



**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.

special duty owed to the general public by them or their corporation. The special trust should arise directly between the individual and the victim of the crime before it can lead to sentence enhancement.

For all of these reasons, EEI would recommend the following as an alternative to Amendment No. 23:

"Special trust" refers to violation of a duty of trust between the defendant and the victim or victims of an offense for which a sentence is being imposed. The duty of trust may arise from a fiduciary relationship or a position of substantial discretionary judgment that is legitimately given considerable deference by the victim. (In an employment context, such positions ordinarily are subject to significantly less supervision than those held by employees whose responsibilities are primarily ministerial in nature.) For this enhancement to apply, the violation of the duty of trust must have contributed in some significant way to facilitating the commission or concealment of the offense and not merely provided an opportunity that could have been afforded to other persons. Also, the defendant must have intended or known that the victim would rely on the duty of trust, and the victim must in fact have reasonably relied on that duty, in a way that contributed to the commission or concealment of the offense.



II. Issue For Comment No. 24 and Amendments Nos. 31 and 47, Substantial Assistance to Authorities

The Notice also contains an issue for comment and two proposed amendments regarding the elimination from § 5K1.1 of the requirement that the government make a motion requesting a departure from the guidelines before allowing a court to reduce a sentence as a result of substantial assistance by the defendant in the investigation or prosecution of another person.³ EEI answers the question for comment in the affirmative and supports Amendments Nos. 31 and 47, which would allow the court to consider a departure from the guidelines for substantial assistance provided by a defendant at its own discretion, and urges the

³ Issue For Comment No. 24 and Amendments Nos. 31 and 47, Notice at 62,842, 62,848, and 62,853, respectively.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHAMBERS OF
JON O. NEWMAN
U. S. CIRCUIT JUDGE
450 MAIN STREET
HARTFORD, CONN. 06103

March 12, 1993

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

Dear Commissioners:

This letter concerns Proposed Amendments 24, 31, and 47, included in the Guideline amendments proposed for public comment by the Commission on December 31, 1992. The amendments would modify the current provision of section 5K1.1 requiring a Government motion as a condition for a sentencing judge's consideration of a downward departure for a defendant's cooperation.

I strongly support the elimination of the Government motion requirement, as recommended in Amendments 31 and 47, and, only as a fall-back alternative, favor the modification proposed in Amendment 24.

The Government motion requirement is required by Congress for cooperation departures from statutory mandatory minimum sentences, but is not congressionally required for cooperation departures from guideline sentences not subject to mandatory minimum sentencing provisions. See 18 U.S.C. § 3553(e). The clear implication is that Congress did not expect a Government cooperation motion to be a requirement for cooperation departures from sentences not subject to mandatory minimum provisions. This implication is reenforced by the explicit provisions of 28 U.S.C. § 994(n) requiring the Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

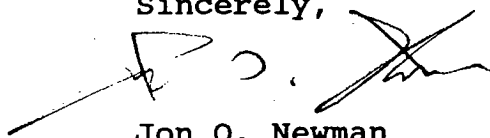
Prior to the Guidelines, sentencing judges retained full authority to reduce a sentence below what would otherwise be imposed to reflect a defendant's cooperation. Prior to the adoption of section 5K1.1, the Government had no power to prevent a sentencing judge's consideration of such a reduction. The Government motion requirement in section 5K1.1 is a sharp and unwarranted break from past practice that has several unfortunate consequences.

First, it appears to run counter to the congressional preference to permit courts to reward a defendant's cooperation, regardless of the prosecutor's wishes, in all cases except those subject to mandatory minimum provisions. Second, it shifts enormous power to the prosecutor to pressure a defendant into what may be perjurious cooperation allegations as the price of obtaining the prosecutor's consent to a

March 12, 1993

cooperation departure. Third, the Commission's current insistence on vesting this unprecedented power in the hands of the Executive Branch seriously calls into question whether the Commission is abiding by its statutory mandate of functioning "as an independent commission in the [J]udicial [B]ranch of the United States." 28 U.S.C. § 991(a).

Sincerely,

A handwritten signature in black ink, appearing to read "Jon O. Newman", is written over a horizontal line.

