PUBLIC COMMENT

for

1993 AMENDMENT CYCLE

UNITED STATES SENTENCING COMMISSION

CUA

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

RE: Proposed Guideline Amendments
for Public Comment - 1993 Cycle

Dear Chairman Wilkins:

On behalf of the Practitioner's Advisory Group (hereinafter called "PAG"), I am writing to you concerning the upcoming amendment cycle. As in the past, I thank you for the opportunity to express the views of the PAG on pending amendments and requests for comments.

TO AMEND OR NOT TO AMEND THE GUIDELINES

A significant debate has begun both within and outside of the Sentencing Commission concerning the propriety of continuously amending the Guidelines. 28 U.S.C. §991(b)(1)(C) requires that "The Commission develop means of measuring the degree to which the sentencing, penal and corrections practices are effective in meeting the purpose of sentencing ... " 28 U.S.C §994 (o) requires the commission to "periodically review and revise.... the guidelines promulgated pursuant to this section." This same statute requires an annual review of the operation of the Guidelines with suggested changes.

It appears that Congress contemplated continued fine tuning of the guidelines sentencing process with at least an annual review of that process culminating in amendments if appropriate. It appears that Congress did not intend that amendments be required annually but such amendments are clearly permitted.

The arguments put forth in support of the practice of amendments is that at least during the initial period of guidelines application there is a need for adjustments in the process which completely altered how sentencing is accomplished in Federal court. The guidelines

are still relatively young; indeed, one of the attributes of a guidelines system is the ability to change practices based on experience gained from the application of the guidelines, while at the same time continuing to promote uniformity in sentencing.

Those who have begun to voice concerns about the continuing amendment process have criticized a perceived IRS-type code mentality with constant changes resulting in confusion, misapplication and the reappearance of disparate sentencing practices based upon institutional disparity resulting from continual Commission and congressional action. The critics point out that for sentencing to be an effective crime deterrent punishment must be certain and consistent, and a system which continually changes cannot be either.

The PAG finds merit in both of the above arguments. Continuous substantive changes in guidelines would result in institutional disparity with one's sentence being potentially dependent upon substantive changes taking place in the amendment cycle immediately preceding one's crime. On the other hand Congress clearly intended for the guidelines sentencing process to be dynamic and not stagnant with changes occurring as dictated by experience, especially in the initial application period in response to actual guidelines utilization.

The Commission's five-year practice of restrained change appears to appropriately balance these competing interests. In fact, the PAG has recommended less restraint and more substantive changes during past cycles than we are advocating during this amendment cycle. It would be unfortunate if the argument against any change prevailed in this amendment cycle in that many of the current proposals represent the culmination of area review or working groups final reports which have taken either one year or several cycles to complete. Changes which experience has shown are necessary to promote the purposes of sentencing should be enacted if the Commission is to truly abide by the duties which were entrusted to it by Congress in enabling legislation.

SPECIFIC AMENDMENT PROPOSALS

The PAG has broken down its comments into three areas: (1) Proposed Drug Amendments (numbered paragraph 1); (2) Proposed Tax Amendments (numbered paragraph 2); and (3) other proposed amendments which are covered sequentially (numbered paragraphs 3-22).

COMPREHENSIVE PROPOSAL FOR DRUG OFFENDERS

1. Proposed Amendments 8-12 - Drug Trafficking and Role in the Offense - The PAG prefers the Comprehensive Proposal for Drug Offenders that forms the basis of our Proposed Amendment number 39. Our original proposed amendment number 39 was published as pages 57-63 of the "reader friendly" proposed guideline

amendments. Attached to this letter is our "new" proposed amendment number 39, which contains changes as a result of further reflection and as a result of a consensus reached at the Practitioners' Advisory Group meeting held on February 22, 1993. The PAG rational for our proposed amendments in the drug area is as follows:

One of the most troublesome aspects of the sentencing guidelines revolves around controlled substances. Judges, defense lawyers, probation officers and even prosecutors have focused criticism on four major areas. First, it is argued that by centering drug sentences on the quantity of controlled substances, other aspects of drug crimes such as violence, organization, profits and obstruction of justice are inappropriately diminished as factors which influence sentencing, especially at the higher ranges where these aggravating characteristics are most likely to occur. Second, critics have argued that the establishment of drug crime mandatory minimum sentences in the Crime Control Acts of 1986 and 1988 inappropriately influenced the sentencing levels set by the Sentencing Commission for all drug crimes, even those not subject to the congressional mandate. Third, it has been argued that the Commission's failure to more fully define the mitigating factors of minor and minimal participants has resulted in a disparate application of this critical aspect of drug sentencing. Finally, there has been vocal protest that the drug guidelines treat less significant participants in concerted drug activity too harshly. Critics argue that usually overkill results when a lower level defendant, because of the application of relevant conduct principles, is credited with most or all of the substances distributed by all the participants in jointly undertaken drug activities.

The PAG believes that many of these criticisms have merit. Because the critical interplay between role in the offense adjustments, specific offense characteristics and drug quantity significantly influences the final sentence in drug crimes, the PAG believes that a comprehensive integrated proposal which addresses all of these critical aspects is the approach most likely to correct what currently is an imperfect system for sentencing drug offenders.

The PAG has closely examined various proposals and has synthesized those changes which would have the most impact on current inequities. The central guiding principles of the changes proposed are the underlying justifications for sentencing codified in 18 U.S.C., §3553(a)(2). Only changes which offer significant increases in deterrence, protection and just punishment should be adopted by the Commission now that the guidelines have in large part been successfully tested in the Courts. The PAG believes that the changes proposed are necessary when considered in light of these guideposts of deterrence, protection and just punishment.

SPECIFIC OFFENSE CHARACTERISTICS

The increasing possession, display and use of firearms in drug crimes remains a societal problem which demands increased protection. The PAG believes that an incremental rise of 2 and 4 levels for increasingly serious conduct involving firearms can provide increased protection and deterrence which is needed and warranted when firearms are used to facilitate drug offenses. In fact, 15% of all drug offenders sentenced in 1991 in Federal Court possessed firearms. In contrast, only 3% were career offenders. The current two-level increase for possession, or the threat of a 924(c) prosecution for use or carrying, does not adequately address the use of weapons in drug crimes. Our new incremental proposal (a 2 level increase for possession of a dangerous weapon and a 4 level increase for use of a dangerous weapon) forms an important link to the proposal which follows to emphasize aggravating and mitigating factors in drug crime sentencing.

As quantity somewhat decreases in importance in drug crimes, role in offense increases in importance. The PAG does not believe any further distinction should be drawn between organizations which employ more than 5 individuals. It may take only a few pilots to smuggle large amounts of cocaine, while it may take 225 off-loaders to smuggle a large amount of marijuana, so that at the upper levels, numbers of participants become less relevant. The result is that persons who qualify for level 38 quantity, who are organizers, but who fully accept responsibility, would not receive the maximum penalty unless they obstructed justice or otherwise engaged in other aggravating conduct. Again, quantity is adequately considered under the PAG proposal, but leadership and obstruction are also re-established as critically important factors, as they should be, in a system grounded on protection and deterrence.

DRUG TABLE

When the Commission originally structured §2D1.1, the drug quantity tables ended at level 36, but the table was later amended to level 42. The Commission also keyed the offense levels for drug amounts which corresponded to the 10-year (1 kilogram of Heroin, 5 kilograms of Cocaine, 1,000 kilograms of Marijuana, etc.) and 5 year (100 grams of Heroin, 500 grams of Cocaine, 100 kilograms of Marijuana, etc.) mandatory minimums at guideline ranges so that the mandatory minimums were encompassed by the low point in the corresponding range rather than the high point in that range. The result of these two fundamental decisions have made drug quantity the linchpin in federal sentencing for controlled substances violators. The PAG recognizes that mandatory minimums must play a role in designing sentences for all drug defendants and that because mandatory minimums focus on drug quantity, the guidelines must reflect such a focus. The PAG thus rejects proposals which inappropriately diminish these aspects. However, both the selection of a low point keyed to the mandatory minimum and the increase of the tables up to the

maximum level of 42 have severely overemphasized quantity in achieving the final sentence for the drug offender. The PAG believes that this overemphasis on quantity provides less rather than more protection to citizens of the United States.

The guidelines system is significantly built on the underlying theoretical justification of deterrence. Potential defendants are discouraged from committing crimes, and persons who committed lesser offenses are deterred from aggravating their conduct because increasing penalties are prescribed.

The Commission has identified certain specific aggravating factors which increase a defendant's sentence so as to deter persons from engaging in such acts.

The entire guidelines system presupposes that the more aggravated a crime becomes the higher the sentence should be so that the system is designed to punish in a graduated manner with incremental increases as conduct becomes more serious so that society is protected from the serious offender.

Unfortunately, the current guidelines contain no incentive for persons distributing larger quantities of substances to desist from engaging in aggravating conduct, because at the upper end of the guidelines quantity determines the maximum sentence without regard to aggravating factors. There is no differentiation between the large quantity dealer who uses a firearm (15%), who obstructs justice (5%), who uses special skills (1%), or who realizes substantial gain, from the large scale dealer who does not engage in such conduct. In essence, for the level 42 dealer, the guidelines speak words of encouragement to obstruct justice because the dealer's sentence is only determined by quantity, and if the dealer successfully obstructs justice, the dealer may receive no sentence at all.

The larger scale, non-violent drug dealer who uses no weapon, pays no hush money, bribes no official, and uses no special skill should not receive the same sentence, simply because of quantity, as the dealer who does engage in such aggravating conduct.

