them perform community service forces the taxpayers to pay as well.

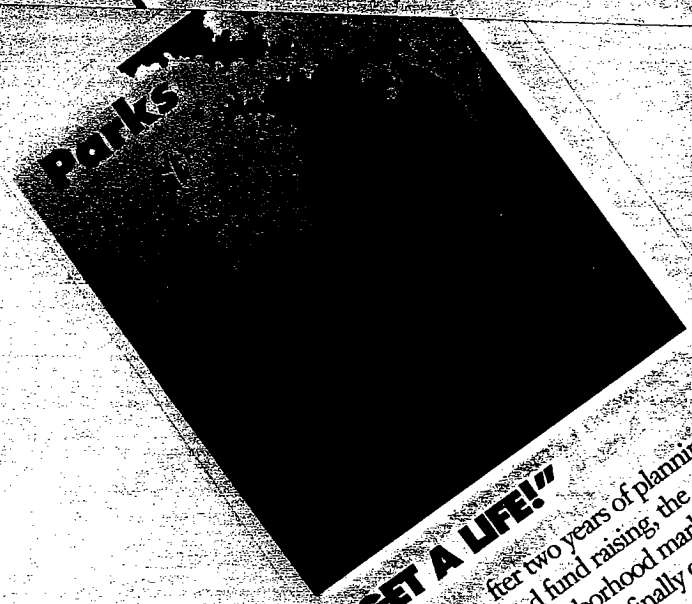
Correction

An editorial in The Constitution Friday said California's new U.S. House delegation of 52 will be a fifth of the total. Actually, as the Associated Press reported, the new census figures that increase the delegation to 52 give the state a fifth of the electoral votes needed to elect a president.

MORNINGSIDE LENOX PARK

MLPA NEWSLETTER

QUARTERLY PUBLICATION OF MORNINGSIDE/LENOX PARK ASSOCIATION, INC. • VOLUME 12, NO. 2 • AUTUMN 1991



"GET A LIFE!"

After two years of planning and fund raising, the neighborhood marker project is finally completed! A visual identity is important to a historic neighborhood such as Morningside. These markers unite several smaller neighborhoods into an association of over 3,000 homes. With this large association, we are able to have a stronger voice at City Hall.

The "legal" placement of the twelve markers was the most difficult and most time consuming part of the project. Marker locations had to meet state and federal setbacks and guidelines. I would like to thank Mary Davis, Jeff Petrillo, Gail Ronan, Charles Huddleston and David McAlister for their expert help in taking care of all the "red tape". I am sure they were tired of my phone calls and faxes. Because of the varied and difficult location sites, the final design had to lend itself to fit into the surrounding site. I would like to thank the Monument Committee for selecting the old Lenox Park marker design. Committee members were Jon Carlsten, Rick Flynn, Gail Ronan, Bill Russell, Ben Wauford and myself.

The new markers would not have been complete without the elegant plaque artwork produced by our neighborhood's own Barbara Gellner.

The limestone castings were made at "very reasonable" rates by Tony Garcia of Architectural Ornamental Castings in Decatur. He did a beautiful job in reproducing the old, crumbling Lenox Park marker castings.



Because of Rick Flynn's contact with Rick Maher of the Federal Probations, we were able to cut the construction costs of the project in half. This federal program is a great deal for taxpayers and the community. Instead of incarcerating non-violent criminals, they put them to work for the community. Rick Maher's next project will be the Georgia Mental Health Institute on Briarcliff and University. Here old swimming pools will be repaired and the grounds will be landscaped. Call Rick (980-0360) to make a donation towards materials for this neighborly effort. The labor is free, but money is needed to support the project.

Some of the markers had to be located on private property. I would like to thank the following property owners for their special contribution to this project. They are Asa Bearse, Kevin and Mary Brown, Bill Cherry, Emma and Harold Dye, Jack Harich, Lem and Del Johnson, Farel and Jerry Nesmith, Diana Refsland, and Mary Beth Wallace.

Of course this project would have never started without cold, hard cash. Major thanks to our major sponsors who were Barry Doss, Metzler/Murheid, Inc. of Greystone, Kevin and Mary Brown, David Michud, and last, but not least, Zac Pasmanick, whose real estate office has also adopted the flower bed around the marker at Amsterdam and Lanier Boulevard.

Some of the fundraising was accomplished through the newsletter and the MLPA membership bulletin. Most, however, was accomplished by going door to door. Lisa Holte, who had just moved to the area, raised the funds on her street for the Smith Park location, and was able to meet her new neighbors at the same time. Mary Huntz, Janci Davis and the Johnson/Noble Estates street captains were able to raise enough money for the marker at Herbert Taylor Park on Johnson Road.

Special thanks to James Jordan and Gary McCool for their expert help in pouring the footings and forming the internal columns for the markers.

It was a long and difficult project to keep track of all those who gave money or time. I hope that the list of contributors is complete. If not, please let me know. Over $12,000 was raised from the neighborhood for this project with the Association paying the final difference of $3,000 to complete the details.

We should feel pretty good about this accomplished goal. This neighborhood, like many of Atlanta's Intown neighborhoods, has a community spirit all its own. Morningside has a very heterogeneous mix of people. Sexual preference, religion, and race are not an issue here. I was delighted to see how well we can work together when we are focused on a goal. Zoning issues and roads have been a catalyst in this unified spirit and a way of getting to know each other.

To finalize all of this and to get on with my life, I would like to dedicate the markers to those who in the past, and into the future, have found time to rally to the fight of encroaching roads, higher density, and other zoning issues. This dedication includes the countless volunteers who help on the MLPA Tour of Homes and MLPA's other projects and committees, and its tireless volunteer board members. (Please take a look at the MLPA annual budget.)

I am amazed at the effort made by the Association to do so many things that are important to the area. We are also lucky to have a very capable neighborhood planning unit who sweats the zoning details for this area of town.

The Association could do more if it had the membership support of the entire neighborhood. Of over 3,000 homes, only 900 are members. I do not understand why it is not close to 2,000. It seems to me that a resident of this neighborhood, who has an investment in property here, would, at the very least, want to support the Association by joining for a mere fifteen dollars a year. If you do not have the volunteer time, at least show your support by joining. You should not view this as just another membership in something that you really do not think you will reap any benefits from. The MLPA makes sure your tax dollars are spent in this area and assures that your voice will be heard downtown. What membership could be more important to you or easier to support by absentee?

Everyone in the neighborhood receives this newsletter free. The way to know if you are a member is if you receive a bulletin in the mail. On the address label, you will find your membership expiration date. I know we are all busy and sometimes feel like we are on the treadmill to oblivion, so here is what you should do. Tear out the membership form right now and put it in your monthly bill pile. It will be something worth stopping and making the effort for.

Other Park News

Thanks to MLPA, Smith Park, at the corner of Monroe Drive and Piedmont Road, has a new sprinkler system for the flower bed. Johnson Irrigations, Inc. graciously volunteered to install the system for us, free of charge!! They did a great job and it should make the flower bed much easier to maintain.

MLPA is sponsoring the installation of a drinking fountain at Lenox-Wildwood Park tennis courts. We are only a few hundred dollars away from completion of this project. If you would like to speed this project along, please earmark your check and send it to MLPA.

MLPA is looking for a contractor to construct a gazebo at Sidney Marcus Park. In memorial of Gail Smith, a neighborhood friend who died of cancer, $1,400 has been raised. Please call Margo Dixon (872-9183), or myself, if you have any questions.

Neighbors at the end of Wildwood Place are enjoying the landscaping efforts of their new neighbor, Chip Brown. He has adopted the island circle at the end of the street and has planted a flower bed in front and mows the grass, too. What a great neighbor!

Thanks to MLPA, the traffic island at the intersection of Lenox and Johnson Roads is sporting a new grass groundcover. The sprinkler system upgrade and new perennial flower plants were part of the efforts of Martha Curtis and myself. The Morningside Garden Club does a great job maintaining and planting this traffic island.

Continued thanks to Ray Rowell and Tony Marcella who mow the grass under the power line at N. Pelham and Pine Ridge.

You too can be involved in neighborhood beautification. Through Park Pride Atlanta, you can help make the "one person difference."

David Robertson
874-5090

VOLUNTEERS NEEDED

Volunteers are needed to plant trees at Sunken Garden Park this fall. The city is supplying the trees and we are supplying the labor. You can donate unwanted small trunk diameter trees from your property. The city has a tree spade and can transplant them this fall. Call Dave Robertson at 874-5090.

Community Service ....everyone wins

AN OVERVIEW

The prison population in both State and Federal institutions is growing at an alarming rate, one that requires an addition of some 900 beds per week to meet demand. It is virtually impossible from both an economic and political perspective to accommodate the overload that exists in the prison system. This overcrowding has reached crisis proportions which presents a major problem for both the criminal justice system and society as a whole.

Obviously, alternatives to incarceration are imperative. Alternative service should meet a number of requirements. First and foremost it should provide community based restitution. This not only is the desire of society, but is also therapeutic to the offender. The program, however, must also possess a punitive element as well as be cost effective. Some substitutionary methods have been tried with varying degrees of success. One of the most successful has been the use of reparative work projects most commonly known as community service. The degree of success of this method can best be summed up by saying that "everyone wins"....the system, the community and the offender alike.

How Does Community Service Work?

The process begins when a judge and probation officer with prudence selects non-violent situational offenders that represent no threat to the community. The community interest is best served by lengthy incarceration of those offenders who are violent or habitual in criminal activity.

The probation officer then screens each individual under his direction and creatively combines the needs of the participating agency with the skills of the probationer. The director continually visits, monitors and supervises each person under his care.

The participating agency is also a key to the effective implementation of this program. They must accept each placement as an equal employee with a proper combination of flexibility and control. Thus, the most effective use of the productive skills of the individual can be achieved while providing the much needed restrictive and restorative elements of the program.

For a Community Service Program to be effective the judge, offender, probation officer and sponsoring agency must work in concert.

Who is Eligible and How are They Placed?

The system as a whole, and we in particular, are highly selective about the people who are qualified for the Community Service Program. Obviously ,this selectivity has added materially to the success of our efforts in that of the first 200 participants in the program 194 completed it with positive rewards for all concerned. Through this rigorous qualification process we are able to "set people up to succeed, not to fail".