Jon O. Newman
United States Circuit Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH, PENNSYLVANIA 15219

CHAMBERS OF
ONALD E. ZIEGLER

U.S. DISTRICT JUDGE
412-644-3333

March 10, 1993

Hon. William W. Wilkins, Jr.,
Chairman, U.S. Sentencing Commission
Suite 2-500, South Lobby
One Columbus Circle Northeast
Washington, D.C. 20002-8002

Dear Judge Wilkins:

Re: United States Sentencing Guidelines

I am responding to the invitation of the Sentencing Commission to comment on the proposed amendments to the Guidelines and the proposals of various groups. I have served as a state court trial judge for five years and a federal district court judge for 15 years in a metropolitan area. Hence, I bring to my work a fair understanding of the best and worst of both criminal justice systems in reviewing the Proposed Guideline Amendments. In my judgment, the federal sentencing guidelines are inferior to the state court guidelines in Pennsylvania, and therefore I have scanned the Proposed Amendments in an attempt to select the amendments that will improve the federal sentencing scheme.

Proposed Guideline Amendment No. 1, Pg. No. 1 should be adopted as urged by the Practitioners Advisory Group in Option 1 at Pg. 56. Most citizens and virtually every juror would be shocked to learn that a court is required to include conduct in the sentencing equation that their representatives have found not proven by the prosecution. In addition, any exception to a complete bar of such evidence strikes most informed observers as unfair and one-sided. Prior to the guidelines, federal trial judges did not consider acquitted conduct at the time of sentencing, and the supporters of the guidelines have failed to sustain their burden of proving that § 1B1.3, as constituted, has had any deterrent effect upon aberrant conduct, or has promoted uniformity in sentencing.

Proposed Guideline Amendment No. 10, Pg. 20 should be adopted to promote uniformity of law and introduce common sense in a difficult area of sentencing. The inclusion of uningestible mixtures in the weight of a controlled substance promotes public cynicism and contempt by the offender. It also leads to grossly disproportionate sentences in certain cases and therefore undermines the foundation on which the guidelines are bottomed.

Proposed Amendments 29 and 30 (Judicial Conference) are long overdue. The members of the Commission and staff are fond of stating at various Circuit Judicial Conferences and in other fora that departures are authorized in appropriate cases under the guidelines. The courts of appeals are often blamed by members of the Commission for being too rigid in interpreting the departure provisions. The Criminal Law Committee of the Judicial Conference has now provided the Sentencing Commission with the opportunity to stand up and be counted on this issue.

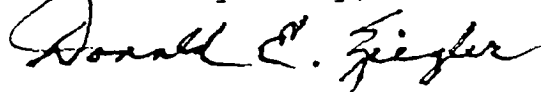
* Proposed Amendments 31, 32 and 33 (American Bar Association) are progressive proposals that recognize that prisons are limited resources that should be reserved for the most serious offenders. They also recognize that for many non-violent offenders there are effective alternative sentences. For many years prior to the guidelines, I kept a record concerning the number of offenders that violated a probationary sentence. The number of violators totalled 15%. This means that 85% of the defendants did not violate probation and for these offenders a non-prison sentence was successful, effective and obviously less expensive.

Proposed Amendments 37 and 38 (Practitioners Advisory Group) are sensible and deserve adoption. They advance uniformity of application and fairness for offenders who do not profit from an offense. This is especially important for non-violent offenders for whom alternatives to total confinement may be entirely appropriate.

Amendment No. 40 (Practitioners Advisory Group) correctly captures the disparate impact of the guidelines upon minorities. The 100 to 1 quantity ratio is irrational and leads to unfair sentences. Quantity based sentencing involving crack cocaine produces sentences, in many cases, that are harsh, have no deterrent impact and are grossly disproportionate. The same reasoning applies to Amendment No. 50 (Federal Offenders Legislative Subcommittee). Congress could not have intended such results.

Thank you for giving me the opportunity to comment on the matters pending before the Sentencing Commission.

Yours very truly,



Donald E. Ziegler

ef

BROWN & MOREHART

ATTORNEYS AT LAW

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Fax (513) 381-1776

Patrick L. Brown
Douglas M. Morehart*

*Also Admitted in Kentucky

March 8, 1993

Mr. Mike Courlander
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: Proposed Amendments to Sentencing Guidelines

Dear Mr. Courlander,

This letter is to provide my input on several of the proposed changes and amendments to the sentencing guidelines. I hope that these are of some use to you as these changes are contemplated. I am limiting my comments to three proposals, but on a broader scale would suggest that the Commission give favorable consideration to all changes which result in a more equitable situation.

