



**EDISON ELECTRIC
INSTITUTE**

PETER B. KELSEY
Vice President,
Law and Corporate Secretary

March 15, 1993

The Honorable William W. Wilkins, Jr., Chairman
Members of the U.S. Sentencing Commission
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Chairman Wilkins and Members of the Commission:

The Edison Electric Institute ("EEI") is grateful for the opportunity to present comments to the Commission on the proposed amendments to the sentencing guidelines.¹ EEI is the association of electric companies. Its members serve 99 percent of all customers served by the investor-owned segment of the industry. They generate approximately 78 percent of all the electricity in the country and service 76 percent of all ultimate customers in the nation. Its members are pervasively regulated at the federal and state level in all aspects of their business. These electric utilities range in size from ones employing less than 100 employees to ones employing more than 10,000 employees. Our member companies have a real and direct interest in the content of the proposed amendments to the individual guidelines given enforcement trends toward the prosecution of corporate managers and supervisors.

I. Amendment No. 23, Abuse of Position of Trust

The Commission invites comment on a proposed amendment to § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).² The proposed amendment attempts to reformulate the definition of what constitutes a "special trust."

¹ Sentencing Guidelines for United States Courts; Notice, 57 Fed. Reg. 62,832 (December 31, 1992)(hereinafter "Notice").

² Amendment No. 23, Notice at 62,842.

Commission to adopt the same amendment to § 8C4.1 of the Guidelines, which is the same provision as it applies to organizations.

There is a significant potential for unfairness when the prosecutor is given complete control over substantial assistance departures. Furthermore, the substantial assistance departure is currently the only ground for departure from the guidelines that requires a government motion before the court may consider it. Even if the amendment is adopted and a court is allowed to consider the issue at its own discretion, the government will still be the principal source of evidence regarding whether "substantial assistance" was in fact provided by the defendant. But prosecutors should not have sole discretion whether to raise the issue of substantial assistance for a court's attention, especially given that a prosecutor's exercise of this discretion generally is unreviewable. In order for this section to achieve its goal of encouraging defendants to aid law enforcement authorities in the prosecution of offenses, defendants must perceive that the section will be fairly applied. This requires courts to be able to consider the issue of substantial assistance of their own accord and in response to motions by defendants as well as in response to motions by prosecutors.

On a related subject, the limitations suggested by Issue for Comment No. 24 (i.e., must be a first offender and no violence must be associated with the offense) are unnecessary. Courts should be allowed to consider substantial assistance by defendants in all cases where such assistance has been rendered. First offender status and non-violent nature of the crime should be left as facts to be taken into account at the discretion of the court. They should not be used as a basis for universally limiting consideration of substantial assistance.

As noted above, § 8C4.1 of the Guidelines contains language that applies to the sentencing of organizations analogous to that contained in § 5K1.1, and it contains the identical governmental motion requirement. The purpose of the sections is the same. Therefore, an amendment to one should prompt an amendment to the other, as there is no policy justification for doing otherwise. Thus, EEI urges the Commission to strike the government motion requirement from both § 5K1.1 and § 8C4.1 of the guidelines.

*** III. Issue For Comment No. 30, Departures**

Amendment No. 30 requests comment as to whether the language in Chapter One, Part A4(b) may be read to be overly restrictive of a court's ability to depart

from the guidelines.⁴ EEI supports the suggestion made by the Committee on Criminal Law of the Judicial Conference of the United States that the language contained in Part A4(b) should be changed to the extent that it discourages departures by encouraging courts of appeals to find that sentences that depart from the guidelines are "unreasonable."⁵

While the language of Part A4(b) concedes that the initial guidelines will be the subject of refinement over time, and that the departure policy was adopted because "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision[.]" the language that follows nevertheless suggests that departures from the guidelines are improper.⁶ The courts must be allowed to exercise reasonable judgment with respect to application of the guidelines, and must not be required to adhere inflexibly to specified types of departures and departure levels. At a minimum, EEI recommends that Part A4(b) be amended to strike the last sentence of the fourth paragraph and the last sentence of the fifth paragraph.