Principally, only those individuals who are first time offenders are eligible for the program. In addition, the nature of the crime and the quality of the individual must indicate that there is not only no threat to the community but to the contrary, there is strong reason to believe that the community's interest can best be served by the probationer supplying needed service to the public at large.

For the best possible results, the proper placement of the individual is critical. We attempt to match up a participating agency's need with a probationer's capabilities. Since we work with in excess of 30 such agencies there are a wide variety of needs. A specific example of how this care in placement has yielded multifaceted rewards is the case of a printer working for the Georgia Mental Health Institute. During his nine months of service at forty hours per week he taught a hospital custodian to not only operate and maintain the equipment, but also to completely oversee the printing process. When the probationer's service was completed the former custodian was given a pay raise and the elevated position of printer.

There are other noteable "success stories". A chef at an upscaled Atlanta restaurant was given probation and community service as payment for an offense. To satisfy this service requirement, he was given the responsibility of head chef for the Cerebral Palsy Center. Obviously, joy reigned supreme as the well deserving patients were treated to "non-institutional" food for some months. In another case, an athlete with organizational skills was placed with the Special Olympic Program. His interest grew to exceed his term of service and he was chosen volunteer of the year in that organization.

Proper matching of people with deserving organizations is a good formula....**one where everyone wins.**

Who Benefits?

Few undertakings provide benefits to all segments involved. Community Service does!

First, the public or society benefits by:

- Making invaluable services, for which there are no funds in the budget, available to the community.
- Saving taxpayers money through reduction in prison costs.
- Enabling the community to change existing attitudes toward the criminal justice system.

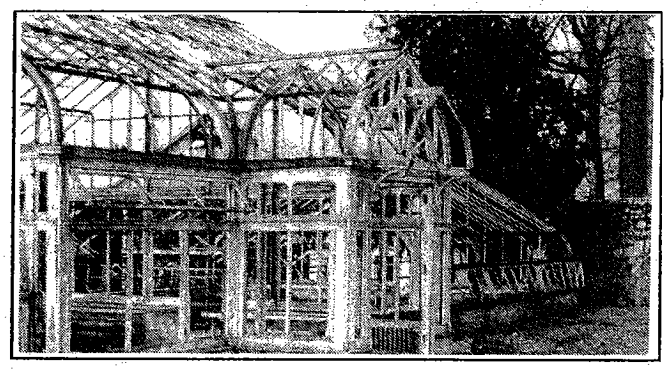
Secondly, the criminal justice system benefits through:

- Easing of the over-crowded conditions of institutions.
- Reducing the pressure for an increased number of jails and corrections personnel.

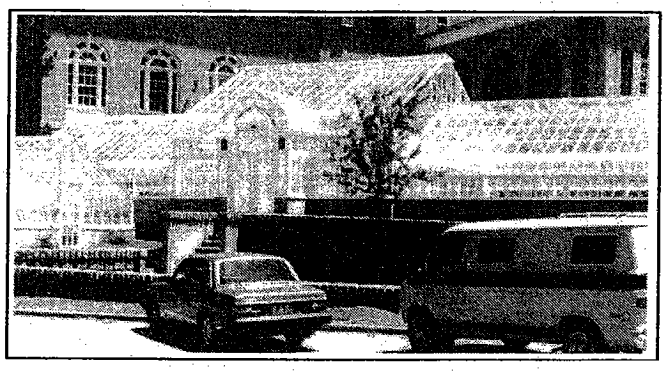
Finally, the offender benefits through:

- The provision of a positive alternative for restitution to society in a manner therapeutic to the offender.
- Keeping offender's families together.
- Providing a way to pay a debt to society while maintaining self-esteem and possibly gaining much needed skills.
- Showing tangible results for responsible efforts.

Shown below are examples of North Georgia projects that continue to provide lasting material benefit to society, the community and the offender alike.



A



B

Figures A & B. **Georgia Mental Health Center Candler Greenhouse**

Of the 24,000 plus man hours spent by individuals doing community service work in 1987 almost 9,000 were spent on this project. The conservatively estimated value of the work is $150,000. Stained glass work, painting, re-construction, carpentry and iron work are among the many trades utilized on the project shown at the above right. Shown above left is a pre-construction picture of the Greenhouse indicating the overgrowth and structural deterioration.



Figure C. **Cerebral Palsy Center...**

Elegant food preparation at the Cerebral Palsy Center.

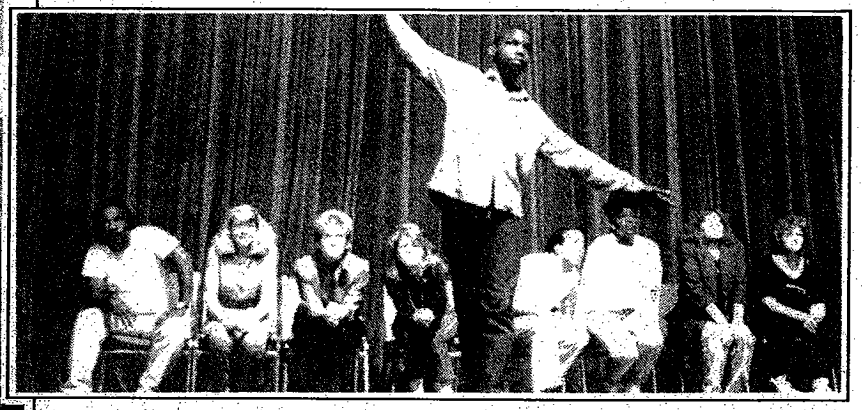


Figure D. **Academy Theatre Production... ON THE EDGE**

Numerous people have been influenced by the production show above. The cast and support staff for this drug rehabilitation program is largely made up of probationers in the Community Service Program in the North Georgia District.

Is *Community Service* Effective?

In a word, **yes**...Community Service is very effective. As shown, this type of service involves an effective use of people and skills to accomplish both material and emotional objectives. Our success rate through the project in the Northern District of Georgia has been in excess of 95%. This compares most favorably with the general success rate of the federal prison system as measured by repeat offenders of 32%. A community service program turns the system from wardens and jailers to teachers and coaches. The effects are that people are used where their talent is needed, wanted and appreciated. Through these efforts attitudes change, people are encouraged and salvaged, and needless expenditures are eliminated.

Where Do We Go From Here?

The need for alternative and rehabilitative programs is great. This need, coupled with the success of our program, gives us great hope for future expansion of our efforts. To effect this expansion we need increased support from within the system, as well as the community. Also imperative is a broad cross-section of judges willing to be creative in sentencing, as well as co-operative participating agencies. Lastly, we need funding. With the coming together of these efforts, our program and its sister programs throughout the U.S. can materially effect the thrust of the criminal justice system in America.

#124

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March 2, 1992

By Hand Delivery

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

Re: Proposed Amendments to the Sentencing Guidelines for Offenses Involving the Environment (Section 2Q)

Dear Sir or Madam:

These comments are submitted in response to the notice of proposed amendments to sentencing guidelines published by the Commission in the Federal Register on January 2, 1992, 57 Fed. Reg. 90, 97. The comments are submitted on behalf of Chevron USA Inc. and its employees, and other persons who have asked not to be identified.

The Federal Register notice proposed an amendment to Section 2Q1.2 (Mishandling of Hazardous Substances) to eliminate double counting where the offense involves a permit violation. The notice also presented two additional issues: 1) whether to increase the offense levels of Section 2Q1.2(b)(1), and 2) if Section 2Q1.2 is amended, whether a comparable amendment should be made to the parallel guideline Section 2Q1.3 (Mishandling of Environmental Pollutants). Our comments follow.

1. Proposed Amendment to Section 2Q1.2

The Commission proposed to amend Section 2Q1.2(b)(4), "Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering and Falsification" to clarify that this specific offense characteristic should not be applied if an adjustment under Section 2Q1.2(b)(1) applies. 57 Fed. Reg. at 97. The reason for this proposed amendment is to eliminate "double counting." Double counting has occurred when some courts have increased the offense level under Section 2Q1.2(b)(1) based

upon a "discharge, release, or emission" without a permit or in violation of a permit and also increased the offense level under Section 2Q1.2(b)(4) where the discharge occurred "without a permit or in violation of a permit." The notice recognizes that in many cases the "discharge, release, or emission" is not a violation of law unless it occurs without or in violation of a permit.

We support the Commission's proposal. The proposal would correct improper and unintended interpretations of the guidelines. The Commission should also assure that double counting does not arise through an application of 2Q1.2(b)(4) and the base offense. Many criminal cases are brought under environmental statutes that require permits, as is evidenced by reports and statistics issued periodically by the Government. The base offense in such cases includes a discharge, release, emission or other activity involving the management of hazardous wastes without a permit or in violation of a permit. Double counting would be avoided if Section 2Q1.2(b)(4) were not applied where the base offense involves a permit violation.

2. Increase in Offense Levels

The Federal Register notice stated that the Commission is reconsidering the appropriate adjustment for offenses involving a release of a pollutant. The notice did not set forth any basis for an increase in the offense level. An increase in the offense levels under Section 2Q1.2(b)(1) is not justified. The record on sentences imposed to date is very limited. To increase the level, there would have to be a finding that the guidelines underpenalize criminal behavior. There is no basis for such a conclusion.

3. Possible Parallel Amendment to Section 2Q1.3

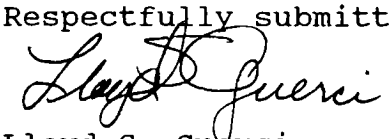
If Section 2Q1.2(b)(4) is amended to eliminate double counting, we believe that a comparable amendment to the parallel guideline, 2Q1.3, is necessary. Section 2Q1.3 is similar to Section 2Q1.2 except the former applies to offenses involving conventional pollutants. The two guidelines are parallel except

for the lower offense levels in 2Q1.3. The reasoning set forth in point 1 above applies to 2Q1.3 as well.

Conclusion

We support the amendment of Sections 2Q1.2 and 2Q1.3 to eliminate double counting in imposing sanctions for offenses done without a permit or in violation of a permit. We oppose increasing offense levels under Section 2Q1.2(b)(1).