Prior to expressing my views I wanted to give some background on myself. I am an attorney in Cincinnati, Ohio. The majority of my practice involves federal criminal sentencings and post-conviction motions related to sentencing. I handle cases in federal court across the country. Because of my work I have become familiar with the contents of the guidelines. It is with this understanding that I provide the following comments.

* The proposal that would permit a District Court Judge to make a downward departure, without the United States Attorney making the request, if the Judge believes the Defendant has provided substantial assistance is one which should be approved. The current scenario permits the United States Attorney to plea bargain with the Defendant and decide after the Defendant provides information whether to make a request for a downward departure. Absent unconstitutional motivation on the part of the U.S. Attorney, there is nothing a Defendant or Judge can do, if the U.S. Attorney does not request a downward departure. This system smacks of unfairness. The U.S. Attorney, gains the information and then can decide not to give the Defendant any credit for it. The Defendant may have already put himself at grave personal risk and additionally is not able to retrieve what he has provided to the U.S. Attorney. Permitting the Judge to have control on this situation would level the playing field and result in a more just situation.

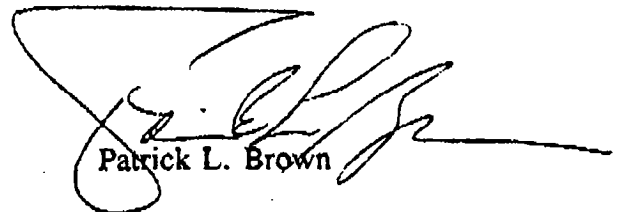
The proposal reducing the top guideline from 43 to 32 is another one which should be approved. The length of sentences in drug cases has simply gotten out of hand. As a society we can not continue to pay the costs of warehousing individuals for twenty and thirty years, especially when they are first time offenders. The comparison is made repeatedly

between violent offenders and drug offenders and the relative disparity in sentences received. The proposed amendment would help alleviate this disparity and more importantly result in sentences, especially for first time drug offenders, which are more in keeping with a system of fairness and justice.

The third proposal I am writing about relates to eliminating the weight of the carrier in LSD cases when calculating the weight of the drugs involved. It is difficult for me to understand the rationale behind adding to the weight of the actual drug the weight of the carrier paper. This would easily result in a situation of a supplier or manufacturer who has not separated the drug into doses and thereby not placed it on carrier paper being treated the same as the street seller because of the added weight of the paper the drug is placed on. Simply, a person should be held accountable for the drugs involved, not the material it is carried on.

I thank you for the opportunity to comment on these specific proposed amendments, and the amendments in general. I hope that the amendments will receive favorable consideration. Additionally, I would welcome the opportunity to provide testimony or additional information at any scheduled hearings on these proposed amendments. If I can be of further assistance please do not hesitate to contact me at (513) 651-9636.

Very Truly Yours,



Patrick L. Brown

PLB\wpf

cc: Congressman David S. Mann

Richard D. Besser

13 Arrowhead Way
Clinton, NY 13323

TEL (315) 853-4370

FAX (315) 853-4371

March 4, 1993

Attn: Public Information
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Gentlemen:

I am writing to voice my opinion on the amendments to the sentencing guidelines that are currently under consideration by your Commission.

While I believe that the entire concept of mandatory minimums is abhorrent and unconstitutional, there are three amendments that I believe rise above the others in importance:

1. Eliminate the carrier in determining sentencing in LSD cases.

2. Reduction in the top guideline level from 43-32.

* 3. Allow Federal Judges to depart from guidelines if he believes the defendant has provided substantial assistance without the approval of the prosecutor.