IV. Issue For Comment No. 32, First Time Offenders

The Commission has requested comment as to whether it should promulgate an amendment that would allow a court to impose a sentence other than imprisonment in the case of a first offender convicted of a non-violent or otherwise non-serious offense.⁷ EEI believes that there should be a specific provision for departures in the sentencing of first offenders of non-violent offenses. Judges need this departure to prevent the possibility of offenders receiving punishment that does not fit the crime. This departure should be accomplished through providing an additional ground for departure in Chapter Five, Part K.

⁴ Issue For Comment No. 30, Notice at 62,848.

⁵ Letter of Vincent L. Broderick, Chairman, Committee on Criminal Law of the Judicial Conference of the United States, to the Honorable William W. Wilkins, Jr., dated November 30, 1992.

⁶ Federal Sentencing Guidelines Manual (1992 Ed.) at 6.

⁷ Issue For Comment No. 32, Notice at 62,848.

School of Law

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March 12, 1993

Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002

Re: Proposed Amendments 1 and 34

Dear Mr. Courlander:

I thank the Sentencing Commission for the opportunity to offer written comments on the Proposed Amendments to the Federal Sentencing Guidelines, dated January 12, 1993. My comments are directed exclusively to Proposed Amendments 1 and 34, both of which concern the "relevant conduct" provision of U.S.S.G. § 1B1.3.

For the past two years I have made a close study of the policy issues surrounding various practices of real-offense sentencing, not only within the federal system, but in states across the country. The results of that work have recently been published as *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 Stan. L. Rev. 523-73 (February 1993). (A reprint is enclosed.) Because the analysis of *Sentencing Facts* is pertinent to your present deliberations, I wanted to make it available to you.¹

Proposed Amendment 1. I applaud the Commission's proposed amendment to § 1B1.3(c) that **"Conduct of which the defendant has been acquitted after trial shall not be considered under this section."** A number of states bar the use of acquittal conduct at sentencing, even while retaining a real-offense orientation to sentencing in other respects. See *State v. Marley*, 364 S.E.2d 133, 138-39 (N.C. 1988); *State v. Cote*, 530 A.2d 775, 783-85 (N.H. 1987); *McNew v. State*, 391 N.E.2d 607, 612 (Ind. 1979). Still other states forbid the consideration of acquittal conduct as part of their general approach of conviction-offense sentencing. See *Sentencing Facts*, 45 Stan. L. Rev. at 535-41 (surveying the experience of three state guidelines systems). See also *id.* at 552 ("Among the recommendations in this article, the foremost is the restoration of the legal force of acquittals at sentencing through a prohibition of the consideration of facts embraced in charges for which the defendant has been acquitted").

¹ Also, since 1989 I have served with my father as Co-Reporter to the American Bar Association's effort to promulgate a third edition of its *Criminal Justice Standards for Sentencing Alternatives and Procedures*, which were adopted formally by the ABA on February 9, 1993. This letter, however, represents my own views and not necessarily those of the ABA.

Michael Courlander
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* In conjunction with the proposed amendment to § 1B1.3(c), I suggest a parallel amendment within Part K ("Departures") -- perhaps in the policy statement of § 5K2.0, perhaps in a new policy statement -- providing that **"Conduct of which the defendant has been acquitted after trial shall not be considered as grounds for departure from the guidelines."** I recognize that this suggestion conflicts with Proposed Amendment 1 insofar as the Commission would amend § 1B1.3, comment (n. 11) to provide that acquittal conduct *may* provide basis for departure in an exceptional case. The Commission proposal, to this extent, would permit the result in *United States v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989) (per curiam), and similar cases. As outlined in *Sentencing Facts*, 45 Stan. L. Rev. at 531-33, 550-52, the policies supporting a bar on acquittal conduct at sentencing extend equally to departure and to guideline sentences. On this ground, I would delete the second sentence of proposed § 1B1.3 comment (n. 11).