Respectfully submitted,



Lloyd S. Guerci

#35

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January 13, 1992

Mr. Mike Corlander
United States Sentencing Guidelines Commission
Suite 1400
331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mr. Corlander:

I am a practicing attorney in Monticello, Kentucky. As such, I have had numerous opportunities to appear in State and Federal Courts regarding a variety of matters. It was not until recently that I have had occasions to deal with the sentencing guideline as it pertains to the growing and cultivation of marijuana. Before I voice my opinion, let me give you a little of my background.

I am 44 years of age, married and have a 13 year old daughter. My wife is a school teacher as were my parents and as were her parents. I have served as the Wayne County Attorney and Assistant Commonwealth Attorney for the 40th Judicial District. I have prosecuted many felony and misdemeanor cases involving drugs, alcohol and firearms. I am not a user of illegal drugs nor an abuser of alcohol. For the past several years, my law practice has been primarily plaintiffs civil litigation with 10 to 20 per cent of my practice being criminal defense work.

I recently defended a case in the United States District Court for the Eastern District of Kentucky at London, Kentucky, styled United States of America versus Robert Kenneth Gregory, Jr. and Ralph Beckman. Mr. Gregory and Mr. Beckman were convicted of cultivation of approximately 120 plants of marijuana. Of these marijuana plants, a lesser number were actually plants of marketable size. The officers described it as approximately 40 good plants during the course of their investigation. Mr. Beckman and Mr. Gregory received sentences of approximately eight years without any probation or parole. These sentences were imposed at the bottom end of the guidelines.

Mr. Beckman was a member of the Somerset Country Club, a father of five children, a husband to a very fine young lady, and was active in his community. He was an employed college graduate and had no previous criminal record of any sort.

#39

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296-2571

March 2, 1992

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

The Honorable Vincent Broderick
c/o Research Division
Federal Judicial Center
1520 H Street, NW
Washington, D.C. 20005

Gentlemen:

I have had an opportunity to review the "Synopsis of Proposed 1992 Amendments to the Federal Sentencing Guidelines", and offer the following comments and suggestions regarding two of the issues which have been raised.

The Commission has requested comment on whether the proposals regarding expanded availability of non-prison sentencing options "compromise the structure of the Guidelines as originally drafted?". As I understand it, the Guidelines were implemented to bring about uniformity in sentencing. Unfortunately, from my experience it appears that the Guidelines have created a type of "cookbook" justice which seriously deprives the Court from tailoring a sentence to meet the facts of a particular case. I believe Option 6 is well advised and would provide the Court with needed flexibility in dealing with non-prison sentencing options as well as creating more opportunities to consider such under the framework of the Guidelines. Furthermore, I agree that available sentencing options should be expanded to include additional alternative programs listed on Page 4 of the synopsis. My experience practicing in state court indicates that the more options available to a sentencing judge the more likely it is that the court can fashion an appropriate penalty that is geared to have a specific impact on the particular defendant.

With respect to departures based on offender characteristics, I endorse the amendment to consider age as an important reason to impose a sentence below the applicable guideline range, if combined with another factor. Furthermore, I agree that the courts should be able to consider a defendant's "lack of youthful guidance, history of family violence or similar factor as a ground for departure" from the Guidelines.

Although these limited comments deal with two specific issues, I would hope that generally the Guidelines would provide more opportunities for flexibility, depending upon individual situations. The Guidelines have provided a structure which encourages uniformity in sentencing. What they have failed to do is provide opportunities for judges, prosecutors and defense attorneys come to appropriate dispositions in certain cases.

Thank you for your consideration of these matters.

Very truly yours,

William F. Byrne

WFB/drg

x.c. The Honorable Robert E. Maxwell

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February 17, 1992

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

Attention: Guideline Comments

Dear Sir/Madam:

I have reviewed the Synopsis Of Proposed 1992 Amendments to the Federal Sentencing Guidelines. As a general premise, I believe that the District Court should be provided greater flexibility in sentencing. Amendment 29 seems to further that end. The use of "shock" incarceration is extremely valuable where a "split sentence" scenario is utilized. Most lower level, first time offenders would benefit greatly by experiencing a brief period of incarceration. The use of "boot camp" punishment is also an option which has merit and should be expanded in split sentence or lower guideline cases.

However, the Bureau of Prisons is working under a different set of procedures and guidelines for purposes of designating to "boot camp" under the present ICC program. For example, just recently the District Court departed and sentenced my client to twenty-four (24) months and made a strong recommendation that the Defendant be assigned to ICC at FCI Lewisburg. The Bureau of Prisons rejected the recommendation out of hand and said that he was ineligible because of internal criteria (which was not published and was unknown to the Court, probation officer and counsel). Thus, it is imperative that the Commission be aware that the Bureau of Prisons is acting in a totally autonomous manner and with little consideration being given to the District Court's sentencing recommendations.

Moreover, I take this opportunity to recommend that the "scope of conduct" used to determine acceptance of

responsibility be limited and narrowed to a great extent. To require the offender to accept responsibility for all "related conduct" is unmanageable. The uncertainty of the scope of related conduct is by itself a problematic issue. It has been the routine practice that the United States Attorney's office has the unilateral power to ascertain whether or not the offender has accepted responsibility for the "related conduct". The options under Amendment 23 seem to further that end by limiting the scope of conduct for which the offender must accept responsibility. On the other hand, it is my belief that the present two-level reduction for accepted responsibility is appropriate and should be maintained for across-the-board offenses. There does not seem to be a rational justification for increasing the levels of reduction for accepted responsibility simply because the offense severity is extremely low or extremely high. In this regard, I recommend that consistency be maintained throughout all guideline levels and offender categories.

My only comment with regard to Amendment 1 is that further clarification of "relevant conduct", "common scheme or plan" and "same course of conduct" would be beneficial to the Courts, the probation officers and counsel.

I have no comments with regard to Amendment 16, 17, 18, and 27.

With regard to Amendment 35, I believe that any conduct which is dismissed pursuant to a plea agreement, should not be later considered by the Court in determining the applicable guideline range. To do so, circumvents the very nature of the plea bargaining process. By no means do I suggest that information should not be provided to the Court, rather all information is known to the United States Attorney and the counsel prior to entry of the plea agreement and evaluated in considering the relative strengths and weaknesses of each case. Such conduct may or may not be deemed provable.

With regard to Part (C) of Amendment 35, it is my opinion, based on past experiences in several cases, that the conduct of which the offender is acquitted, should not be later used to select the applicable guideline range. It has always been my impression that this practice flies in

the face of our long-standing constitutional protections. It simply seems grossly unfair.

Further, I wish to state that I agree with regard to Amendment 2, Parts (A) and (B), Part III of the List Of Additional Proposed Amendments.

I have no further comments with regard to the other Amendments set forth in the synopsis. I thank you for your considering my comments.

Very truly yours,

J. Michael Benninger

JMB/klp

xc: The Honorable Robert E. Maxwell, Chief Judge

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April 15, 1992

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

Attention: Public Information Office

Dear Members:

I am a sole practitioner with about 25 percent of my work concentrated in federal criminal defense. I am writing regarding what I see as an emergency presented by the Sentencing Guidelines. Although I draw on experiences and comments of judges, probation officers, prosecuting attorneys, and other defense attorneys, these opinions are mine alone.

I offer these thoughts with high regard for what obviously has been a tremendous commitment of time and energy on your part.

As you probably know, it was with considerable uneasiness that practitioners received the first draft of the Sentencing Guidelines that went into effect on November 1, 1987. It is with horror, however, that we are left to receive the dizzying number of amendments to the Guidelines, now totalling 434. Many of these separate amendments carry on for paragraphs and even pages of small print. Some of the amendments actually include separate amendments to dozens of separate Guidelines.

These amendments have been spread out over six separate effective dates. The 1987 West edition of the Guidelines was in about 300 pages. The 1991 edition covers over 800 pages. With each new edition, the West publisher now routinely, and correctly, warns that all prior editions of the Federal Sentencing Guidelines Manual "should be retained . . . in the event there is a need to refer to the text of a specific Guideline, Commentary, or Policy Statement at a particular point in time."

For our further direction, you suggest a doctrine of "selective retroactivity" for usually, but not always, applying the Guidelines in effect on the date of sentencing, not the date of the offense. (Even more mind-stimulating is the place where that doctrine is announced. It seems to be found in the answer to Question Number 71 of your list of "One Hundred Questions Most Frequently Asked

About the Sentencing Guidelines." With all due respect, this looks like a David Letterman Top Ten List run riot.)

Most of the separate Guidelines by this time have been amended. The most important of them seem to have been amended at least twice, often three or four times.

I wish to put aside for the moment substantive objections to the entire concept of the Guidelines. Surely you have heard them all, and obviously they are not a deterrent to this large-scale experiment in reflex penology.

I have a more limited suggestion, but one that I think is absolutely critical.

Stop. You must stop.

I am not recommending that you do anything or that you undo anything. You must simply stop.

I harbor no harsh thought about the members of the Commission or any of their support staff. Quite the opposite. I am personally struck that this pace of amendments could only be indulged by well-intentioned persons whose humility over past mistakes has regrettably caused them to embark on an endless mission to fix what very possibly is not fixable.

I am sure that you are mindful of the concerns for settledness in the sentencing law, thus that you would not have enacted 434 amendments unless you thought they were of genuine substantial importance in correcting <u>serious</u> earlier errors.

There are those more judgmental souls (people genetically disqualified to be good criminal defense attorneys) who would accuse you of runaway hubris.

But whether motivated by extreme humility or extreme hubris, much is said about how fine an idea the original Guidelines were if they have required hundreds of amendments, in thousands of important distinct parts, covering hundreds of pages of small print in a bare four years.

Indeed, if achieving predictability and avoiding disparity are the chief goals, it is especially hard to understand this pace of change.

I am not here complaining about the fact that we have departed from a system where defendants and their lawyers (and often prosecutors) went into sentencing hearings armed with realistic and sincere

programs to turn a person's life around, only to have embarked on a system that sees defendants, their lawyers, and their prosecutors enter sentencing hearings armed only with pocket calculators and bromo seltzers. Perhaps those criticisms are mistaken. Perhaps the fact that modern-day federal sentencing has virtually nothing to do with 95 percent of the significant information about the person being sentenced is appropriate, or at least it's the way Congress may have wanted it.