I am sure you are aware of the inequities in sentencing that result from application of the current guidelines in LSD cases. If not I would offer the following:

One gram of pure LSD (no carrier)=63-78 months, guideline level 26

One gram of LSD on 100 grams of paper=188-235 months, guideline level 36

Reduction of the highest sentence for a first time offender to 121-151 months is a modest reduction at best. Where else in our legal system does a first time offender for a nonviolent crime receive a 10

Richard D. Besser

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year plus sentence, without parole? People who commit armed robbery are let off with less severe sentences. Should the Federal Courts apply sentences that are more severe for nonviolent crimes than the state courts do for violent crimes? I think not.

As to allowing judges to have latitude in sentencing, I would postulate that the justice system was designed to have prosecutors prosecute and judges and juries determine guilt and impose sentences. In Federal drug cases discretion is taken from the judges and given to the prosecutor who's motives are typically self-serving. It appears that in their zealousness to apply justice even-handedly they created a system that recognizes no extenuating circumstances and have denied judges the ability to perform their judicial responsibilities.

It appears to me that your Commission could do a lot to correct these and other inequities in sentencing, to say nothing of what you would do for prison overcrowding and the drain on the Country's resources, both financial and human, by passing these amendments.

As someone who has been personally impacted by these guidelines I would be more than happy to offer additional testimony.

Sincerely,



R.D. Besser

cc: Families Against Mandatory Minimums

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CHARLES W. B. FELS
W. THOMAS DILLARD
DAVID M. ELDRIDGE

WAYNE A. RITCHIE II
KENNETH F. IRVINE, JR.

TELEPHONE
615-637-0661

FAX
615 524-4623

February 25, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Dear Sentencing Commission:

I have reviewed with great interest your 1993 Proposed Amendments to the Sentencing Guidelines. The opportunity to express my concerns, on a few of the proposed amendments, is greatly appreciated. This particular group of amendments addresses several important areas:

A. Relevant Conduct: Amendments #1 and 35 propose two different ways to deal with acquitted conduct. Amendment #35, option 1, proposes a total ban on the use of acquitted conduct. I personally favor this approach. In addition to my personal preference, this is an area that I have discussed with numerous people. Lawyers and non-lawyers alike are often shocked when they learn that conduct, for which a defendant is acquitted, can still be used as relevant conduct. It is fundamental to our system of justice that persons acquitted of criminal charges are not directly or indirectly punished for that conduct.

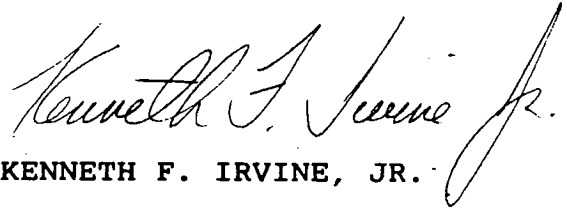
* B. Substantial Assistance: Amendments #24, 31, and 47 suggest several ways to change the current system for determining when substantial assistance has been rendered. This is an area which should be decided by the sentencing court after the government has had an opportunity to state its position. Without question the government's position should be given careful consideration but the ultimate decision should be the court's. It has been my experience that "substantial assistance" varies from one U.S. Attorney's Office to the next and even from one AUSA to the next. Also based on my experiences the decision not to move for a downward departure, based on substantial assistance, has occasionally been arbitrary.

C. Specific Offender Characteristics: Amendment # 29 would give the sentencing courts some flexibility in fashioning an appropriate sentence. While uniformity is an important objective, it should not be the only consideration.

D. Sentencing Options; Non-violent, first offenders: Amendment # 32 would also give sentencing courts more flexibility. Of the two options suggested in this amendment, it seems that an additional ground for departure would be the most effective way to reach this type of offender.

While many other proposed amendments are equally deserving of comment, I am going to limit myself to the four listed above. If the Commission wishes for any additional input from me I am available at your convenience.

Sincerely yours,

A handwritten signature in cursive script, reading "Kenneth F. Irvine Jr.", written in dark ink.

KENNETH F. IRVINE, JR.

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

DATE: February 16, 1993

RE: 24. Issue for Comment.

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

TO: U. S. Sentencing Commission
Public Information

*Often the Government is reluctant to discuss the issue of cooperation with the probation officer beyond an indication that they may file a motion for downward departure to reflect a person's substantial assistance. In this District, the inclusion of this potential as a provision of the plea agreement is all but standard language.