By adjusting the guidelines downward so as to further punish those upper end drug defendants who committed egregious acts in furtherance of their drug enterprises, the Commission can reestablish deterrence as an element of sentencing for these offenders without violating the intent of Congress which established mandatory minimums. The PAG proposal would establish level 38 as the upper end for quantity. The proposed departure is eliminated for truly unusually large quantities so as to emphasize aggravating factors which are also expanded under our proposal. The PAG proposal also would key the mandatory minimum to the upper end of the guideline range so that persons below that range would be sufficiently deterred from larger scale distributions and to provide more emphasis on aggravating factors. These proposals preserve quantity as an important factor

but contain the additional benefits of protecting society by discouraging offenders from aggravating their conduct. Only 3% of all drug offenders are career offenders, yet Congress and the Commission have focused attention on this group. The PAG proposal impacts upon 15% to 20% of offenders while preserving congressional mandates.

Finally, a base offense level cap of level 32 for serious drug offenses and a base offense level cap of 26 for offenses involving all other controlled substances for those defendants who qualify for a mitigating role adjustment, protects against overly harsh sentencing for defendants who are only peripherally involved in the offense.

ROLE IN OFFENSE

Mitigating Role

The PAG believes its proposal to clarify by example those who qualify for mitigating treatment in concerted activity will significantly end disparity in this area.

Deleting the language concerning the lack of knowledge of the scope of the activity, which is contained in the subgroup proposal, was accomplished because such knowledge and lack thereof can play a significant role in the newly redesigned rules of application for relevant conduct and should therefore play no part in determining mitigating role. If the defendant is responsible for all jointly undertaken activities, but played a minor or minimal role, he qualifies for a reduction. If he was only aware of a small part of the offense conduct, but was not a minor participant in the conduct he was aware of, his overall offense level may be diminished but not because of a downward role adjustment.

Also, the PAG sees no reason to treat "mules" any differently than sellers, financiers, or owners and includes transporters so that they are treated in the same manner as these persons.

Because of the increases proposed for firearms possession as specific offense characteristics, the PAG believes a disqualification for firearms possession is no longer appropriate. Using the "Pinkerton" theory to saddle a significantly minimal participant with the principal organizer's weapon is a concept which should be rejected because it blurs the organizational lines between such participants. Minimal offenders who actual possess weapons will receive incremental increases as a deterrent to weapon possession. Persons who induce others to possess or use weapons also are included in this specific offense characteristic.

The PAG believes that the changes proposed enhance the underlying purposes of sentencing, diminish disparate treatment and ameliorate the sentences for minor and

minimal participants in drug distribution activity while continuing to provide significantly just punishment for these serious federal offenders. The PAG believes that the changes proposed substantially contribute to forming a more perfect guidelines sentencing structure. The PAG believes that if this package of amendments is adopted as a whole, the concerns articulated by the Judicial Advisory Group resulting from a simple reduction in base offense levels are in large part eliminated because of the re-emphasis on aggravating factors created by the balance of the provisions in this package of amendments.

PROPOSALS RELATING TO TAX OFFENSES

This report comments on the proposed amendments to the federal sentencing guidelines affecting prosecutions for tax offenses. The amendments published by the Sentencing Commission for public comment would delete the enhancements for "more than minimal planning" and "sophisticated means" used in connection with fraud-related and tax offenses in Sections 2B, 2F and 2T, and substitute increases in the loss tables, consolidate the guidelines for tax offenses in Section 2T, and create a uniform definition of "tax loss." The proposals published at the request of the Internal Revenue Service would restructure the guidelines applicable to most tax felonies to provide for a fixed base offense level and an incremental enhancement for tax losses. All reference to the tax loss table in §2T4.1 is deleted. The IRS also seeks to modify the Chapter 3 grouping rules to increase offense levels for certain grouped offenses, proposes a new offense guideline for the non-violent aspects the omnibus criminal provision in 26 U.S.C. §7212(a), and puts forth proposed enhancements to the narcotics and money laundering offenses that would apply when there is evidence of unreported income.

SUMMARY

The PAG opposes the Commission's proposal to delete the enhancements for "more than minimal planning" and "sophisticated means" used to calculate the sentencing range for fraud-related and tax offenses and use an increase in the loss tables as a surrogate. The PAG favors the proposal to consolidate the tax guidelines and to simplify the definition of "tax loss" by using a uniform standard that allows the actual loss of revenue to the government to rebut an artificial construction of a defendant's tax liability. The PAG opposes new commentary in Section 2T that would cumulate the tax loss on individual and corporate returns involved in a single course of conduct on the grounds it constitutes invidious double counting.

The PAG takes no position on the IRS proposals that generally increase the sanctions for tax crimes and increase the offense levels determined when two or more counts are grouped. The PAG prefers the tax loss definition suggested in the amendments for public comment over the IRS formulation which relies more heavily on

artificial constructs of a defendant's tax liability than on the actual tax loss suffered by the government. The PAG expresses no opinion on the IRS' proposed guideline for violations of 26 U.S.C. §7212(a). Finally, the PAG opposes the IRS proposal to add an enhancement to the narcotics and money laundering guidelines for unrelated and uncharged tax offenses.

Proposed Amendment number 5 - Fraud, Theft, Tax -

1. Summary of Guideline

The guidelines for larceny, fraud-related offenses, and tax crimes include an enhancement when the defendant's conduct involves more planning or sophistication in committing the offense than would otherwise be typical or required to support a conviction. In the larceny and fraud-related guidelines the enhancement applies to "more than minimal planning."[1] In the tax context, the enhancement applies when a defendant uses "sophisticated means" to prevent the offense from being detected.

The General Application Principles in Chapter One instruct that the "more than minimal planning" enhancement for larceny and fraud offenses is appropriate in three situations: (1) where the offense involves "more planning than is typical for commission of the offense in a simple form," (2) where "significant affirmative steps were taken to conceal the offense," and (3) "in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." U.S.S.G. §1B1.1, comment. n.1(f). See also United States v. Rust, 976 F.2d 55 (1st Cir. 1992).

In the guidelines for tax offenses, the enhancement is to be used "if sophisticated means were used to impede discovery of the nature or extent of the offense." See, e.g., U.S.S.G. §2T1.1(b)(2). Like the enhancement for "more than minimal planning" the standard is subjective and only generally defined. See United States v. Brinson, No. 90 CR 273-1, 1991 WL 235925 at *4 (N.D. Ill. Oct. 30, 1991) ("whether 'sophisticated means' were employed (§2T1.1(b)(2)") requires a subjective determination similar to that in §2F1.1(b)(2) (citation omitted)). It "includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case." U.S.S.G. §2T1.1, comment. (n.6). By way of illustration, the guidelines suggest that the enhancement is applicable "where the defendant used offshore bank accounts, or transactions through corporate shells." Id.

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[1]Under the fraud and deceit guideline the enhancement is worded in the disjunctive and applies either to "more than minimal planning" or "a scheme to defraud more than one victim." U.S.S.G. §2F1.1(b)(2).

Amendment No. 5 would delete entirely the specific offense characteristic for "more than minimal planning" employed in the guidelines for larceny, fraud and insider trading[2] and the correlative specific offense characteristic for "sophisticated means" employed in the guidelines for tax offenses.[3] As a surrogate, changes would be made to the applicable loss tables resulting in a two level increase over the November 1, 1992, guidelines for loss amounts greater than $40,000. Additionally, this amendment would modify the loss tables in Sections 2B, 2F and 2T to use a more constant rate of increase in the loss increments and to increase the offense levels for cases that involve exceptionally high losses. The proposed changes to the loss tables are set forth below:

Larceny, §2B1.1(b)(1)

Increase in Level	Loss (Current)	Loss (Proposed)
No increase	$100 or less	$600 or less
Add 1	More than $100	More than $600
Add 2	More than $1,000	More than $1,000
Add 3	More than $2,000	More than $1,700
Add 4	More than $5,000	More than $3,000
Add 5	More than $10,000	More than $5,000
Add 6	More than $20,000	More than $8,000
Add 7	More than $40,000	More than $13,500
Add 8	More than $70,000	More than $23,500
Add 9	More than $120,000	More than $40,000
Add 10	More than $200,000	More than $70,000
Add 11	More than $350,000	More than $120,000
Add 12	More than $500,000	More than $200,000
Add 13	More than $800,000	More than $325,000
Add 14	More than $1,500,000	More than $550,000
Add 15	More than $2,500,000	More than $950,000
Add 16	More than $5,000,000	More than $1,500,000
Add 17	More than $10,000,000	More than $2,500,000
Add 18	More than $20,000,000	More than $4,500,000
Add 19	More than $40,000,000	More than $8,000,000

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[2] See U.S.S.G. §§ 2B1.1, 2B1.2, 2B1.3, 2B4.1, 2B5.1, 2B6.1, 2F1.1, and 2F1.2.

[3] See U.S.S.G. §§ 2T1.1(b)(2), 2T1.2(b)(2), 2T1.3(b)(2); 2T1.3(b)(2), 2T1.4(b)(2), and 2T1.3(b)(1).