What I am talking about here is a crisis in the day-to-day adjudicative process. I am reminded of David Mellinkoff's observation in The Language of the Law of an insurance policyholder trying to figure out where he stands.

> By the time he has found his way to the end of an insurance policy, the alert and unusual householder (layman or attorney) cannot know what he is covered for--because there is more in his policy than he can read and retain even if he understood every word as he read it. The reading has left him--nay, made him--ignorant.

Your hard work has made us ignorant.

Not all of us practicing federal criminal law are brilliant. Approximately half of us graduated in the bottom half of our law school classes.

I would venture that the majority of us practice without large litigation budgets, much if any research assistance, regular access to legislative history, or even computerized research. Regardless of our resources, we are practicing under a flood of case law and amendments to the statutory law that are also burying us. (The Guidelines directly contribute to these explosions as well as evidenced by Appendix I to West's 1991 Guidelines edition showing over 5,000 case law treatments of the Guidelines since 1987.)

And for us, sentencing is not the only consideration. There is often the matter of defending the charge. The same penological aggressiveness that has brought about the Guidelines, endless mandatory minimum sentencing, bills to punish by death killers of federal egg inspectors, and what can fairly be called a federal infatuation with incarceration can, if unopposed, take innocent victims. Some of our clients are indeed innocent, and many are at the very least seriously over-charged.

We are called upon often to study thousands of pages of exhibits in a single case, wrestle with niggardly rules of discovery that were

written with witness-killing defendants in mind but which are applied indiscriminately against even the most non-violent defendants, study rapidly changing statutory and case law, and, yes, even actually try cases.

My most respected colleagues spend hours and hours getting to know their clients, including a sketch of their lives, their educational and vocational skills, their mental and physical conditions (including drug or alcohol dependence or abuse), employment history, family ties, community ties, and even the areas of their lives where they have shown strength and success in contributing to society such as military, civic, charitable, or public service. In other words, a good attorney expends a great deal of time and effort learning about the matters that the Commission has determined "are not ordinarily relevant in determining whether a sentence should be outside the applicable Guideline range."

That same attorney, even when there is no defense to the material elements of the charge, seeks to make his participation in the case an effective intervention against the parts of a client's life that are not working either for the client or for the community. He is part expert at client confrontation, part friend, part lay counselor, and part a referral source to experts who can interrupt a defendant's mismanagement (only part of which is normally criminal mismanagement) of his life.

The reader of the excellent article by Judge Sally H. Gray and Dr. Timothy J. Kelly, Counseling the Alcoholic--An Opportunity to Make a Difference, "Res Gestae" (March, 1989), will find a rare blueprint for what the responsible attorney regularly spends enormous efforts trying to accomplish with his clients, and often with great success.

For all of the rhetorical flights in modern-day politics that would lead the public to believe that judges are spineless, prosecutors incompetent, and defendants versions of Willie Horton (whatever we are lead to believe Mr. Horton represents), as you know, most people succeed on probation and respond favorably to these efforts.

But back to the emergency. Because only about a quarter of my practice (or perhaps less) is devoted to federal criminal defense, I would normally anticipate that studying, interpreting, and advocating regarding the Sentencing Guidelines would be a very small part of my practice. About federal sentencing I now feel lost. No, I am lost. I experience my clients' sentencing hearings in federal court as something of a lottery where the result is announced to me by people who, although themselves professing to be lost, know a little bit more by attending seminars, retreats, and structured readings of manuals.

But among my fellow criminal defense lawyers, I am what is called an expert. My colleagues call me. They think that I know something and can tell them something to advocate for their clients, or failing that, at least more deftly observe for human rights violations.

More often than not, federal criminal defendants in our mid-sized city are represented by attorneys appointed under the Criminal Justice Act, attorneys who may have only one or two federal criminal cases a year. These attorneys, although well-intentioned, are heard to ask laughable questions like "But if they're only guidelines, why would the judge get reversed if he doesn't follow them?" Studying five versions in four years of what constitutes "more than minimal planning" or "relevant conduct" is never reached.

None of this is to detract from the incredible effort all of you have expended on your amendments. It is simply too great an effort for the mortal practitioner (by which I include judges, prosecutors, and probation officers who, in my experience, also cannot keep up) to handle.

In all sincerity, I pause from my work to tell you that your commitment to amendments is not working.

As you know, many responsible observers have doubted that this attempt to mathematize the criminal justice system is even possible. Can even the grinding of the teeth between the statutory wheels and the Guideline wheels ever cease? Just last month I had a sentencing in a criminal contempt case under 18 U.S.C. § 401. As you know, that statute authorizes a sentencing court to fine a defendant or imprison him, but not both. Under Guideline 5E1.2(a), the Court is required to impose a fine in all cases (except where a defendant establishes that he is not able to pay). Did you mean the Guidelines to require a fine and thus preclude consideration of any imprisonment? (Please promise me you won't enact an amendment to answer this.)

The people with whom I work (criminal defense colleagues and others) may not be geniuses but they are serious-minded people. I think that it is fair to say that the consensus among them is that there is more disparity and more inexplicable sentencing under the Guidelines than there ever was before, and that all the tinkering in the world is not going to change that. The disparate sentences often required by the mechanistic approach of the Guidelines very often leave us wondering, or muttering, whether we should believe "science" or our lying eyes.

Worst of all, there is no accountability. Defense lawyers tell their clients that the prosecutor names the charge that pretty much determines the penalty. Prosecutors say they are just bringing the charges and that the judges sentence. Judges say that their hands are tied by the Guidelines. No one even asks what the right sentence should be--or what a right sentence is.

We used to have people who asked just that, and we called them judges. Right or wrong, they had the courage and responsibility to look at the facts, hear the arguments, and actually decide that a particular sentence was the most allowable under the law.

I offer even that observation advisedly because it invites the opposite of what I am recommending. I recommend absolute, unqualified, exceptionless, aggressive inertia. The Guidelines should be left alone long enough so that reasonable people (yourselves included) can try to see what we have and what the effect is on the criminal justice system, crime, and the general respect for law in society.

The punishment-oriented model of the Sentencing Guidelines seems to be either far behind, or perhaps far ahead, of the learning curve elsewhere. I ask that you please each, if you have not already done so, find a copy of the Winter, 1992 issue of "Criminal Justice," the publication of the Section of Criminal Justice of the American Bar Association. The articles there, particularly Americans Behind Bars: Why More People are Locked Up Here Than in Any Other Nation, seem now to reflect not just the opinion of criminal defense lawyers but the opinion of prosecutors as well. More and more people seem now at least vaguely suspicious that imprisonment has no more helpful effect over crime than an attempt to make sentencing a science has over the justness of sentencing.

Instead of amending 250 Guidelines this year I suggest you study these questions and any connection you can see between them and the Guidelines.

Consider also that if this large-scale experiment called the Sentencing Guidelines is to be evaluated, some of the variables need to be isolated. There cannot be 100, or even ten, amendments a year. No responsible social scientist could stop laughing at the idea of a review of your work that never sits still and thus presents as a kind of man-made instance of the Heisenberg uncertainty principle. By the time you look at it, it's gone.

Perhaps if the Guidelines could be left alone for a reasonable period (which in my opinion would be a minimum of three years given all the necessary judicial construction), the entire idea would then be seen as brilliant. Perhaps each of the 434 amendments

would be regarded as having made the whole idea incrementally even more brilliant. Perhaps the punishment model of reacting with an intentionally reflexive sanction to a certain class of misconduct (however much it seems most of our clients were raised by such ego-dismantling models) would be shown to bear fruit.

My own suspicion is that we would find that successful crime control and successful drug control require abandoning the notion "more government is the answer"; that we have been asking all the wrong questions (e.g., Does a one-time small-time marijuana seller's "relevant conduct" include the quantities of marijuana sold by thrice-removed drug dealers he never met but whose larger dealings were objectively foreseeable, but not subjectively foreseen, by him? or, as the Eleventh Circuit actually addressed in a published opinion on March 20, 1992, does the Sentencing Commission's amendments to a Guideline commentary, as opposed to a Guideline itself, nullify earlier contrary judicial interpretations of the Guidelines?); that we have been asking virtually none of the right questions (e.g., Why are our children poisoning themselves?); and that the greatest service that the Commission could perform would be to report to the public that there never has been and never will be much of a penological solution to these problems, only a penological response.

Interestingly, a typical federal drug case in Indiana often involves dealing in "ditch weed"--marijuana plants descended from massive crops planted by the federal government a half century ago. With no disrespect for the good intentions that are driving all of today's "policy," it may also turn out to be much more problem than solution.

The most intoxicating, addictive, simple, and wrong notion of all may turn out to be that attempted federal regulation of drug supply is a substitute for teaching our children one-by-one to love and esteem themselves, and thus not to ingest poison. My personal opinion--based on hundreds of cases of clients who have abused drugs, many of whom today spread the contagion of recovery--is that the simplistic appeal to federal criminal regulation to solve this problem is ultimately a dangerous hoax that worsens the problem immeasurably.

But we can never know any of this--one way or the other--unless and until the blizzard of amendments stops. We can never know anything unless and until the Commission distinguishes itself as one of the rare examples of government regulation that paused long enough from its mad pace of internal workings to invite objective evaluation of its original purpose and its ensuing degree of success.

Thank you for considering these thoughts.

And remember, please stop.

Sincerely,

Charles A. Asher

cd

Mr. Gregory was employed as a mining engineer, married to a school teacher and the father of a four year old daughter. From the conversations which I had with the prosecutors and judges, the remarks made during the trial and sentencing hearings, I concluded that everyone connected to this prosecution felt that the sentences imposed were probably too harsh for the crime and the quality of individuals involved. Yet, both the judge and prosecutors had a job to do under the laws of the United States and all did their jobs in a commendable fashion. However, a system of justice that provides no discretion to the sentencing judge or the prosecuting attorney is a system that can easily result in inequities for the first time offender.

This is the first criminal case I have defended which I had difficulty sleeping at night both during the trial and after the return of the verdict. The thought that these two very fine young men, who incidently still maintain their innocence, serving nearly eight years in the penitentiary for an offense in which state courts would have resulted in most jurisdiction a very small amount of time, if any, spent incarcerated bothers me.