I question how the Court will be able to determine the extent and level of a defendant's cooperation if the Government is not inclined to file a motion. Will the defendant move the Court for such consideration in all cases? The Court will have to hear and litigate all of these motions. The defendant will attempt to prove a mitigating sentencing factor that can only be substantiated by the Government (what, if any benefit it derived from the substantial assistance).

Why does the Commission introduce "first offenders" involved in "non-violent" crimes into the mix since those variables are not mentioned in 18 USC 3553 or Rule 35?

Are we not discussing semantics here. The Court can depart if it finds a factor not adequately considered and that factor should result in a sentence different than the one set out in the guidelines. The Court's departure will stick if it is not appealed or if it can provide ample justification on the record.

Does the avenue to departure really matter? Perhaps you should create a policy statement in Chapter 5, Part K suggesting the Court may depart in cases involving first time offenders involved in non-violent crimes. Care must be taken to clearly define both "first offender" and "non-violent crimes". In the end, this course may be easier.

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February 18, 1993

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, D.C. 20002-8002

Attention: Public Information

**Re: Proposed Guideline Amendments for Public Comment
Amendment Proposal Nos. 24, 31, and 47**

Ladies and Gentlemen:

As a former United States Attorney and current criminal defense practitioner, I wholeheartedly endorse the proposed guideline amendments which would restore sentence reduction authority to the judicial branch.

There is currently no uniformity among the various United States Attorneys' offices with regard to the determination of substantial assistance. Some offices require that the assistance received from a defendant result in an actual conviction of another individual. Such an interpretation can be totally unfair, as it requires both the investigative agency and the prosecutor to agree to the subsequent prosecution--a result which often is determined by factors totally separate and apart from the level of cooperation attributed to the cooperating defendant.

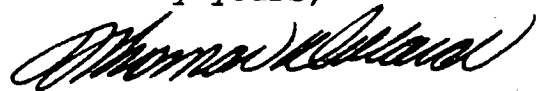
Other U. S. Attorneys' offices appear to have no set policy, and an individual may risk life and limb to obtain the benefits of substantial assistance, only to find that his particular efforts are deemed unworthy.

We need to return to a criminal justice system where prosecutors prosecute and judges judge. An Article III federal judge is the individual who should determine the merit of substantial assistance performed by a defendant. Otherwise,

United States Sentencing Commission
Page 2
February 18, 1993

prosecutors and agents may require an unrealistic level of achievement from a defendant. I therefore heartily endorse this concept and hope that the Commission does approve such an amendment.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "W. Thomas Dillard", written in dark ink.

W. THOMAS DILLARD

WTD:srw

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

CHAMBERS OF
HAROLD D. VIETOR
U. S. DISTRICT JUDGE
U. S. COURT HOUSE
DES MOINES, IOWA 50309

February 9, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Attention: Public Information

This letter sets forth some comments I have concerning proposed guideline amendments. I may supplement these comments with a later letter after I have had an opportunity to examine the proposed guidelines amendments in greater detail.

By and large, the proposed amendments look good to me. I strongly favor proposed amendments 1, 9, 10, 11, 12, 23 and 25.

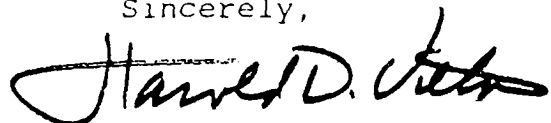
In respect to 13, issue for comment, I believe that section 2D1.1 should be amended to reduce the amount of drugs for which the defendant should be held responsible to the amount that the negotiated payment would fetch on the actual market.

In respect to 24, issue for comment, I believe that the court should have downward departure power for substantial * assistance, without a government motion, when the defendant is a first offender and the offense involves no violence. Indeed, I would prefer an even broader power.

In respect to 40, issue for comment, I believe the Commission should ask Congress to eliminate the 100 to 1 ratio for powder and crack cocaine. The Draconian sentences required for crack offenders are unconscionable.

In respect to 66, issue for comment, I strongly oppose a 4 level enhancement for felonies committed by a member of, on behalf of, or in association with a criminal gang because I believe that such a guideline would be difficult to apply, would border on guilt by association, and would tend to infringe on constitutional rights of free expression and association. It would work far more mischief than good, I fear.

Sincerely,



Harold D. Vietor