Add 20	More than $80,000,000	More than $13,500,000
Add 21		More than $23,500,000
Add 22		More than $40,000,000
Add 23		More than $70,000,000
Add 24		More than $120,000,000

Fraud and Deceit, §2F1.1(b)(1)

Increase in Level	Loss (Current)	Loss (Proposed)
No increase	$2,000 or less	$1,700 or less
Add 1	More than $2,000	More than $1,700
Add 2	More than $5,000	More than $3,000
Add 3	More than $10,000	More than $5,000
Add 4	More than $20,000	More than $8,000
Add 5	More than $40,000	More than $13,500
Add 6	More than $70,000	More than $23,500
Add 7	More than $120,000	More than $40,000
Add 8	More than $200,000	More than $70,000
Add 9	More than $350,000	More than $120,000
Add 10	More than $500,000	More than $200,000
Add 11	More than $800,000	More than $325,000
Add 12	More than $1,500,000	More than $550,000
Add 13	More than $2,500,000	More than $950,000
Add 14	More than $5,000,000	More than $1,500,000
Add 15	More than $10,000,000	More than $2,500,000
Add 16	More than $20,000,000	More than $4,500,000
Add 17	More than $40,000,000	More than $8,000,000
Add 18	More than $80,000,000	More than $13,500,000
Add 19		More than $23,500,000
Add 20		More than $40,000,000
Add 21		More than $70,000,000
Add 22		More than $120,000,000

Tax Table, §2T4.1

Offense Level	Tax Loss (Current)	Tax Loss (Proposed)
6	$2,000 or less	$1,700 or less
7	More than $2,000	More than $1,700
8	More than $5,000	More than $3,000
9	More than $10,000	More than $5,000
10	More than $20,000	More than $8,000
11	More than $40,000	More than $13,500
12	More than $70,000	More than $23,500
13	More than $120,000	More than $40,000
14	More than $200,000	More than $70,000
15	More than $350,000	More than $120,000
16	More than $500,000	More than $200,000
17	More than $800,000	More than $325,000
18	More than $1,500,000	More than $550,000
19	More than $2,500,000	More than $950,000
20	More than $5,000,000	More than $1,500,000
21	More than $10,000,000	More than $2,500,000
22	More than $20,000,000	More than $4,500,000
23	More than $40,000,000	More than $8,000,000
24	More than $80,000,000	More than $13,500,000
25		More than $23,500,000
26		More than $40,000,000
27		More than $70,000,000
28		More than $120,000,000

We oppose the portion of this proposed amendment that would delete the enhancement for "more than minimal planning" and "sophisticated means" and substitute a two level increase in the loss tables. This proposal is philosophically, practically, and legally flawed. Deleting the enhancement is inconsistent with the underpinnings of the guidelines because it removes a valid sentencing variable from consideration and increases the opportunities for sentencing disparity. Moreover, phasing out the planning and sophistication enhancements undercuts the effort to increase offense levels where extremely high losses are involved. As a practical matter, the amendment erroneously presumes that a measure of the quantitative monetary loss suffered by the victim or society is a rational surrogate for the qualitative acts of the defendant when he commits the offense. In the context of the case law, the proposed amendment appears to

eliminate a double counting problem that to date has gone unrecognized in the published opinions. The problem that appears in the application of this enhancement is its overuse where there are "repeated acts" otherwise already taken into consideration by the loss tables, and the tendency to confuse the number of acts with thorough planning.

The proposed amendment is philosophically inconsistent with the Sentencing Commission's goals of increasing deterrence, reducing sentencing disparity, and distinguishing between offenses committed on the spur of the moment and those that require forethought and preparation. See, e.g., U.S.S.G. §1B1.1, comment. (n.1(f)). If there is validity to the proposition that "[t]he 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," the enhancement for more than minimal planning and sophistication should be retained so that the courts have an articulated basis in the guidelines for distinguishing such offenses at sentencing. See U.S.S.G. §2F1.1, comment. (backg'd.) (emphasis added). The current guidelines contain a framework that the courts can use to assess the defendant's conduct. When a defendant's criminal activity involves only minimal planning, no enhancement is called for under the guidelines. When a defendant's preparations for carrying out the offense are "more than" minimal or the defendant utilizes sophisticated means to avoid detection, the guidelines provide for a two level increase in the offense level. Finally, when a defendant takes "extraordinary" measures to conceive, execute and conceal the offense of conviction and the relevant conduct, an upward departure is warranted. Eliminating the sentencing variable for planning and sophistication risks losing sight of the goal of deterring sophisticated criminals by punishing them more severely than those who commit the typical offense and offers a greater opportunity for sentencing disparity. See U.S.S.G. §2T1.1, comment. (backg'd.); United States v. Werlinger, 894 F.2d 1015, 1018 (8th Cir. 1990) ("a major purpose of providing individualized, conduct-related adjustments is to ensure different sentences for criminal conduct of different severity.... [D]ouble counting is inconsistent with this goal").

Monetary loss is not a rational surrogate for forethought, planning and sophistication. There is no rational basis for assuming that it necessarily takes more planning to steal $10 by false pretenses than it takes to steal $10,000. See United States v. Meek, 972 F.2d 1346 (9th Cir. 1992), pet. for cert. filed, _____ U.S.L.W. _____ (U.S. Nov. 16, 1992) (text in Westlaw). Similarly, when a defendant submits a false travel voucher to the state for reimbursement, there is no qualitative difference between a $1,700 alteration and a $17,000 alteration. See United States v. Rust, 976 F.2d 55, 56 (1st Cir. 1992). Yet, under the proposed amendment, there would be no enhancement for the former and a four level increase for the latter. There can be large loss cases where no planning, no repetitive acts, and no significant acts to conceal the conduct were involved. Cf. U.S.S.G. §2F1.1, comment. (n.10) ("[i]n a few instances the loss determined

[from the loss table] may overstate the seriousness of the offense"). By like token, a well-planned and concealed fraud may produce little or no monetary loss.

Reviewing the proposed amendment in light of the published case law suggests that this proposal seeks to eradicate a non-existent double counting problem. The guidelines acknowledge that certain offenses, even in their "simple form," require more than minimal planning. For example, where the offense "substantially jeopardize[s] the safety and soundness of a financial institution," courts are instructed there shall be a rebuttable presumption that the offense involved "more than minimal planning." U.S.S.G. §2F1.1, comment. (n.18) (emphasis added). In the tax guidelines, the commentary observes that "tax evasion always involves some planning." U.S.S.G. 2T1.1, comment. (backg'd.). See United States v. Beauchamp, _____ F.2d _____, 1993 WL 30804 at *4 (1st Cir. Feb. 16, 1993) ("[c]rimes of fraud and deceit by their very nature may, and often do, compel, quite predictably, later efforts at a cover-up"); United States v. Lennick, 917 F.2d 974, 979 (7th Cir. 1990) (applying enhancement "to factual scenarios involving clear examples of ... complex criminal activity"); United States v. Fox, 889 F.2d 357, 361 (1st Cir. 1989); ("[we] cannot conceive of how obtaining even one fraudulent loan would not require more than minimal planning"); United States v. Kaufman, 800 F. Supp. 648, 655 (N.D. Ind. 1922) (refusing to find that a scheme involving a second set of corporate books to facilitate tax evasion "was more complex or demonstrated greater intricacy ... than a routine tax evasion case"). Cf. United States v. Sanchez, 914 F.2d 206, 207 (10th Cir. 1990) (upholding enhancement because the offense involved "several calculated falsehoods"). Compare United States v. Maciaga, 965 F.2d at 408 ("a simple step to hide [the] crime ... does not amount to 'more than minimal planning'").

Accordingly, the base offense level for larceny, fraud-related and tax offenses already incorporates the "simple form" planning in the conception, execution or concealment phases. The enhancement is appropriate only when this basic degree of planning has been exceeded. See United States v. Georgiadis, 933 F.2d 1219, 1226 (3d Cir. 1991) ("§2B1.1(b)(1) calibrates punishment to the magnitude of victim injury and criminal gains ... 'more than minimal planning' considers the deliberative aspects of a defendant's conduct and criminal scheme"). Since the base offense level contemplates the ordinary planning necessary to commit the offense, and the enhancement applies only to incremental additional planning, there is no double counting. See United States v. Wilson, 955 F.2d 547, 550 (8th Cir. 1992); Cf. United States v. Curtis, 934 F.2d 553, 556 (4th Cir. 1991). Finally, this proposal is unnecessary. Prison sentences for those whose crimes result in greater losses can effectively be lengthened by adopting that portion of the amendment that modifies the loss tables and leaving the "more than minimal planning" and "sophisticated means" enhancements in place to be independently evaluated.

Rather than eliminating the enhancement, the PAG suggests that it be clarified so that it focuses on the kinds of planning and sophistication that cannot be quantitatively measured. The "repeated acts" prong can be deleted without disturbing the purpose of the enhancement because where there are repeated acts of fraud by definition there will be increases in the losses and concomitant increases in the offense level.

Proposed Amendment number 21 - Tax -

Summary of Guidelines

In the sentencing guidelines as amended on November 1, 1992, there are 12 tax guidelines in Section 2T. Nine relate to income tax offenses, including tax evasion, tax perjury, willful failure to file or supply information, aiding and assisting in the preparation of a false return, and conspiracy to defraud the United States.[4] U.S.S.G. §§2T1.1- 2T1.9. Two deal with non-payment of taxes and regulatory offenses in connection with alcohol and tobacco tax offenses. U.S.S.G. §§2T2.1 - 2T2.2. One relates to evading import duties, smuggling and receiving or trafficking in smuggled property. U.S.S.G. §2T3.1.

There is substantial overlap in the five guidelines related to tax evasion, willful failure to file, tax perjury, aiding and abetting tax fraud, and filing false returns (U.S.S.G. §2T1.1 - 2T1.5). All but the guideline for filing a false return use the tax loss table in §2T4.1 to determine the base offense level and enhance the level if the offense involves more than $10,000 of income from criminal activities or "sophisticated means" were used to impede discovery of the nature or extent of the offense.[5] However, each guideline utilizes a different definition of "tax loss," which is the key determinant of the sentence.

This amendment would consolidate the guidelines for tax evasion, willful failure to file, tax perjury, and false tax returns into one guideline. The base offense level would be the greater of the level taken from the tax table in §2T4.1, or six, in instances where

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[4]Although the conspiracy statute does not appear in the Internal Revenue Code, tax-related indictments often include a charge of defrauding the United States by impeding or obstructing the lawful governmental functions of the IRS in ascertaining and collecting taxes in violation of 18 U.S.C. §371. See United States v. Klein, 247 F.2d 908 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958).

[5]The PAG's comments on the proposed amendments affecting the specific offense characteristic related to "sophisticated means" appear in the discussion of Amendment No. 5, supra.

there is no tax loss. There would be two specific offense characteristics each calling for a two level enhancement. One would apply "if the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity" (the same as in the current guidelines). A second would apply "if sophisticated means were used to impede discovery of the existence or extent of the offense."