I am writing this letter to urge that the Sentencing Commission and/or Congress review the sentencing guidelines and statutes. First time offenders on marijuana charges should be eligible for some type of probation or parole or the sentencing guidelines should be so broad that a judge have considerable discretion in a sentence to be imposed.

Our trial lasted approximately five days. During that time, both defendants conducted themselves as gentlemen. They conducted themselves as gentlemen during the arrest, trial and sentencing. Justice has not been served in this particular case by a lengthy sentence. Justice could have been served had our Federal Judge and prosecutors had more discretion in this matter.

Thank you for your assistance in this matter.

Sincerely yours,

Thomas E Carroll

Thomas E. Carroll

TEC/dss

Date: February 27, 1992

To: Michael Courlander, Director
United States Sentencing Commissioner
1331 Pennsylvania Avenue, N. W. - Suite 1400
Washington, D. C. 20004

From: Marrie Rose Miller
#11768-039 (Younity)
Federal Medical Center
3301 Leestown Road
Lexington, Kentucky 40511

Regarding: Sentencing Guidelines

Dear Director Courlander:

I am writing in hopes you will take the time from your busy schedule to review the following data. I realize your job and that of your fellow commissioners is difficult, but I sincerely feel that after you review the following you will also join, with those numerous voices and urge Congress to elaborate on the Sentencing Guidelines, in respect to Lysergic Acid Diethylamide. The purpose of the Sentencing Guidelines is to eliminate disparties in sentencing.

Policy Statement which states:

> "The Acts basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair, sentencing system. To achieve the end, Congress first sought honesty in sentencing.....
>
> Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar criminal offenders.
>
> Congress sought proportionality in sentencing through a system that imposes appropriatly different sentences for criminal conduct of differing severity." "Annoted S. G. at. P.2."

The following will demonstrate the existing problem and disparity in sentencing offenders convicted of L.S.D. distribution.

The various forms of distribution in L.S.D. Liquid (purist form of diluted). Blotter paper, tablets, capsules,

geletin, sugar cubes, and most recently sprayed on marijuana.

The term mixture or substance should not apply to L.S.D. and the distribution of the hallucinogen.

In part D of the guidelines, there are a number of tables. There is the Drug Quanity Table. That table consist of the following:

"pg. C. 65 (421) Base Offense Level 36.

At least 10 KG but less than 30 KG ofherion; (or the equivalent amount of other Schedule I or II Opiates);

At least 50 KG but less than 150 KG of Cocaine; (or the equivalent amount of other Schedule I or II stimulants);

At least 500 G but less than 1.5 KG of Cocaine Base;

At least 10 KG but less than 30 KG of PCP or at least 1 KG, but less than 3 KG of pure PCP;

At least 10 KG but less than 30 KG of Methamphetamine, or at least 1 KG but less than 3 KG of pure Methamphetamine;

At least 100 G but less than 300 G of LSD; (or the equivalent amount of other Schedule I or II Hallucinogins); etc...,

Level 36 clearly indicates the pure and unpure form in two different substances.

"C. 73 (429)

Unless otherwise specified the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level. In the case of a mixture or substance containing PCP or Methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or Methamphetamine, whichever is greater.

"pg. C. 77 (433)

The purpose of the amendment is to make the Drug Equivalency Tables more comprehensive. The effective date of the Amendment is November 1, 1989.

The above statement does not clarify the term mixture or substance in reference to L.S.D.

"pg. C. 77 (433)

130. The commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 "Drug Equivalency Tables" in the subdivision captioned "Hallucinogins" by deleting "1 Mg" in the line beginning "LSD (Lysergic Acid Diethylamine)" and inserting in lieu thereof ".05 MG.," by deleting "Peyote 12 MG and by inserting the following in the appropriate place in alphabetical order:

"Peyote (dry)	12 gm"
"Peyote (wet)	120 gm"
"Psilodyke mushroom (dry)	5 gm"
"Psilodyke mushroom (wet)	50 gm".

"The commentary to 2D1.1 captioned etc.,"

"The purpose of this amendment is to provide a more accurate approximations of the equivalincies and dosages for certain controlled substances and to eliminate unnecessary references. The effective date of this amendment is November 1, 1989".

To eliminate disparity in sentencing Wet and Dry forms of the above mentioned Hallucinogins were added.

Pg. C. 77 (433)

131. "The commentary §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of the subdivision of the "Drug Equivalency Tables" captioned "LSD, PCP, and Other Schedule I and II Hallucinogens" by deleting;

1 gm. of Liquid Phincylidine = 0.1 gm. of Herion or P.C.P.

Pg. C 78 (434)

132. The commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equvialency Tables" by inserting immediately following the captions "Cocaine and other Schedule I and I Stimulants", and "LSD, PCP, and other Hallucinogens" in each instance "(<u>and their immediate precusors</u>)".

The precusor chemical in "Special Alert §2D1.1(d) of 1991. (Rel-4Spec. Alert Pub. 471).

<u>Chemical Quanity Table</u>

Level 28 Listed precusor chemicals.

20 KG or more of Benzyl Cyanide;

200 G or more of D-Lysergic Acid;

The disparities are clear even to a lay person. The purist form of LSD carries a lesser sentence than a lower

level of the distribution chain.

Level 28 - Criminal Category I, 78 - 97 mos.

According to the Sentencing Commission, the LSD in an average dose weighs 0.05 mg; therefore 1 pure gram is capable of 20,000 doses.

133. The commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 by deleting:

"The following dosage equivalents for certain common drugs are provided by the Drug Enforcement Adminstration to facilitate the application of §2D1.1 of the guidelines in cases where the number of doses, but not the weight of the controlled substances are known. The dosage equivalents provided in these tables reflect the amount of the pure drug contained in the average dose".

"DOSAGE EQUIVALENCY TABLE"

and inserting in lieu thereof:

"11. If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills or capsules by the typical weight per dose to estimate the total weight of the controlled substance (e.g. 100 doses of Bufotenin at 1 mg. per dose = 100 mg. of Bufotenine). The Typical Weight Per Unite Table, prepared from information provided by the Drug Enforcement Adminstration, displays the typical weight per dose, pill, or capsule for common controlled substances.

It would be apprently clear, the way Congress intended to weigh LSD because of the various carriers, blotter paper, liquid, etc.., at .05 mg./dose. The reason I came to this conclusion is Bufotenine is a Hallucinogen.

The purpose of Congress in creating the new Sentencing Guidelines was to eliminate disparties in the sentencing process. One may conclude from the sentences imposed by the judicial system that the guidelines have failed.

2.50, (76) November 1, 1990

"LSD, PCP and Other Schedule I and II Hallucinogens (and their immediate precursors)

1 gm of Bufotenine=	0.07 gm of Heroin or PCP
1 gm of D-Lysergic Acid Diethylaminde/Lysergide/LSD=	100 gm of Heroin or PCP

Etc....

1	gm of Mushrooms containing Psilocin and/or Psilocybin (dry)	= 0.001 gm of Heroin or PCP
1	gm of Mushrooms containing Psilocin and/or Psilocybin (wet)	= 0.0001 gm of Heroin or PCP
1	gm Peyote (dry)	= 0.0005 gm of Heroin or PCP
1	gm Peyote (wet)	= 0.00005 gm of Heroin or PCP
1	gm of Phencyclidine/PCP	= 1 gm of Heroin
1	gm of Phencyclidine/Pure PCP	= 10 gm of Heroin or PCP

The table indicates the wet and dry forms as well as pure and impure for the dosage equivalency table. Utilizing this chart for LSD sentencing purposes is preposterious because of the various carriers. The table makes sense for the immediate precursors.

The purpose of the New Guidelines is to eliminate Sentence disparities quoting from Chapman vs. US 114:.Ed. 2d. p533 Footnote [3].

2.53, (79) November 1, 1990

To estimate the total weight of the controlled substances (e.g. 100 doses of Mescaline at 500 mg. per does = 50 gms of Mescaline). The Typical Weight PerUnit Table prepared from information provided by the Drug Enforcement Adminstration, displays the typical weight per dose, pill or capsule for certain controlled substances. Do not use this table for any more reliable stimate of the total weight is available from case-specific information.

The commentary to 2D1.1 captioned etc..,

The purposes of this amendment are to provide more accurate approximations of the equivalincy and dosages for certain controlled substances and to eliminate unnecessary references. The effective date of this amendment is November 1, 1989.

This amendment clarified the two above mentioned Hallucinogens, Peyote and Psilocybe Mushrooms, by their wet and their dry weight, which are the carriers containing the Hallucinogens. This amendment excluded clarifying the carriers of L.S.D. It is clear that Congress had the intentions of clarifying the L.S.D., but didn't elaborate.

C. 77 [433]

131. "The Commentary §2D1.1 captioned "Application Notes" is amended in Note 10. in the subdivision of the"Drug Equivalancy Tables" captioned LSD, PCP, and Other Schedule I and II Hallucinogins" by deleting:

" 1 gm of Liquid Phemcyclidine = 0.1 gm of Herion or PCP".

C. 78 [434]

"132. The Commentary to 2D1.1 captioned Application Notes" is amended in Note 10. in the "Drug Equivalancy Tables" by inserting immediately following the cations "Cocaine and Other Schedule I and II Stimulants" and "LSD, PCP, and Other Hallucinogins" in each instance "(and their immediate precursors)". The percusor chemical in Special Alert 2D1.1(d) Chemical Quanity Table of 1991 (Rel - 4 Spec. Alert Pub 471).

(1) Level 28
Listed Precusor Chemicals
20 KG or more of Benzyl Cyanide;
200 G or more of D - Tysergic Acid;

The disparities are clear even to a lay person. The purist form of LSD carries a lesser sentence than on a lower level of the distribution chain.

Level 28 - Criminal Catagory I 78 - 97 months.
"According to the sentencing Commission, the LSD in an average dose weighs 0.05 mg: therefore 20,000 pure doses in a gram.

"133. The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 by deleting"

"The following dosage equivalents for certain drugs are provided by the Drug Enforcement Adminstration to facilitate the application of §2D1.1 of the guidelines in cases where the number of doses, but not the weight of the controlled substances are known. The dosage equivalents provided in these tables reflect the amount of the pure drug contained in an average dose.