Proposed Amendment 34. The Commission has invited comment on a further amendment to § 1B1.3 as submitted by the American Bar Association's Sentencing Guidelines Committee (the "SGC amendment"). The SGC amendment would **"restrict the court's consideration of conduct that is relevant to determining the applicable guideline range to (A) conduct that is admitted by the defendant in connection with a plea of guilty or nolo contendere and/or (B) conduct that constitutes the elements of the offense of which the defendant was convicted."** I wish to comment in favor of the SGC amendment, which should be adopted in addition to Proposed Amendment 1.

First, the SGC amendment would alter the basic operation of § 1B1.3, changing it from a modified "real-offense" provision into a modified "conviction-offense" provision. The policy choices relevant to such a decision are complex. In *Sentencing Facts*, 45 Stan. L. Rev. at 547-65, I have argued that the conviction-offense program is far preferable to the real-offense alternative. I do not reproduce that argument here. I will note, however, that state guidelines jurisdictions have been uniform in their endorsement of conviction-offense sentencing. See Michael Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 Fed. Sent. Rptr. 355, 356-57 (June 1992) (recommending that the federal commission adopt a conviction-offense scheme); *Sentencing Facts*, 45 Stan. L. Rev. at 535-41.

Finally, the SGC amendment is consistent with the newly adopted ABA Criminal Justice Standards, *Sentencing Alternatives and Procedures* (3d ed., approved February 9, 1993). The applicable Standard, § 18-3.6, provides as follows:

Michael Courlander
March 12, 1993
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Standard 18-3.6. Offense of conviction as basis for sentence.

The legislature and the agency performing the intermediate function [e.g., the sentencing commission] should provide that the severity of sentences and the types of sanctions imposed are to be determined by sentencing courts with reference to the offense of conviction in light of defined aggravating and mitigating factors. The offense of conviction should be fixed by the charges proven at trial or established as the factual basis for a plea of guilty or nolo contendere. Sentence should not be based upon the so-called "real offense," where different from the offense of conviction.

* *

In conclusion, Proposed Amendment 1 represents a significant improvement upon existing law, although its reach should be extended to departure sentences. Proposed Amendment 34 is also an important advance, and should be adopted in addition to Proposed Amendment 1.

Sincerely,



Kevin R. Reitz
Associate Professor of Law

VIA FEDERAL EXPRESS

cc: Members of the United States Sentencing Commission

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

February 23, 1993

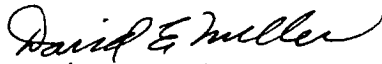
U. S. Sentencing Commission
One Columbus Circle, N. E., Suite 2-500
Washington, D. C. 20002-8002
Attention: Public Information

Dear Judge Wilkins

Attached hereto are personal comments regarding certain proposed guideline amendments. I have written a separate document for each of the issues on which I commented. Understand that the comments provided are only my own and are not representative of this agency or the Court for which I work.

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

Sincerely



David E. Miller, Deputy Chief
U. S. Probation Officer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

746 U.S. POST OFFICE
AND COURT HOUSE
5th AND MAIN STREET
CINCINNATI 45202-3980

MEMORANDUM

DATE: 2/23/93
RE: 29 and 30. Issues for Comment.
FROM: David E. Miller, Deputy Chief
U. S. Probation Officer
TO: U. S. Sentencing Commission
Public Information

* In its effort to learn and correctly apply the guidelines the probation system generally has been reluctant to attempt to find, justify and recommend departures. We were driven by a mentality of "doing it right", meaning technically correct guideline application. This attitude has become practice to the extent the Courts follow the lead of probation officers.

The system does need to loosen up and recognize the importance of the use of sound, reasoned and rational departures. The Commission should look carefully at all of its departure language and determine if adjustments can be made to permit a more liberal reading which might enable Courts greater freedom to depart.

The original plan of the Commission to observe common practices of the Courts over time; to monitor departures, and to propose amendments consistent with those findings is still good logic. I am not sure the vast number of guideline amendments have met that standard heretofore.