This proposal would adopt a uniform definition of "tax loss" based on a series of rebuttable presumptions tailored to the nature of the offense or the actual amount that was the object of the evasion, or that the taxpayer owed and did not pay. The amendment also contains two new Application Notes related to the "tax loss" definition. As proposed, the commentary would provide that "the rebuttable presumption is to be used unless the government or defense provides sufficient information for a more accurate assessment of the actual tax loss." The proposed commentary would also provide that "if the offense involves both individual and corporate tax returns, the tax loss is the cumulative tax loss from the offenses taken together."

Finally, this Amendment contains minor clarifications of the specific offense characteristics related to professional return preparers convicted of aiding and abetting tax fraud in §2T1.4, and conduct to encourage others to commit tax crimes or participate in Klein conspiracies encompassed in §2T1.9. The amendment also contains proposals to conform the grouping guidelines in §3D1.2(d) to the proposed consolidation in Section 2T.

The PAG favors simplifying the guidelines for tax offenses. The proposed consolidation does not alter the structure of the tax guidelines or their substantive operation. The only change that would result would be a one level increase in the base offense level applicable to convictions for willful failure to file a return currently set at one level less than the amount derived from the tax table or five where there is no tax loss.

The PAG also favors adoption of a more workable definition of the "tax loss" to be used in calculating the base offense level. The current framework -- with four different definitions and numerous variables -- has led to inconsistent interpretations. Some courts look to the actual tax loss; some use other formulations. Compare United States v. Schmidt, 935 F.2d 1440 (4th Cir. 1991) with United States v. Brimberry, 961 F.2d 1286 (7th Cir. 1992).

The PAG favors the adoption of a uniform definition of "tax loss." A single tax loss definition that utilizes presumptions rebuttable by evidence of the actual tax loss to the government would eliminate the confusion and allow sentences to be determined based on the actual tax loss as computed in accordance with the Internal Revenue Code.

The only aspect of this amendment that the PAG opposes is the new Application Note that provides "if the offense involves both individual and corporate tax returns, the tax loss is the cumulative tax loss from the offenses taken together." This provision constitutes blatant double counting when applied to a single course of criminal conduct and flies in the face of the changes to the "tax loss" definition in which the actual loss of revenue to the government is preferred over an artificial construction of the loss based on rebuttable presumptions.

Assume the following factual scenario: The defendant skims money from his employer and alters the corporate books and records to conceal the amount diverted. He fails to report the diverted income on his individual income tax return and causes the corporation to file a false return that understates its corporate revenue. He pleads guilty to one count of income tax violation in connection with his individual tax return. There is only one source of income, i.e., the $1 paid to the corporation is the same $1 diverted by the defendant.

The proposed application note presumes that each $1 diverted by the defendant constitutes $2 taxable income: $1 of income on which the corporation is liable for taxes and $1 of taxable income to the defendant. A "tax loss" based on this formulation double counts one course of conduct to arrive at an artificial "tax loss" incurred by the government.

The Supreme Court requires a clear expression of legislative intent before sentence enhancement provisions can be applied cumulatively. See Busic v. United States, 446 U.S. 398, 403-404 (1980); Simpson v. United States, 435 U.S. 6, 12-13 (1978). Coupled with the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," Id. at 14 (citation omitted), in the context of determining a sentencing factor cumulative punishment for the same conduct would be impermissible absent specific recognition and authority from the Commission and the Congress. The rule, to date, has been that one course of conduct should not be cumulatively punished under the guidelines. See United States v. Lamere, 980 F.2d 506, 517 (8th Cir. 1992); (an enhancement based on "conduct that [is] coterminous with the conduct for which [the defendant is] convicted" constitutes impermissible double counting); United States v. Romano, 970 F.2d 164, 167 (6th Cir. 1992) ("the Commission did not intend for the same conduct to be punished cumulatively"); United States v. Werlinger, 894 F.2d 1015, 1018 (8th Cir. 1990) ("the Sentencing Commission did not intend for multiple Guidelines sections to be construed so as to impose cumulative punishment for the same conduct"). There is no basis for departing from this rule to calculate a tax loss especially where the result would overstate the actual loss of revenue to the government.

PROPOSED TAX AMENDMENTS PUBLISHED AT THE REQUEST OF THE IRS

Proposed Amendment number 41 - Tax - (I.R.S. Proposal)

Summary of Guideline

The IRS proposes to rewrite §2T1 in its entirety. The guidelines in Sections 2T1.1 through 2T1.9 would be replaced in toto. The commentary would also be revised. The IRS would increase base offense levels, adopt a uniform definition of "tax loss," and create a new offense guideline for certain non-violent violations of 26 U.S.C. §7212(a). The IRS would abandon the current structure of the tax guidelines which uses tax losses and the tax table in §2T4.1 to determine a base offense level where there is a tax loss, and a fixed level where there is no loss. In its place, the IRS proposes to fix the base offense level for felonies at nine for failure to file and ten for tax evasion, tax perjury and Klein conspiracies. A new specific offense characteristic would enhance the base offense level where the "tax loss" from the defendant's conduct exceeded $10,000. Using the same incremental increases employed in the November 1, 1992, tax table (not the increments appearing in proposed Amendment No. 5), the enhancement ranges from a low of one additional level for a tax loss of more than $10,000 but less than $20,001 to a high of 10 additional levels when the tax loss exceeds $800,000. The IRS would define "tax loss" for the purposes of this guideline as "the amount of loss that was the object of the evasion or fraud." A simple set of facts will illustrate the differences between the IRS proposal and the combined impact of proposed Amendments No. 5 and 21. Assume that a defendant is convicted of one count of tax evasion. Although the indictment alleges that the defendant attempted to evade $1.0 million of tax, at the sentencing hearing, the defendant establishes that the actual tax loss to the government was only $600,000. All of the income at issue is from legal sources. The defendant did not use sophisticated means to impede discovery of his offense, and no other guideline adjustments are applicable. Under the IRS proposal, the tax loss would be the entire $1 million, and the base offense level would be 20 (10 for tax evasion plus an enhancement of 10 for a tax loss greater than $800,000). Under proposed Amendment No. 21, the tax loss would be $600,000. Using the tax loss table appearing in proposed Amendment No. 5, a tax loss of $600,000 would yield a base offense level of 18.

The commentary proposed by the IRS provides for a rebuttable presumption that the tax loss would be determined by applying the defendant's applicable tax rate to the total amount that the defendant attempted to evade, the amount of omitted income, the improper deduction or tax credit, and so forth. Furthermore, while these calculations could be overcome by "credible evidence" produced by the defendant that the tax loss "was different," the defendant would be prohibited from showing "that the actual tax loss was less than the amount calculated ... by asserting that the intended loss was less than

that which would have resulted had the scheme succeeded." The IRS also proposes a new offense guideline to be used for violations of 26 U.S.C. §7212(a), pertaining to "corrupt endeavors to obstruct or impede the due administration of the internal revenue laws" excluding those involving forcible threats or interference which would continue to be addressed by the assault guidelines in §2A2.2 and §2A2.3, as suggested in the Commission's statutory appendix.

While the PAG expresses no opinion on whether there should be an increase in the base offense levels for tax crimes, it prefers the "tax loss" formulation appearing in proposed Amendment No. 21 over the IRS proposal. The IRS proposal ignores the actual impact of the defendant's conduct and would put artificial constraints on a defendant's ability to rebut tax loss calculations made by the government. The PAG expresses no opinion on whether it is necessary or desirable to adopt a new offense guideline for violations of 26 U.S.C. §7212(a).

Proposed Amendment number 42 - Grouping Rules - (I.R.S. Proposal)

Summary of Guideline

Guideline §3D1.2 sets forth the criteria for grouping multiple counts involving "substantially the same harm". The specific section addressed by proposed Amendment No. 42 provides that two (or more) counts shall be grouped when one embodies conduct that is treated as a specific offense characteristic in (or other adjustment to) the guideline applicable to another count. U.S.S.G. §3D1.2(c). The rules for determining the offense level applicable to counts grouped in accordance with §3D1.2(c) appear in §3D1.3(a). When counts are grouped pursuant to §3D1.2(c), the offense level applicable to the group is the offense level for the most serious single count within the group. Guideline §2D1.1 applies to certain narcotics crimes and violation of the continuing criminal enterprise ("CCE") statutes. Guideline §2S1.1 applies to certain money laundering activities.

This Amendment has two options. In Option One, the IRS proposes an amendment to §3D1.3 to address the situation where the count that gives rise to a grouping requirement pursuant to §3D1.2(c) has a lower base offense level than the other count(s) with which it is grouped. In this circumstance, the IRS proposes that two levels be added to the applicable base offense level determined in accordance with §3D1.3(a). Option Two proposes the addition of a special offense characteristic to the narcotics and CCE guideline in §2D1.1(b) and the §2S1.1(b) money laundering guidelines to be employed "if the defendant failed to report income exceeding $10,000 in any year." The proposed amendment to the narcotics and CCE guideline specifically refers to unreported income from the "unlawful manufacturing, importing, exporting,

trafficking, or possession of drugs." The proposed amendment to the money laundering guideline has no such limitation.

The PAG believes that both Options One and Two are superfluous. Under §3D1.3(a), the ultimate offense level applicable to counts grouped pursuant to §3D1.2(c) will be that offense level which is the highest for any single count within the group. Any specific offense characteristic that constitutes a criminal activity will be considered as relevant conduct pursuant to §1B1.3(a). Similarly, the proposed enhancement for the tax offenses specified in Option Two will either be addressed as relevant conduct, or in the sentence calculations for unrelated charged offenses. Unrelated, uncharged conduct is not and should not be a basis for sentence enhancements.

Proposed Amendment number 43 - Grouping Rules (I.R.S. Proposal)

Summary of Guideline

Section 3D1.4 provides the framework for determining the offense level when there is more than one group of counts. The bench mark is the group with the highest offense level. Each additional group is assigned a unit value (that corresponds to an enhancement) depending on its seriousness (measured by its calculated offense level) relative to the bench mark. Under §3D1.4(b) any group that is five to eight levels less serious than the bench mark is assigned one-half Unit. Groups that are nine or more levels less serious than the bench mark are disregarded. U.S.S.G. §3D1.4(c).