"Dosage Equivalency Table"

And inserting in lieu thereof:

"11. If the number of doses, pills, or capsules but not the

weight of the controlled substance is known, multiply the number doses, pills, or capsules by the typical weight per dose to estimate the total weight of the controlled substance (eg., 100 doses of Bufotenine at 1 mg per dose = 100 mg of Bufotenine).

The Typical Weight Per Unit Table prepared from information provided by the Drug Enforcement Adminstration, displays the typical weight per dose, pill or capsule for common controlled substances".

It would be apprently clear, the way Congress intended to weigh LSD because of the various carriers, blotter paper, liquid, etc., at .05 mg 1 dose. The reason I came to this conclusion is Bufotenine is a Hallucinogin.

The purpose of Congress in creating the new sentencing guidelines was to eliminate disparities in the sentencing process. One may conclude from the sentences imposed by the Judicial System, that the guidelines have failed.

2.50 [76] November 1, 1990.

"LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)

1 gm of Bufotenine = 0.07 gm of Herion or PCP.

1 gm of D. Lysergic Acid Diethylamide/Lysergic/LSD = 100 gm of Herion or PCP, etc..,

1 gm of Mushrooms containing Psilocin and/or Psilocybin (dry) = 0.001 gm of Herion or PCP.

1 gm of Mushrooms containing Psilocin and/or Psilocybin (wet) = 0.0001 gm of Herion or PCP.

1 gm of Peyote (dry) = 0.0005 gm of Herion or PCP.

1 gm of Peyote (wet) = 0.00005 gm of Herion or PCP.

1 gm of Phencyclidine/PCP = 1 gm of Herion

1 gm of Phencyclidine (Pure PCP) = 10 gm of Herion or PCP.,etc.

The table indicates the wet and the dry forms as well as the pure and the impure forms, for the dosage equivelancy table utilizing this chart for L.S.D. sentencing purposes is purposterious, because of the various carriers. The table makes sense for the immediate precusor.

The purpose of the New Guideline is to eliminate Sentence Disparities quoting from Chapman vs. U.S. 114 L. Ed. 2d. p. 353 Footnote #3.

To estimate the total weight of the controlled substance (eg., 100 doses of Mescaline at 500 mg per dose = 50 gms of Mescaline). The Typical Weight Per Unit Table prepared from information provided by the Drug Enforcement Adminstration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case specific information.

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE

Hallucinogins

LSD (lysergic Acid Diethylamide)*	.05 mg.
MDA*	100 mg.
Mescaline	500 mg.
PCP*	5 mg.
Peyote (dry)	5 gm.
Peyote (wet)	120 gm.
Psilocin*	10 mg.
Psilocybe Mushrooms (dry)	5 gm.
Psilocybe Mushrooms (wet)	50 gm.
Psilocybin*	10 mg.
2,5-Dimethoxy-4-Methylamphetamine (STP, DOM)*	3 mg.

*For controlled substances marked with an asterick, the weight per unit shown is the weight of the actual controlled substance and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.

Every indication has been made to weigh L.S.D. at .05 mg/ dose. The disparities are significantly clear.

"Special Alert" of 1991 (Rel. 4 - Spec. Alert Pub. 471) Section 2D1.1(c) is amended in the note following subdivision (19) by inserting the following as the second paragraph.

"Ice; for the purposes of this guideline means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity". Reason for amendment: The amendment implements the instruction to the Commission in Section 2601 of the Crime Control Act of 1990 (Public Law 101-647) in a form compatable with the structure of the guidelines.

Amendments are also made for the drug "Ice", making it compatable for sentencing purpose. To relieve disparities.

If the government weighed L.S.D. by the dose instead of the carrier the L.S.D. is placed on disparities would be eliminated.

9. Amendment: Chapter Two Part D, Subpart 1, is amended by inserting the following additional guidelines and accompanying commentary:

"§2D1.11. Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical.

(a) Base Offense Level: The offense level from the Chemical Quanity Table set forth in subsection (d) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon..,

(2) If the defendant is convicted of violating 21 U.S.C.§§841 (d)(2), or 960 (d)(2), decrease by 3 levels, unless the defendant knew or believed that the listed chemical was to be used to manufacture a controlled substance unlawfully.

(c) Cross Reference

(1) If the offense involved unlawfully manufacturing a controlled substance, apply §2D1.1 (Unlawfully Manufacturing, Importing, Exporting, Trafficking) or §2D1.4 Attempts and Conspericies), as appropriate, if the resulting offense level is greater than determined above.

(d) Chemical Quanity Table

(1) Level 28

Listed Precussor Chemicals

20 KG or more of Benzyl Cyanide;

200 G or more of D-Lysergic Acid;
etc..,

(2) Level 26

Listed Precursor Chemicals

At least 6 KG but less than 20 KG of Benzyl Cyanide.

At least 60 G but less than 200 G of D-Lysergic Acid;

Thanking you for taking the time to investigate this matter and I am sure others before me have written and I am sure you will continue to receive mail regarding this matter.

I sincerely believe that there must be a serious change in relieving the disparity in sentencing in regards to the pure and the unpure Lysergic Acid Diethylamide and since you are in a position to help to bring about these changes, it is with fervent hope that you will soon effect such a change.

Very truly yours,

Marrie Rose Miller

MRM/cw
CC/file

U.S. Sentencing Comm.

To whom it may concern:

I received word yesterday that you are reviewing the guidlines March 2, 1992. I would like to say that having been effected by them, (a fiance incarcerated) I think that that are totally unrealistic for first time offenders to habe compound sentences that could be up to 30 years for 1 crime. But your guidlines are made so that the nonviolent crimes are as or almost as bad the ones that guns are involved.

Your prisons as far as I can see are not rehabilitative. In fact, I think it breeds more potential crime. I can speak from experience. I was married to a volent man who beat & raped me and has been convicted with 4 rape counts against my daughter he is now a federal prisoner for a drug charge had it

not been for the drug charge he would be on the streets terrorizing my family in person and but now since he is in prison he is trying to have (hire) me & my daughter killed and my other one kidnapped. (This has all been documented)

I think that to much has been done for these drug crimes with these huge sentences and not enough done for the violent crimes. Such as rape and assault and murder.

My suggestion is to have shorter sentences or more probation for 1st time offenders on nonviolent drug crimes (prison) and the money saved on there housing etc. have it or a portion spend on job training and counseling and make it mandatory, also drug testing.

I think there should be a change on the "war on drugs" and make it a "war on domestic violence or violence" and maybe there won't be as big a need for the drugs.

My name is Laura Baker I am the ex wife of Melvin Baker

I was also the informant of the largest drug bust in the Southern district of Ohio for the past ten years I have seen 5 men sentenced for this drug crime and the sentences I believe are unjust for 4 of them and especially 3 of them. I am also the victim of extreme violence and have to roped daughter and I am living in fear of my ex husband and am in hiding. If it wasn't for the courage of Scott Brown 62438-061 I wouldn't or neither some of the members of my family be alive today. He was apart of the conspiracy (which was approx a 4 year) he part for approx 3 mos. in the growing of marijuana he was involved but was going to get out before, but he saw the danger my family was in and stayed to help me get out. His sentence 32 months as compared to 3 years by another one involved for the 4 year period. I believe your guidelines are unfair and should be rewritten. From what I have seen from your systems it is not working.

The guidlines are not working and neither is your system. I say it is your system until you let us have a bigger voice and we can make it work and be our system.

Thank you for your time,

Laura Baker

former resident of Ohio

I can be reached if necessary thru my P.O. Box 165, Lancaster Ohio 43138

TO: U.S. SENTENCING COMM.
WASHINGTON, D.C. 20004

Jan., 1992

Dear Reader:

I believe the Guidelines are unrealistic responses to social problems that create more destruction than anything. They should be abolished.

Sincerely yours,

Jorje Luis Castillo
2401 NW 33 St
Miami Florida

Braulio Castillo

total offense level: 26

13 YEARS.

February 22, 1992

The United States Sentencing Commission
1331 Pennsylvania Ave. Suite 1400
Washington, D.C., 20004

To Whom it might concern:

I am writing in hopes that while contemplating possible changes in sentencing policies you will take into consideration the cold hard truth regarding the Sentencing Reform Act of 1984, its lack of effectiveness and overall tragic effect.
Mandatory minimums, elimination of judicial discretion, and blind sighted political policies have created what has become nothing more than vindictive punishment, creating overwhelming burdens for our court system and prisons.
It is my hope you will approach this issue honestly and objectively. I would like to suggest the following compromises that might be considered to help elevate the burdens and injustices created by the Reform Act.

A. Eliminate Mandatory Minimums
B. Return of judicial discretion; particularly in regards to first time non-violent offenders

c. Give judges discretion in deciding offenders mitigating role. Alow judges to depart from guidelines where offenders role does not warrent statutory punishment

D. Re creation of incentive good-time, reinstate extended good-time, (statutory) return to parole system.

e. Alternative sentencing, most inmates in federal prison camps would be candidates for home detention (must be much more fun reaching than judical conference proposal)

I am currently incarcerated at, Eglin Federal Prison Camp, serving a 63 month sentence. Exercising my constitutional right of a jury trial I learned first hand the terrible imbalances and injustices of the Reform Act. My co-defendent who the government conceded in my P.S.I. (Pre Sentence Investigation) has had previous ventures into the importation and distribution of cocaine, played a more mitigating role, and made overt acts to further the offence, received a lesser sentence than I because he became a government witness. Making this sitnation more

observe my PSI also stated that I did nothing outside the normal reim of my job activities and have had no history of any criminal activities. The "kingpin" or main player in this scenario is yet to be indicted.

It is time to take the blinders off. The Reform Act of 1984 is a disaster. While drugs due continue to be a problem, we must deal with this situation honestly, stop using it as a political ploy.

Albert Alschuler of the Univ. of Chicago Law School, said it best, "some things are worse than sentencing disparity, and we have found them."

Sincerely,

Ronald O. Hardy

Ronald O. Hardy

Dear Sir / Madam 2-26-92

I have read the new sentencing guidelines in the federal register. I understand that public comment is requested by March 2nd, 1992. Since these guidelines are affecting my life, my family and friends, your consideration to these comments are appreciated.