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Issue Chapters

CURE-ENOUGH (Ex-offenders Need Opportunities, Understanding, Guidance and Help)
CURE For Veterans
CURE-SORT (Sex Offenders Restored Through Treatment)
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Executive Director and Administrator

Charles and Pauline Sullivan

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CITIZENS UNITED FOR REHABILITATION OF ERRANTS

"A National Effort to Reduce Crime Through Criminal Justice Reform"

PUBLIC COMMENT OF CHARLES SULLIVAN TO THE UNITED STATES SENTENCING COMMISSION

* CURE very strongly opposes "in an exceptional case, however, such conduct may provide a basis for an upward departure" (amendment to Commentary to 1B1.3).

CURE is dedicated to reducing crime through rehabilitation. One of the first steps in this process is the perception by the person convicted that "the system" is fair.

When the potential is there in the Guidelines to use acquitted conduct to enhance a sentence, then I believe the system will be perceived as "rigged".

In fact, in my opinion, this proposed amendment goes against the very spirit of the confirmation hearings of the first commissioners that were conducted in 1985 by Sen. Charles Mathias, the Republican from Maryland.

I shall never forget Sen. Mathias asking the commission-appointees "to raise their hands" if they had ever spent time in jail. For those who had not, he encouraged them to visit the jails and prisons.

By this exercise, Sen. Mathias was encouraging a word that is almost non-existent today, "mercy". Sen. Mathias was indirectly telling the Commission that their attitude should be one of coming down of the side of reducing (not enhancing) the sentence whenever appropriate!

In the same way, I encourage you to support the 33 proposed amendments that would reduce drug sentences especially the one that would eliminate the weight of the carrier in LSD cases.

In this regard, I have attached a copy of a recent letter that we have received. I have removed the name since we are not certain if he wants his name to be known.

Dear *CHARLES+PAULINE*

.....Monday March 1st 1993

Greetings from F.C.I. Danbury. I am currently serving a 128 month sentence without parole, for conspiracy to distribute LSD. I have no history of violence what so ever, nor any prior felony convictions. I have taken responsibility for my crime. I continue to demonstrate, diligently, my whole-hearted conviction to reform my life. I am biding my time wisely, attending Marist College (I made high honors last semester,..intend to do so again), and the Comprehensive Chemical Abuse Program, among other programs. In 21 months, I've done *all* this--128 months are entirely unnecessary and unfathomable. I *am* an asset to our society, and to the world.

An interesting turn of events has unfolded, and it warrants your *immediate attention!* I have enclosed information that documents and explains the "quirk in the law" that justifies these absurd sentences for LSD offenses, by including the irrelevant weight of carrier mediums. You will also find an excerpt, from the Federal Register, containing 1993 amendments to the Federal Sentencing Guidelines, as proposed by the U.S. Sentencing Commission. See amendment #50--*synopsis of proposed amendment and proposed amendment*--which reads: "In determining the weight of LSD, use the actual weight of the LSD itself. The weight of any carrier medium (blotter paper, for example) is not to be counted." This amendment seeks to rectify a truly gross misappropriation of justice.

This means that prison stays (which are costly to the American taxpayers and public at large, as well as the individuals and their families, in both tangible and intangible ways) could be dutifully shortened, for myself and 2000 other human beings serving 10, 15, and 20 year sentences (with out parole), for the sheer weight of *irrelevant* carrier mediums....This would not be mocking the fact that LSD is illegal, it would simply serve to produce *just sentences*, in which the "time would fit the crime".

I earnestly request that you write the U.S. Sentencing Commission, and voice your support for crucial amendment #50! IT IS ESPECIALLY IMPORTANT FOR YOU TO URGE THAT IT BE RETROACTIVE!! This needs to be done by March 15th, since public hearings are scheduled in Washington D.C., on March 22nd. (See Federal Registrar excerpt).

I hope and pray that you will find the time and understanding to act on this issue,..it's not only for my benefit, but thousands just like me, encompassing all our families and loved ones, as well as all those that will continue to be federally prosecuted for LSD offenses. Please, justice and equity *must* transcend rhetoric!