The IRS proposal would delete §§3D1.4(b) and 3D1.4(c), and assign one-half Unit value to any group where the offense level is five or more units less serious than the bench mark. The PAG expresses no opinion on this proposed amendment.

3. Proposed Amendment number 1 - Relevant Conduct - The PAG favors Proposed Amendment numbered 1 (PAG #35) which would amend Section, 1 B1.3 by adding a new subsection (c) which would prohibit a sentencing court from including in the offense level alleged conduct of which the defendant has been acquitted after either a court trial or a jury trial. This amendment makes good sense. Although caselaw indicates that double jeopardy provisions do not prohibit a sentencing court from considering conduct of which the defendant has been acquitted, no defendant should be forced to run the gauntlet twice. The present sentencing mechanism allows the government to include counts in an indictment on which the evidence is marginal or weak, take the case to trial on all counts, lose some of the counts at trial because of insufficiency of the evidence on a "beyond a reasonable doubt" standard and then relitigate the matter at sentencing

(where hearsay evidence is allowed) and prevail on a preponderance of the evidence standard.

The government should be content with one bite at the apple. With the relaxed rules of evidence that apply at a sentencing hearing, the defendant should only be held accountable for those counts to which he has either pled guilty or been convicted of in a contested trial.

4. Proposed Amendment number 3 - Juvenile Delinquency Act - The PAG is in support of a new policy statement which would address the applicability of the guidelines to juveniles. We believe this policy statement is necessary in light of the recent Supreme Court decision in United States vs. R. L. C., 112 S. Ct. 1329 (1992).

5. Proposed Amendment number 6 - Fraud - This proposed amendment would add language to § 2F1.1, Application Note 10(a), authorizing upward departure where a fraud "caused substantial non-monetary harm." At present, Application Note 10(a) authorizes upward departure only where "the primary objective of the fraud was non-monetary", but fails explicitly to cover those situations where fraudulent activity results in unintended by nonetheless substantial non-monetary harm.

a. Mens Rea

Upward departure may be appropriate in those rare instances where monetary loss is an inadequate measure of the seriousness of an offense. Certainly, there such offenses including, for example, schemes "to deprive another of the intangible right of honest services" (18 U.S.C. §§ 1341 and 1346). However, ***unintended*** harm is an inappropriate measure of culpability. At a minimum, consideration should be limited to ***reasonably foreseeable*** harm.[9] The Commission's legitimate concern might be addressed by an application note which recognizes that reasonable foreseeability is a factor to be taken into account in determining whether the defendant intended a particular result.[10]

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[9] This sort of limitation obviously has occurred to the Commission in other contexts, as shown by the language of the existing guideline provisions discussed infra, and by one of the questions posed with respect to Amendment #65, also discussed infra.

[10] Perhaps it would be appropriate for the Commission to establish a single standard of culpability for all of the offense characteristics and adjustments based on the harm caused by the offense. It doesn't make much sense for a defendant to be held responsible under

b. Cumulativeness

This proposed amendment, if adopted, should note the existence of specific offense characteristics, adjustments and commentary which already take non-monetary harm into account, and therefore would make departure inappropriate in many cases of non-monetary harm. For example:

> § 2F1.1(b)(4) provides for an increase of two levels, to a minimum of level 13, for offenses which involve the conscious or reckless risk of serious bodily injury;[11]
>
> § 3A1.1 provides for a 2 level upward adjustment where the defendant knew or should have known that a victim was unusually vulnerable.

In addition, the commentary to this proposed amendment clearly is cumulative of existing provisions. The single example given in the proposed amendment is that departure:

> might be warranted in the case of a fraudulent blood bank operation that failed to preserve the donors' blood. Such an offense might cause substantial harm to numerous victims that is not adequately taken into account by the total monetary loss, which might be comparatively small.

Contrary to the language of the proposed amendment, departure would be inappropriate in that case because the harm caused by this sort of offense was adequately taken into account in the formulation of specific offense characteristics. The sentencing court likely would impose a 2 level increase because the offense involved more than one victim (§2F1.1(b)(2)(B)).[12] In addition, the court would impose an additional 2 level increase, to a minimum of 13, based on the obvious risk of serious bodily injury (§ 2F1.1(b)(4)).

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§ 3A1.1 when he "knew or should have known" that a victim was particularly vulnerable, while being held responsible under § 2F1.1 only for the "conscious or reckless" risk of serious bodily harm.

[11] Although §2F1.1(b)(4) is phrased in terms of "risk", such risk is inherent in every case where harm actually occurs. In any event, language relating to actual harm could easily be incorporated into particular provisions, where necessary.

[12] Although Application Note 3 is phrased in terms of "obtain[ing] something of value from more than one person", the offense characteristic probably would apply equally in cases of non-monetary fraud.

The court would also have available a 2 level upward adjustment because the offense described in the amendment commentary would involve obviously vulnerable victims (§ 3A1.1).

6. Proposed Amendment number 7 - Fraud & Theft - The Commission invites comment on whether certain guidelines (§§ 2B1.1, 2B1.2 and 2F1.1) should be amended to identify circumstances where upward departure may be appropriate to take into account circumstances where loss does not fully capture the seriousness of the offense. Proposed Amendment number 7 is related to number 6 and suffers from similar defects.

a. Cumulativeness

Most of the examples given in this proposed amendment often are covered by existing provisions. For example:

> A fraud offense which "caused particularly significant emotional trauma to ...one or more victims" will, at least in some cases, be covered by the vulnerable victim adjustment (§3A1.1), which specifically refers to "mental condition", and victims who were "particularly susceptible to the criminal conduct".
>
> An offense in which the defendant "consciously or recklessly endangered the solvency of...one or more victims" most often will be covered by § 2F1.1(b)(6) where the victim is a financial institution.
>
> A fraud offense in which the defendant risked the health, bodily safety or life of one or more victims is covered by § 2F1.1(b)(2)(B) (2 level increase where more than 1 victim involved) and § 2F1.1(b)(4)(2 level increase, to a minimum of 13, if the offense involved conscious or reckless risk of serious bodily injury).

b. Mens Rea

As discussed above in connection with Proposed Amendment number 6, the examples given would authorize the court inappropriately to depart upward based on wholly unintended, and possibly unforeseeable, consequences.

c. Preference for Authorizing Departures

This proposed amendment poses the question whether the Commission should continue to add specific offense characteristics with 1 or 2 level increases, or simply authorize upward departure when unexpected situations arise. The latter approach is preferable. The government often advocates application of specific offense characteristics whenever there is any supporting evidence, however slight. The courts have developed an unsettling tendency of accepting the government's arguments uncritically. On the other hand, the courts seems more reluctant to depart without ample supporting evidence. Thus, by authorizing departure in unexpected situations, the courts would be given needed flexibility without inviting unwarranted increases in offense levels.

7. Request for Comment number 13 - Calculation of weight under negotiation in reverse sting cases - Should there be an amendment addressed to the offense level determination in such cases? Yes. Why? Because government agents should not be able to control, and increase, a defendant's potential punishment based on the agents' ability to set artificial market conditions. A defendant should not be punished for what he or she would like to be able to do, but rather on the basis of what he or she can do.

To determine an appropriate amendment to address the issue raised by the Commission, it is necessary to realize that the problem is actually broader than stated by the Commission. The problem exists not only where government agents set a below-market price, but whenever agents, in a reverse sting operation, create artificial market conditions that increase a defendant's purchasing power.

Two recent cases of which the PAG is aware help illustrate the scope of the problem. In one case, undercover government agents offered to sell the defendant 300 kilograms of cocaine. The defendant agreed to do so. The only problem was that he had no money (none). The agents, however, suggested that the defendant issue a quit claim deed to his house to the agents to serve as collateral for the cocaine purchase, which the defendant than did. (As a result, the house has been forfeited.) It turns out that the mortgage on the house exceeded the current appraised market value of the property--i.e., the house had negative equity. The government's position is that the defendant should be punished for a 300 kilogram offense.

In the second case, the defendant wanted to purchase 5 kilograms of cocaine and had the money to do so. The undercover FBI agents said they did not deal in such small quantities and that they would only sell the defendant 55

kilograms. Since the defendant did not have money for 55 kilograms, the agents told him the payment and delivery of the five kilograms would be the first installment on a 55 kilogram deal. If government agents were not the supposed sellers, there either would have been no deal (if the sellers were insistent upon only selling in quantities greater than 50 kilograms) or there would have been an agreed upon sale of 5 kilograms. Nevertheless, under the conditions set by the agents, the overall 55 kilogram deal proceeded and the defendant was arrested when he showed up with money for five kilograms. At sentencing, the government argued that the offense level should be based on 55 kilograms, because the defendant had agreed to purchase that amount. The district judge saw this as a transparent attempt by the agents to manipulate the guidelines and refused to sentence on the 55 kilogram amount. The judge ruled that the defendant had the ability to purchase five kilograms and that the offense level should be based on that amount.

It seems to the PAG that the judge in the second case adopted a reasonable method for resolving the artificial market problem. (While the judge's ruling in the second case might be seen as suggesting that an amendment is not necessary at all, we doubt that all or even most judges would feel free to adopt such an approach without an amendment providing authority to do so.) The guidelines should provide that in a reverse sting case, where the government sets or agrees to artificial market conditions which have the effect of increasing the defendant's purchasing power, the court shall determine the defendant's offense level on the basis of the amount of drugs that he or she could have purchased based on the agreement.