I am presently incarcerated at Aldson FPC, since February 12th, 92; with a sentence of eighteen months. I am twenty-two years of age. My family consists of Lily Chin (mom) and Lisa Chin (sister). My incarceration costing American taxpayers about $30,000 per year for housing and rehabilitation during my incarceration. As for me, this prison camp is definitely not rehabilitating me in any way, shape or form. I don't and never did have drug abuse or alcoholic problem. The educational courses offered here do not have my study of Nursing. I have a HS diploma, and have completed more than one year of college. I'm well aware of my abilities.

The US prison system dehumanizes its victims, and I'm surely one of them. I'm accepting my punishment because I had to. Here, mental torment and loneliness are acceptable, dreams are not. I am merely a number in the system, punished and used as your system demands. I have to resign to the fact that I no longer control my life. Prison leaves a deep mark on one's personality.

Your commission has totally ignored sociological, and criminology studies, as well as history, when you impose sentences. Drug crimes or drugs has decreased. Therefore, the reasoning for long harsh sentences is invalid because they do not accomplish, what is purposely intended.

Why hasn't the policy 5050.41 been used, which considers age, illness, dependants, and first time offenders. My family and I are seeking for justice based on the concept of fairness.

Respectfully,

[signature]

#30

AMERICAN FARM BUREAU FEDERATION

225 TOUHY AVENUE • PARK RIDGE • ILLINOIS • 60068 • (312) 399-5700 • FAX (312) 399-5896
600 MARYLAND AVENUE S.W. • SUITE 800 • WASHINGTON, D.C. • 20024 • (202) 484-3600 • FAX (202) 484-3604

February 28, 1992

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

Dear Sir/Madam:

The American Farm Bureau Federation (AFBF) is the largest voluntary general farm organization in the United States, representing the interests of nearly four million member families. Our purpose is to promote, protect and represent the interests of farmers and ranchers across the United States. AFBF has member state Farm Bureaus in every state and Puerto Rico.

Our purpose in submitting comments is to point out a mistake in the revision to Section 2Q2.1 entitled "Specially Protected Fish, Wildlife and Plants; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife and Plants." The example in paragraph 1 under "Application Notes" of "for pecuniary gain" cites "when a farmer destroys migratory birds to prevent their consumption of cereal grains." We submit that this is not the type of activity referred to in the guidelines and unfairly establishes a criminal burden on farmers and ranchers who protect their crops in good faith. Further, the reach of this provision will likely include and render as criminal activities that are established agricultural practices and methods of crop protection, which, by extreme liberal definition, could be interpreted as threatening or destructive of wildlife.

The section is really aimed at trafficking in parts of endangered and threatened species, and we submit that it is that activity that should be included as the example. The migratory bird example does not fit the section because they are not endangered or threatened species, nor are they marine mammals that are listed as "depleted." Furthermore, the application of "for pecuniary gain" to a farmer trying to make an honest living is inappropriate and offensive to our members. Such an interpretation stretches the term to unacceptable limits, and would encompass any activity done in furtherance of a lawful business.

The federal Animal Damage Control Act (7 U.S.C. 426) provides for the control of depredating animal pests. The Animal Damage Control program within the U.S. Department of Agriculture carries out actions required to control such pests, including actions to control depredating bird species. Not only are such activities lawful, but they are required by law.

We therefore request that you strike the example set forth in Section 2Q2.1 because it is inapplicable and inaccurate, and further that it not be included by definition or otherwise as an element of criminal activity. Thank you for your attention to our request.

Sincerely,

John Datt

John C. Datt
Executive Director
Washington Office

Senator Patrick J. Leahy
U S Sentencing Commission
1331 Pennsylvania Avenue
Suite 1400
Washington, DC 20004

Dear Senator Leahy: 4-10-92

I am concerned about the extreme costs the Federal Sentencing guidelines, enacted in 1987, are placing on society and we, the taxpayer.. I am also aware of the ongoing debate among the legal community of the efficacy and basic justice of mandatory minimum sentencing. The failures of these guidelines are exasperated when they are applied to non-violent drug crimes. Since the enactment of the new sentencing guidelines, the prison population has soared. Over 50% of those now in prison are non-violent drug offenders

Under the Federal guidelines for sentencing, harsh and expensive sentences are handed out to even low level participants. Culpability does not play a role; Federal Judges are bound by the sentencing graphs of the new guidelines and cannot take into consideration who the defendent is -his/her good side, work record or family background

Despite the non-violent status, parole and rehabilitation are not part of the new guidelines. Productive citizens are taken out of the workforce for years. These long sentences are more than punishing the offenders, they are taking away their whole lives. It is inhumane and leaves the added problem of how to incorporate these men and women who are literally lost in time, back into a world they no longer know. After 10, 15 or 20 year sentences which are so common to even peripherial offenders of the new drug laws, families are lost, the offenders come out to the harsh life of the indigent. They will need special training and financial assistance if they are just to survive and not to return to crime. This, in turn, places even more burden upon the taxpayer. Many of these offenders are capable of leading productive lives should they not be forced to serve even longer sentences than violent criminals. Drug related sentencing is disproportionate to the severity of the crime which is, in itself, a crime.

The current "War On Drugs" is not working - statistics have proven this to be so. If anything, it has just put more profit into the illicit drug trade due to the fact that, in most cases, the "little" person serves the time leaving the drug lords free to ply their trade. Most "little" people, especially if well educated with the added plus of family support, learn their lesson well and do not return to crime. Instead of a war on non-violent drug offenders, let's initiate a war on violence; a war on crimes against person and property. Let the aggressive,

violent offenders be the ones who serve the long sentences. Let those involved non-violently be re-entered into the workforce and given home confinement thus saving the American taxpayer billions of dollars and reserve the prison cells for those who are violent offenders against society, i.e. child/adult rapists, armed robbers, murderers, etc. With the 1987 guidelines in place, this cannot occur. Please assist in the effort to repeal them and allow our Federal Judges to judge the offenders, set the sentences and decide upon the culpability of the defendent.

Sincerely,

Sylvia F. Dussome
Howard W. Dussome

2068 Tate Rd.
Rice, WA 99167

U.S. Sentencing Commission
1331 Pennsylvania Ave, N W Suite 1400
Washington, D.C 20004
Attention: Guideline Comment
March 6, 1992

Attention; Communication Director
Attention; Guideline Comment

I have read the new Sentencing Guidelines in the Federal Register. I wish To make The following Comments:

My Son was arrested on June 26, 1989. His offence is an one Count Indictment, 21 U.S.C. 841 (A)(1) + 846; Conspiracy To manufacture more Than 1000 marijuana plants. There were no guns, no violence, he has NO criminal history NOR is he a pesistanee felon. Yet as a first time offender he is serving a minumum mandatory Sentence of no less Than 10 years, and No more Than life.

My Son broke The law, this is True, and I'd be The first To say restitution is in order. Not 10 years of his or any first Time offenders life.

I believe Innovative sentencing practices should be The first step. Sentences should be lowered To 3-5 years unless guns or violence are involved. All of These first time offenders need and are asking for a second chance, to start a straight life. The Longer we KEEP them incarcerated, The less they have

To give back To the community, family and most of All themselves, Help them help themselves and the Taxpayer. Most want To live and would strive To make our community a better place. We cannot Afford To waite.

Our Prison system overflows with 1.1 million inmates. At $20,000 an inmate how long can the Taxpayer Keep the pace without rebelling.

Were my son released Today, he'd have a family that loves and would support him and help him stay on the right track.

Thank Jaw.
Ann Mattingly

Rebly requested

U.S. Sentencing Commission
1331 Pennsylvania ave. N.W. Suite 1400
Washington D.C. 20004
attention Guideline Comment
March 6. 1992

attention Communication Director
attention Guideline Comment

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According to the F.A.M. (Families Against mandatory sentences) & what I have read in the news papers & seen on T.V. the average murder gets 7 years & average rapist gets 6 years & and a man charged with marijuana gets 10 yeas to life as a First time offender.

I think this is ~~bad~~ totaly unjust to my son & to a lot of other men. My son is no Murder & my son is no Rapist and has no violent history. I ask you people on the Guidline Commission to really think about this subject & see if you can come up with something a little more ~~pain~~ just & humane for my son. Don't get me wrong please I am against drugs as much as everyone else I know my son done wrong and needs to be punished but not for 10 years of his young life.

Thank You
Joseph David Mattingly S.R

Reply Requested Please

Please —
ask Congress to repeal
Mandatory minimum sentences!

"Penalties for possession of a drug
should not be more damaging to an
individual than use of the drug itself."
— President Jimmy Carter —

As an inmate who is looking at
11+ years guidelines, for "intent" to
commit an offense whose terms were
not legally defined until end of trial,
I am outraged.
"P.R." I will certainly put forth this
on behalf of the government!
What a waste!!!

"Legal-Lies,"

Karl ~~Hofstatter~~
P.O. Box 2308
Mount Clemmens
Michigan, 48043

March 13, 1992

U.S. Sentencing Commission
1331 Pennsylvania Ave
Washington, D.C. NW #1400

Gentlemen:

After reading the DAMM-gram for January/February, we are imploring you to ask Congress to repeal the mandatory-Minimum sentencing.

My son has just been sentenced unjustly to a 5 year term under the mandatory minimum sentencing laws.

Thank you very much.

Sincerely

Mr + Mrs Albert L. Hertz

March, 12, 1992

U.S. Sentencing Commission;

I am writing to you suggesting and appealing to you, that you ask Congress to repeal mandatory minimum sentences, they are so very unjust.

Many of these are one time, non violent offenders, there is no rehabilitation in prison, just corruption. Mercy should be tendered with justice, according to Gods word.

There are many who receive lighter sentences for rape, murder & child molesting, than drugs, and they are paroled in very short time, this certainly makes no sense to me.

2

I received information on your commission from FAMM

My heart breaks every day for my son, he is a human being and not an animal, he is also a kind, hard working and loving person. I pray every day the Lord will watch over him and bring him home safe and the same. I am 67 years old and need him.

Please do what you can to have Congress repeal this unfair sentencing. I know I speak for many.