The amendment should provide that this method is mandatory (i.e., "shall determine") whenever artificial market conditions have been set or agreed upon for several reasons. First, no defendant should be sentenced on the basis of artificial market conditions. Second, if the amendment is not mandatory, disparity will result among similarly situated offenders. Third, the passage of such an amendment will probably reduce the frequency of such cases but it is less likely to have such a salutary effect unless it is mandatory (i.e., if agents know that it is still possible to increase a defendant's punishment by artificial market conditions).

There still remains the question of what constitutes artificial market conditions. That is not a difficult as it might seem. The DEA keeps statistics on the "going price" for different controlled substances according to geographic area and time period. The question of what constitutes artificial market terms for a sale could be established by expert testimony or common established practices familiar to the court or the parties. Perhaps the defendant should have the initial

burden of making a prima facie showing (by proffer or otherwise) that the price and/or terms were artificial and the government would have an opportunity to rebut the showing by a preponderance of the evidence standard. Alternatively, the defendant could have the burden of establishing, by a preponderance of the evidence standard, that there were artificial market conditions set or agreed to by the government agents which increased his or her purchasing ability.

One final note. The request for comment number 13 does not completely address the problem of "sentencing entrapment." There are cases where defendants are encouraged to purchase, or sell amounts that they had not intended to, but agreed to buy or sell at the encouragement of government agents. Even where the defendant has the ability to purchase or sell the increased quantity (which means they would be unaffected by the proposed amendment), it seems to me that a convincing case can be made for not sentencing the defendant on the amount which is the product of government inducement.

8. Proposed Amendment number 20 - Money Laundering - The PAG strongly supports the proposed amendments to §§ 2S1.1 through 1.4, pertaining to money laundering offenses and reporting violations. As noted by the Money laundering Working Group, the money laundering statute, 18 U.S.C. § 1956, has been used by prosecutors to "up the ante" in selected cases despite the fact that the charged financial transaction offenses do not differ substantially from the underlying unlawful activity. Money Laundering Working Group, "Explanation of Draft Amendments to §§ 2S1.1 through 1.4" at 1 (November 10, 1992) (footnote omitted). Also, as the Money Laundering Group recognizes, the existing guideline's high base offense level assumed that large scale, sophisticated money laundering would be the norm. The experience of the PAG is that money laundering counts are often added to other cases to increase prosecutorial leverage and obtain harsher sentences. Accordingly, from the perspective of the PAG, the most important aspect of the proposed amendments is that they remove the potential for actual or threatened sentence manipulation through charging practices. We agree with the Working Group that where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same for the underlying offense." Id.

Although we largely support the proposed amendment, we are concerned about two issues. First, the amendment would eliminate reliance on the table found in § 2S1.1(b)(2) and substitute reliance on the fraud table found in § 2F1.1, despite the substantial difference between loss in a fraud case and the value of

funds involved in a money laundering transaction. Second, the pervasive use of government stings in money laundering cases, in which the government largely controls the value of funds involved in the offense, provides continued opportunities for sentence manipulation and exacerbates the problem of using the elevated offense levels which would be dictated by the fraud table. Accordingly, the PAG recommends that the amendment be adopted with certain revisions: 1) that the incorporation of the fraud table be deleted with the existing money laundering table remaining in its place; and 2) that a lower base offense level be employed for violations of 18 U.S.C. § 1956(a)(3).

While we understand the Working Group's desire to use the fraud table in order to promote uniformity and consistency in economic crime cases, the attempt to equate the value of funds in a money laundering transaction and the loss involved from fraud is without any basis in logic. Fraud offenses almost invariably involve loss to a victim; and it is this loss which is the driving forcer behind the table. See § 2F1.1(b). Money laundering offenses involve financial transactions which do not involve loss to a discrete victim; and, at least under the current Guidelines, it is the value of the funds involved in the transaction which is the driving force behind the table. See § 2S1.1(b)(2).[13]

In addition to the difference in the "victim," the two offenses are completely different in terms of the amount of funds generally involved. While money laundering typically involves relatively large sums of money, fraud comes in all shapes and sizes: using a counterfeit telephone credit card to make long distance telephone calls or a scheme to fraudulently collect on a five million dollar insurance policy.

This difference in the amount of funds involved in each crime and in the nature of the "victim" of each crime makes any reliance on the fraud table ill-advised, and the PAG recommends that the Commission not eliminate the table currently found in § 2S1.1(b)(2), but rather use this table rather than the fraud table as the basis for the adjustments called for in the amendment, §§ 2S1.1(a)(2-3), 2S1.2(1)(1-2). This table should be used in connection with the amendments

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[13]Indeed, although fraud is far closer in nature to theft than to money laundering in that both involve a discrete victim who has lost something of economic value, the Third Circuit recently held that for sentencing purposes the differences between the nature of a theft and the nature of a fraud rendered the equation of these two crimes "flawed." United States v. Kopp, 951 F.2d 521, 535 (3d Cir. 1991).

proposed lower base offense level in light of the Money Laundering Working Group's recognition that low dollar amount, unsophisticated cases are prosecuted under this statute. In the event that the Commission believes that the existing table is inadequate a revised, money laundering specific table should be employed.

The proposed guideline amendments fail to recognize the unique nature of the money laundering sting provisions of 18 U.S.C. § 1956(a)(3). Under that section the crime is completed if a defendant with the intent (1) to promote specified unlawful activity; (2) to conceal or disguise property believed to be the proceeds of specified unlawful activity; or (3) to avoid a CTR requirement, engages in a financial transaction with property represented by a law enforcement official to be the proceeds of specified unlawful activity. This section has been used in an ever increasing number of undercover sting operations in which federal agents attempt to engage in money laundering activities and represent that their money comes from unlawful sources. As in drug sting operations the agents control the amount of money laundered. Accordingly, there is increased risk of prosecutorial manipulation of the guidelines by government agents increasing the amounts of tendered funds to increase the guideline range.

In such cases there will never be commission of the underlying offense by the defendant, since it is the government agents who are representing that they, or their confederates, committed that offense. Accordingly, while a defendant who commits an underlying offense and launders the funds will be sentenced under the guideline for the underlying offense, under proposed § 2S1.1(a)(1) in a sting operation the defendant will receive a potentially higher sentence for only engaging in the laundering offense.

For example, if a defendant engages in mail fraud with a loss of $1,600 then launders the proceeds, his offense level would be 6 under the proposed amendments to §§ 2F1.1 and 2S1.1. If agents merely represented that the funds were derived from mail fraud and the defendant believed them and engaged in a financial transaction designed to avoid a CTR requirement, his offense level would be 10 (assuming a (b)(1)(A) enhancement, 8 if no enhancement). It makes little sense to punish a defendant more severely for engaging in a sting than for actually committing of the underlying offense.

9. Proposed Amendment number 23 - Abuse of Position of Trust - This proposed Commission amendment would significantly narrow the existing 2 level "abuse of position of trust" adjustment, so that it applies only to abuse of "special trust." "Special trust" would be defined as referring to "a position of trust characterized

by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference)."

The PAG favors adoption of this amendment, because the current "abuse of position of trust" guideline is extremely broad and susceptible of varying and unfair interpretations, particularly in fraud and embezzlement cases where some form of breach of trust almost always exists. The fraud guidelines themselves already contain a number of add-on provisions, such as the 2 level increase for "more than minimal planning" or a scheme to defraud more than one victim, and the 2 level increase for misrepresentation that the defendant was acting on behalf of charitable, educational, religious or political organizations. § § 2F1.1(2), 2F1.1(3)(A). The embezzlement guidelines likewise contain a 2 level increase for more than minimal planning. § § 2B1.2. The proposed amendment makes it far more likely that the 2 level enhancement for abuse of trust appropriately would be limited to professionals, high ranking managers and others in a special position of trust, and would not be added to the typical fraud or embezzlement defendant's sentence.

The Commission has also invited comment on whether, as an alternative to modifying § 3B1.3, the Commission should amend § 2B1.1 and § 2B1.2 to add a specific offense characteristic relating to enhancement for abuse of trust in embezzlement cases and provide that the enhancement in § 3B1.3 would not apply if the proposed specific offense characteristic was applied. The PAG recommends against such an amendment, as that would not cure the overbreadth problem inherent in the current language of § 3B1.3, and would compound the problem by adding a vague offense characteristic to the guidelines.

10. Proposed Amendment number 24 - Substantial Assistance - Call for Comment- The PAG is in favor of amending section 5K 1.1 by providing that a sentencing court can, sua sponte, depart downward from the guidelines in those cases involving first offenders where no violence was associated with the criminal offense. This would apply in those cases where the government does not present a section 5K1.1 Motion For Substantial Assistance but where the court nonetheless finds from the evidence that such a motion would have been appropriate had it been filed by the government.

11. Proposed Amendments number 25 and 36 - Standards for Acceptance of Plea Agreements - The PAG strongly urges the commission to adopt its proposed amendment number 25 (PAG #36) by adding commentary which would recommend that the government disclose to the defendant information relevant to the application of the sentencing guidelines prior to entry of a guilty plea. This

commentary would create no new right for a defendant, but would add to "truth in sentencing" and improve the practice of federal criminal law around the country under the Sentencing Guidelines.

12. Proposed Amendment number 27 - Guideline Consolidation - The PAG favors this amendment as it would simplify the Guidelines by deleting 27 Chapter Two guidelines through consolidation with other guidelines that cover similar offense conduct.

13. Proposed Amendment number 28 - Miscellaneous Substantive, Clarifying, and Conforming Amendments Affecting White Collar Offenses - The PAG makes the following recommendations on some of the miscellaneous amendments proposed by the Commission:

§ 2B1.1 Larceny, Embezzlement, and Other Forms of Theft

The PAG recommends adoption of these changes, which conform the embezzlement Commentary on loss computation with the Commentary for fraud and deceit at § 2F1.1.

§ 2F1.1 Fraud and Deceit

The PAG agrees that the specific offense characteristic for violation of an order should apply only when not otherwise addressed in the guidelines. The PAG agrees that the Commentary for fraudulent loan applications and contract procurement cases should be changed to make clear that where the loss significantly overstates or understates the seriousness of the conduct, an upward or downward departure may be warranted. Similarly, we agree that the Commentary on loss determination should be amended to make clear that when loss overstates the seriousness of the offense, a downward departure may be warranted.

§ 2B4.1 Bribery in Procurement of Bank Loan and Other Commercial Bribery

§ 2C1.6 Loan or Gratuity to Bank Examiner for Adjustment of Farm Indebtedness, or Procuring Bank Loan or Discount of Commercial Paper

§ 2C1.7 Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

§ 2E5.1 Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan

§ 2E5.6 Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives or Labor Organizations

The PAG recommends adoption of the proposed amendments for determining the fines for organizations. These amendments would provide that consequential damages could be used in lieu of pecuniary loss only when "reasonably foreseeable." Without such a limitation, consequential damages are likely to distort the appropriate fine level by taking into account a myriad of unforeseen circumstances.

14. Proposed Amendment number 37 - Theft and Fraud - Although styled as an issue for comment, the PAG supports an amendment to the commentary about loss in the theft guideline which would conform the commentary in the theft guideline with the commentary on loss in the fraud guideline.

15. Proposed Amendment number 38 - Theft - Although listed as an issue for comment, the PAG would support an Amendment under section 2B .1 which would provide that the sentencing court has the discretion to make a downward adjustment in those cases where defendants do not personally profit from the offense.

16. Proposed Amendment number 40 - Cocaine and Cocaine Base - The PAG strongly supports this issue for comment which would provide that the Commission would ask Congress to modify or eliminate the provisions that distinguish between the punishment for powder and crack cocaine at the quantity ratio of 100 to 1. At a minimum, we would urge the Commission to do a study on this whole area as to whether or not the ratio of 100 to 1 accurately reflects current scientific research and whether, in fact, the ratio should be reduced.

17. Proposed Amendment number 44 - Theft - This amendment increases the offense level for theft of mail by 2 levels in addition to the monetary value of the property stolen, and provides a minimum offense level of 14 if the offense involved an "organized scheme" to steal mail. Without knowing the Postal Service's experience with theft of mail, it is difficult to comment on the advisability of increasing the offense level. Further, we recognize that the Postal Service's minimal level 14 approach has already been adopted by the Commission for "an organized scheme to steal vehicles or vehicle parts," because it often is difficult to fix a loss figure on stolen vehicles and parts. § 2B1.1(b)(6); comment. (backg'd.). However, the PAG recommends that the Commission not adopt at this time any additional guideline that utilizes the "organized scheme" language, as that term is vague and seems duplicative of the specific offense characteristic for "more than

minimal planning." Virtually any scheme involving more than one person is an "organized scheme," and the Commission should study whether that term can be modified to more precisely cover the activity which concerns the Postal Service.

18. Proposed Amendment number 45 - Multiple Victims - This broad proposal by the Postal Service would create a new victim-related adjustment of 2 levels if more than one victim is affected, and if the offense affected 100 victims or more, the offense level would be increased by 2 levels for every 250 victims, up to a total of 8 levels. The PAG recommends against this proposal, as the 2 level increase would apply in a large number of typical fraud and theft cases, where dollar value already acts as a proxy for impact on multiple victims. Also, the proposed step increase for every 250 victims is arbitrary, and there does not appear to be a need for such an adjustment, especially given the loss tables, and the likelihood that the 2 level increase for "more than minimal planning" would apply to any scheme involving a large number of victims.

19. Proposed Amendment number 46 - Abuse of Position of Trust - The Postal Service proposes to add to the Commentary for 3B1.1 an application note that would specify that the enhancement for abuse of a position of trust applies to all postal employees for theft or obstruction of the mails, embezzlement of Postal Service funds, and theft of Postal Service property. As noted above, the PAG supports the Commission proposal to amend § 3B1.3 so that it applies to abuse of position of special trust. The PAG agrees that Postal Service employees to hold such a position of special trust with regard to theft or obstruction of the mails, because they have special access to the mails and the public depends so heavily on their honesty. Therefore, the Commentary to the proposed Commission amendment could include a reference to such Postal Service employees. However, with regard to embezzlement of Postal Service funds and theft of Postal Service property, the employees do not enjoy a special position of thrust, and should not be subject to an enhancement for such offenses.

20. Proposed Amendment number 59 - This proposed amendment would create a new guideline, § 2F1.2, applicable to violations of the Computer Fraud and Abuse Act of 1988 (18 U.S.C. § 1030). As stated in the "Synopsis of Amendment", and as is apparent throughout the commentary, its emphasis is on dealing with non-monetary harm. This proposed guideline is overbroad and cumulative of existing provisions.

a. Overbreadth

The proposed guideline is drafted so that the base offense is largely meaningless in that one or more specific offense characteristics will apply to virtually every covered offense. Offense level increases are provided for virtually all computer crimes including, for example, the mere examination of business information "not meant for public distribution" (see proposed § 2F1.2(b)(2) and Application Notes 4 and 7).

Furthermore, inclusion of "consequential losses from trafficking in passwords" in the calculation of economic loss invites a host of problems. 18 U.S.C. § 1030(a)(6) makes it a separate crime to traffick in passwords only where there is also intent to defraud. There is, however, no such limitation in proposed § 2F1.2(b)(4)(B). "Trafficking" is defined broadly to include the mere "transfer" of a password (see 18 U.S.C. § 1030(a)(6) and 1029(e)(5)). Thus, less pernicious forms of trafficking in passwords may be included as relevant conduct under Guideline § 1B1.3(a)(2). This could include, for example, one "hacker" merely revealing a password to another without hope or expectation of economic gain. Inclusion of such consequential losses creates a real possibility that defendants will inappropriately be punished for acts by others that were not intended or reasonably foreseeable.

b. Cumulativeness

Violations of 18 U.S.C. § 1030 are presently subject to the fraud guideline, § 2F1.1, for which Application Note 10 authorizes upward departure where the primary objective of the fraud was non-monetary. In addition, Proposed Amendment number 6 would authorize upward departure where "the fraud caused substantial non-monetary harm", and Proposed Amendment number 7 addresses a similar issue. Thus, there is no need for a specific computer fraud guideline to deal with the sort of non-monetary injury discussed in connection with this proposed amendment.

In addition, particular parts of this proposed amendment are cumulative of existing provisions. For example:

> Proposed § 2F1.2(b) deals with offenses where the defendant obtained and/or altered protected information, which includes (under Application Notes 4 and 6) information "relat[ing] to military operations or readiness, foreign relations or intelligence, or law enforcement investigations or operations." This sort of harm is adequately covered by §2F1.1,

Application Note 10(d), which authorizes upward departure where "the offense endangered national security or military readiness."

Proposed § 2F1.2(b)(3)(A) deals with offenses which caused or were likely to cause "interference with the administration of justice." Such offenses often will constitute obstruction of justice, and be separately prosecutable, and punishable, under Title 18, Chapter 73 ("Obstruction of Justice"). In some circumstances (such as where a defendant enters false information in a law enforcement or court database), this sort of harm might also be covered by §2F1.1, Application Note 10(b), which authorizes upward departure where "false statements were made for the purpose of facilitating some other crime."

Proposed §2F1.2(b)(3)(A) also deals with offenses which caused or were likely to cause "harm to any person's health or safety." This sort of harm is adequately covered by § 2F1.1, Application Note 10(c), which authorizes upward departure where "the offense caused physical or psychological harm."

21. Proposed Amendment number 62 - Bank Fraud - Here, the Commission solicits comment on whether the guidelines principally applicable to bank fraud (§§ 2B1.1, 2B4.1 and 2F1.1) should be amended to provide a 4 level enhancement in the base offense level for all offenses which affect a financial institution. This proposal invites problems of both overbreadth and redundancy.

First, if the word "affects" is defined broadly, virtually all offenses involving financial institutions would be deemed to affect such institutions. Such a result cannot be justified by the potential consequence to the victim. There is no reason to believe that a garden variety bank fraud will cause greater damage than a comparable fraud on another kind of business. Furthermore, there is no philosophical reason why the former should be punished more harshly than the latter.

If, on the other hand, "affects" is limited to those frauds which have an impact on solvency, then the proposed amendments would be largely cumulative of existing offense characteristics. Sections 2B1.1, 2B1.4 and 2F1.1 already include as specific offense characteristics that the offense "substantially jeopardized the safety and soundness of a financial institution" (§§ 2B1.1(b)(7)(A), 2B4.1(b)(2)(A) and 2F1.1(b)(6)(A)); and that the offense "affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense" (§§ 2 B1.1(b)(7)(B), 2B4.1(b)(2)(B) and

2F1.1(b)(6)(B)). In either of those events, the offense level is increased by 4, to a minimum of 24. Thus, the Guidelines already make ample provision for those frauds which significantly affect financial institutions.

22. Proposed Amendment number 65 - The Commission requests comment on whether §2F1.1 should be amended to include "risk of loss" in determining the applicable guideline range for fraud when the amount at risk is greater than the actual or intended loss. As with Proposed Amendment number 6, ***unintended*** harm is an inappropriate measure of culpability. At a minimum, consideration should be limited to ***reasonably foreseeable*** harm. Also as with Proposed Amendment number 6, this sort of provision might be incorporated into an application note which recognizes that reasonable foreseeability is a factor to be taken into account in determining whether the defendant intended a particular result.

The PAG also supports amendments numbered 29 and 30 proposed by the Criminal Law Committee of the Judicial Conference of the United States. We especially support proposed amendment number 29 which would add a paragraph to permit a downward departure when offender characteristics are present to an unusual degree and combined in ways important to the purposes of sentencing.

The PAG also supports, in substance, Amendments numbered 31-34 which are being proposed by the American Bar Association Sentencing Guidelines Committee.