I thank you.

Sincerely,

Vera Gustafson

3-10-92

Communication Director
Guideline Comment
To Whom It May Concern,
Dear Sirs:

I am concerned after reading the new sentencing guidelines in the Federal Register wherein public comment is requested. I have a nephew serving ten years for the growing of marijuana plants, which I agreed he was guilty of and deserved some punishment. Seemingly ten years is a strong punishment when even worse crimes are available for probation when cases are reviewed.

Hopefully you will look at these guidelines and help to amend them some -

Sincerely in appreciation,
Sarah Mattingly
122 High St
Lebanon, Ky 40033

Mr. Mike Courlander
Suite 1400
301 Pennsylvania Ave., N.W.
Washington, D.C.

Mr. Courlander:

I would like to comment on the federal sentencing guidelines for first time drug offenders. In a simple sentence, they are too harsh.

As I read the newspapers each day, I find numerous articles mentioning the USA as the number one nation in prison population. In other countries, people are imprisoned for "crimes against the country". The USA has the distinction of number one prison population due to overly harsh drug laws.

I personally am aghast at such a USA number one in the world title, especially since people caught in the "Drug War" propaganda are usually not dangerous criminals but people in the wrong place at a wrong time.

I do agree that criminals with a long record in drugs and crimes need to be separated from the general population, but first time offenders should have another chance.

The answer to the nation's problem of illicit drug use is not to build prisons to put everyone in that is accused of dealing in drugs. The answer is trying to educate people about the dangers of drugs. The education process would be a good rehabilitation for first time offenders. Sentencing should be time spent going to schools talking about the dangers of illicit drugs.

Improvement will not be seen if all first time offenders are warehoused in prisons for years and years. This way of dealing with a problem will just perpetuate this dilemma since it is a known fact that prisons do little if anything to help prisoners.

According to my congressman, Hal Rogers, the sentencing guidelines are to be reviewed by you in early 1992. I hope your review will recommend lenicency for first time offenders such as little or no prison time and allow already incarcerated first time offenders a chance to be paroled.

Sincerely:

Corbin Gregory
HC 74 Box 84
Cooperville, Ky. 42611

A Concerned Citizen

Mr. Mike Courlander
Suite 1400
331 Pennsylvania Ave., N.W.
Washington, D.C.

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Sincerely:

Jeanita M. Foster

A Concerned Citizen

Kathleen S. Connell
233 Tuckerman Avenue
Middletown, Rhode Island 02840

March 16, 1992

U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W. 1480
Washington, DC 20004

Attention: Guideline Comment

Dear Members:

I am writing to ask that you give favorable consideration to the recommendations to the Judicial Conference particularly as they relate to non-violent first offenders.

It is insane social policy to destroy families by imposing totally disproportionate penalties when often the crime is a transgression of a new or obscure rule or regulation.

Further, acceptance of responsibility should be worth more than a two level adjustment, since that at least is fact, while much of the enhancements are far greater and are predicated on conjecture, government manipulation or the visibility of the case.

Probation for first time non-violent offenders with non likelihood to repeat the offense is a waste of resources and a detriment to any likelihood of returning to a useful role in society.

Finally, costs of incarceration further contribute to destruction of families and the punishment of completely innocent members. Please carefully consider the results of guidelines as they are written and adopt the recommendations of the Judiciary Conference.

Sincerely yours,

Kathleen S. Connell

Kathleen S. Connell

Paid for by Friends of Kathleen Connell

Dolores Anna Strazicich
P.O. Box 85210 — Seattle, Washington 98145 — (206) 526-2660

April 11, 1992

United States Sentencing Commission
1331 Pennsylvania Ave. N.W. #1400
Washington, D.C. 20004

Dear Sirs:

I am writing as a taxpayer who feels overwhelmed by the "prisoning" of America.

When you remove the rights of Judges to do their "job," and give them mandatory sentencing, you take away the practice of an honorable profession.

I understand the reasons for clamping down, however, we cannot allow a police state to replace the freedom of our law makers to use intelligence and compassion.

I, personally, do not believe the "current" war on drugs is making this country a "kinder and gentler" nation. And, I do not support mandatory sentencing.

Thank You,

Dolores Strazicich

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

April 8, 1992

Gentlemen:

The reason for this letter is to state my objection to the use of the current Federal sentencing guidelines against first time, non-violent offenders. It is neither reasonable nor beneficial to dole out these exorbitant sentences to non-violent first time offenders.

Alternatives 'must' be considered to assist rehabilitation and alleviate the tax burden. The precentage of time served on any given sentence must be lowered with programs implemented which allow offenders a chance for more good time, or parole. Prisoners have 'no' incentive to improve themselves under the current 87½% system.

The federal guidelines will only hinder and haunt society in the long run. Our country incarcerates more people per capita than any other Nation in the world and it has not served its intended purpose of deterring crime one iota. Other alternatives must be employed to achieve this end. It is time to change the current system of sentencing.

Sincerely,

Ron Swanson
1704 Centerville Road
Rockford, Illinois
61102

LYN B. EHRNSTEIN
257 North Wetherly Drive
Beverly Hills, CA 90211
(310) 275 3730

April 14, 1992

William Wilkens, Jr., Chairman
U.S. Sentencing Commission
133 Pennsylvania Ave. NW, Suite 1400
Washington, D.C. 20004

Dear Sir,

The three adults in my household request that the drug law be amended to exclude the carrier weight in LSD cases, that this be "grandfathered", that parole be reinstated, and that Judges be given sentencing flexibility.

In our view sentencing without these adjustments is a horror story that damages not only the people involved but our society.

Sincerely Yours,

Lyn B. Ehrnstein

Members of the Sentencing Commission 3/25/93

Please ask Congress and committee members to seriously review and repeal the mandatory minimum sentences! We cannot continue to incarcerate all these young drug offenders who need education & drug prevention! Not prison. What is happening to the US?

Carol Hardy
278 Cumnock Rd
Portsmouth, VA.

To whom it may Concern.

It is my belief that there is a serious problem with our government and judicial system.
Why on earth would anyone wish to put so many people in jail for not bringing harm to anyone. Its disgusting and unjust.
According to the 8th ammendment, the United ~~states~~ judicial system is not to administer "Cruel and unusual punishment".
So much for our Rights!

How anyone involved ~~[redacted]~~ in bringing this about can call themselves americans is beyond me!

I for one love my country, but I sure as hell Can't trust the Government.

Michael E Hufford

To Whom It May Concern;
Re: Mandatory Minimum Sentencing on Federal Crimes

Mandatory minimum sentences were designed both to act as a deterrent to potential criminal act s, and to send a message to those who get caught. It doesn't seem to be working Perhaps this may be an issue which should be reconsidered.

Indeed, the numbers of inmates in the federal prison systems is soaring, according to U.S. Bureau of prison statistics.

In 1983, the federal prison system held 28,000 inmates, 27% of whom were convicted drug offenders. By 1988 the numbers had grown to 44000 (448% drug cases) today it is 64,700 (56% drug cases) and by 1995 the number will top 100,000 (70% drug cases).

Alternatives to incarceration may be necessary because of limited prison space due to a 600% increase in the number of drug offenders in prison since 1980.

The drug control strategy is full of advice for state legislators As you can tell, the 1992 Drug Control Strategy offers no fresh ideas on how to solve the drug abuse problem in the country . Promoting punishment as the solution to a complex economic and social problem, I feel is merely a vote getting tactic for this election year.

The $12.72 billion the white house has requested for drug programs is still to be divided the same ratio of 70% law enforcement and interdiction, and 30% for treatment and prevention.

We must find a way to turn this ratio around. Treatment & Prevention first.

Sincerely concerned citizen,

Jerry R Trujillo
7220 Central Ave S.E.
Alb. N Mex 87108

April 23, 1992

U.S. Sentencing Commission
1331 Pennsylvania Ave.
NW Suite 1400
Washington, D.C. 20004

Dear Sirs:

I am writing in reguards to the current sentencing laws pertaining to first time offenders of drug related cases.

First, I would like to state that I am in no way minimizing our current anti-drug laws. I am a firm believer of our justice system and its laws and do not condone anyone that engages in illegal activity in any form. I do, however, believe that the punishment should fit the crime.

For the past three years I have been corresponding with a friend and inmate, Jeff Mattingly, FCI, Box 1000, Morgantown, West Virginia 26507, Carlson Unit 01865-025. He is presently serving a ten year sentence, without parole, for a first time offence indictment, 21 U.S.C. 841 (a) (1) and 846 conspiracy to manufacture more than 1000 marijuana plants. No violence, guns, criminal history of violence or persistant felon were involved with this indictment.

I have personally known Jeff for approximately ten years and my husband has know him since childhood. He was raised in a Christian enviroment by a loving and supportative family. He had all the hopes and desires for a long and bright future. He was a very stable, hard working man and a loving and attentive father. Along this path Jeff, like many others, fell in the 'get-quick-rich' plan and now is paying the price for this costly mistake. No one realizes this mistake more than Jeff.

Through many letters and visits, I have gotten to know Jeff very well over the past three years. I have seen him develop into a strong Christian with deep convictions and sorry from deeds of his past. The bond and love he has for his nine year old son and family grows deeper each day. I see a man agonizing over the thought of not being there for his growing son. I also see a son that is in desperate need of a father's guidance.

I must admit, this is the first letter I have ever written to any congressman or official concerning any bill or legislation. I do feel strongly about this issue and feel that in some cases the law needs some revision.

I do hope that some consideration will be given to these first time offenders when the United States Sentencing Commission convenes for review of these guidelines.

Thank-you for your time and consideration on this matter.

Respectfully,

Anna Fay Rakes

Anna Fay Rakes
P.O. Box 575
Lebanon, Kentucky 40033

4-3-92

Dear Sirs

I'm writting about mandatory Fed. Sentencing Guidlines:

I have a son, who is serving his time and was sentenced by the new guidlines, he got 8 years, It was his 1st offense and non violet person. I and others felt it was very unfair - because he has to serve full 8 yrs. no good time off -

We feel the guidlines should be reconsidered for 1st + non violet offenders.

Thank you for the opportunity to express our opinions at this time

Naomi Stitches
Box 1332
Lenora, Ks 67645