Finally, the PAG supports Amendments numbered 47 and 52-56 of the proposals submitted by the Legislative Subcommittee of the Federal Defenders. As to proposed Amendments numbered 48-51 proposed by the Legislative Subcommittee of the Federal Defenders we prefer our amendment #39 in the Drug trafficking area, but we do support proposed amendment number 50 which would separate the weight of the carrier from the actual weight of LSD to determine the offense level in LSD cases. In the same regard, we also support the concept proposed in amendment number 49 sponsored by the Legislative Subcommittee of the Federal Defenders which would clarify that the weight used to determine the offense level should not include the weight of substances involved in the manufacturing process or substances to which the drug is bonded.

I have confirmed with your Staff Director, Ms. Phyllis J. Newton, that the Sentencing Commission will allow representatives of the PAG to address the Commissioners at your Tuesday, March 23, 1993 meeting at 10:00 A.M. As in the past, the PAG will not be presenting oral comments at the March 22, 1993, public hearing being held at the Ceremonial Courtroom of the United States District Court of the District of Columbia.

I look forward to working with you during this amendment cycle.

Sincerely,

Fred Warren Bennett, Chairman
Practitioner's Advisory Group

cc: Commissioners Nagel, Gelacak,
Carnes and Mazzone

REVISED PROPOSED AMENDMENT #39

Submitted by

PRACTITIONERS' ADVISORY GROUP

PRACTITIONERS ADVISORY GROUP - MODIFIED AMENDMENT #39

(Changes noted are relative to the CURRENT GUIDELINES)

39. **Synopsis of Proposed Amendment:** *This amendment reduces the maximum offense level for drug quantity from 42 to 38 (36 was the maximum offense level in the original sentencing guidelines); provides an additional enhancement for weapon usage; places a cap on the offense level for defendants with mitigating roles; reduces the offense levels associated with higher drug quantities; and provides additional guidance for the determination of mitigating role. (Related amendment proposals: 8, 9, 48, and 60).*

Proposed Amendment: Section 2D1.1(a)(3) is amended by inserting the following at the end:

"Provided, that if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role) and –

(i) the offense involves any of the controlled substances listed below, the base offense level shall not be greater than 32:
(a) Heroin (or the equivalent amount of other Schedule I or II Opiates);
(b) Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
(c) Cocaine Base;
(d) PCP;
(e) LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
(f) Fentanyl; or
(g) Fentanyl Analogue;
(h) Methamphetamine or "Ice".

(ii) the offense involves only controlled substances other than those listed in subdivision (i) above, the base offense level shall not be greater than level 24."

Section 2D1.1(b) is amended as follows (redline indicates additions, strikeout indicates deletions):

"(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If a dangerous weapon (including a firearm) was actually used by the defendant, or the defendant induced or directed another participant to use a dangerous weapon, increase by 4 levels.

(3) If the defendant is convicted of violating 21 U.S.C. § 960(a) under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.".

Section 2D1.1(c) is amended by deleting subdivisions 1-11; by renumbering subdivisions 12-19 as 9-16; and by inserting subdivisions 1-10:

"(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
~~(1) 300 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); 1500 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); 15 KG or more of Cocaine Base; 300 KG or more of PCP, or 30 KG or more of PCP (actual); 300 KG or more of Methamphetamine, or 30 KG or more of Methamphetamine (actual), or 30 KG or more of "Ice"; 3 KG or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); 120 KG or more of Fentanyl; 30 KG or more of a Fentanyl Analogue; 300,000 KG or more of Marihuana; 60,000 KG or more of Hashish; 6,000 KG or more of Hashish Oil.~~	~~Level 42~~
~~(2) At least 100 KG but less than 300 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 500 KG but less than 1500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 5 KG but less than 15 KG of Cocaine Base; At least 100 KG but less than 300 KG of PCP, or at least 10 KG but less than 30 KG of PCP (actual); At least 100 KG but less than 300 KG of Methamphetamine, or at least 10 KG but less than 30 KG of Methamphetamine~~	~~Level 40~~

~~(actual), or at least 10 KG but less than 30 KG of "Ice";~~
~~At least 1 KG but less than 3 KG of LSD~~
~~(or the equivalent amount of other Schedule I or II Hallucinogens);~~
~~At least 40 KG but less than 120 KG of Fentanyl;~~
~~At least 10 KG but less than 30 KG of a Fentanyl Analogue;~~
~~At least 100,000 KG but less than 300,000 KG of Marihuana;~~
~~At least 20,000 KG but less than 60,000 KG of Hashish;~~
~~At least 2,000 KG but less than 6,000 KG of Hashish Oil.~~

(1) ~~At least 30 KG but less than~~ 100 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); ~~At least 150 KG but less than~~ 500 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); ~~At least 1.5 KG but less than~~ 5 KG or more of Cocaine Base; ~~At least 30 KG but less than~~ 100 KG or more of PCP, or ~~at least 3 KG but less than~~ 10 KG or more of PCP (actual); ~~At least 30 KG but less than~~ 100 KG or more of Methamphetamine, or ~~at least 3 KG but less than~~ 10 KG or more of Methamphetamine (actual), or ~~at least 3 KG but less than~~ 10 KG or more of "Ice"; ~~At least 300 G but less than~~ 1 KG or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); ~~At least 12 KG but less than~~ 40 KG or more of Fentanyl; ~~At least 3 KG but less than~~ 10 KG or more of a Fentanyl Analogue; ~~At least 30,000 KG but less than~~ 100,000 KG or more of Marihuana; ~~At least 6,000 KG but less than~~ 20,000 KG or more of Hashish; ~~At least 600 KG but less than~~ 2,000 KG or more of Hashish Oil. — Level 38

(2) At least ~~10~~ 30 KG but less than ~~30~~ 100 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least ~~50~~ 150 KG but less than ~~150~~ 500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least ~~500 G~~ 1.5 KG but less than ~~1.5~~ 5 KG of Cocaine Base; At least ~~10~~ 30 KG but less than ~~30~~ 100 KG of PCP, or at least ~~1~~ 3 KG but less than ~~3~~ 10 KG of PCP (actual); At least ~~10~~ 30 KG but less than ~~30~~ 100 KG of Methamphetamine, or at least ~~1~~ 3 KG but less than ~~3~~ 10 KG of Methamphetamine (actual), or at least ~~1~~ 3 KG but less than ~~3~~ 10 KG of "Ice"; At least ~~100~~ 300 G but less than ~~300 G~~ 1 KG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 4 12 KG but less than ~~12~~ 40 KG of Fentanyl; At least ~~1~~ 3 KG but less than ~~3~~ 10 KG of a Fentanyl Analogue; At least ~~10,000~~ 30,000 KG but less than ~~30,000~~ 100,000 KG of Marihuana; At least ~~2,000~~ 6,000 KG but less than ~~6,000~~ 20,000 KG of Hashish; At least ~~200~~ 600 KG but less than ~~600~~ 2,000 KG of Hashish Oil. — Level 36

(3) At least ~~3~~ 10 KG but less than ~~10~~ 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 34
At least ~~15~~ 50 KG but less than ~~50~~ 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least ~~150~~ 500 G but less than ~~500 G~~ 1.5 KG of Cocaine Base;
At least ~~3~~ 10 KG but less than ~~10~~ 30 KG of PCP, or at least ~~300 G~~ 1 KG but less than ~~1~~ 3 KG of PCP (actual);
At least ~~3~~ 10 KG but less than ~~10~~ 30 KG of Methamphetamine, or at least ~~300 G~~ 1 KG but less than ~~1~~ 3 KG or more of Methamphetamine (actual), or at least ~~300 G~~ 1 KG but less than ~~1~~ 3 KG or more of "Ice";
At least ~~30~~ 100 G but less than ~~100~~ 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least ~~1.2~~ 4 KG but less than 4 12 KG or more of Fentanyl;
At least ~~300 G~~ 1 KG but less than ~~1~~ 3 KG or more of a Fentanyl Analogue;
At least ~~3,000~~ 10,000 KG but less than ~~10,000~~ 30,000 KG or more of Marihuana;
At least ~~600~~ 2,000 KG but less than ~~2,000~~ 6,000 KG or more of Hashish;
At least ~~60~~ 200 KG but less than ~~200~~ 600 KG or more of Hashish Oil.

(4) At least ~~1~~ 3 KG but less than ~~3~~ 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 32
At least ~~5~~ 15 KG but less than ~~15~~ 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least ~~50~~ 150 G but less than ~~150~~ 500 G of Cocaine Base;
At least ~~1~~ 3 KG but less than ~~3~~ 10 KG of PCP, or at least ~~100~~ 300 G but less than ~~300 G~~ 1 KG of PCP (actual);
At least ~~1~~ 3 KG but less than ~~3~~ 10 KG of Methamphetamine, or at least ~~100~~ 300 G but less than ~~300 G~~ 1 KG of Methamphetamine (actual), or at least ~~100~~ 300 G but less than ~~300 G~~ 1 KG of "Ice";
At least ~~10~~ 30 G but less than ~~30~~ 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least ~~400 G~~ 1.2 KG but less than ~~1.2~~ 4 KG of Fentanyl;
At least ~~100~~ 300 G but less than ~~300 G~~ 1 KG of Fentanyl Analogue;
At least ~~1,000~~ 3,000 KG but less than ~~3,000~~ 10,000 KG of Marihuana;
At least ~~200~~ 600 KG but less than ~~600~~ 2,000 KG of Hashish;
At least ~~20~~ 60 KG but less than ~~60~~ 200 KG of Hashish Oil.

(5) At least ~~700 G~~ 1 KG but less than ~~1~~ 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 30
At least ~~3.5~~ 5 KG but less than ~~5~~ 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least ~~35~~ 50 G but less than ~~50~~ 150 G of Cocaine Base;
At least ~~700 G~~ 1 KG but less than ~~1~~ 3 KG of PCP, or at least ~~70~~ 100 G but less than ~~100~~ 300 G of PCP (actual);
At least ~~700 G~~ 1 KG but less than ~~1~~ 3 KG of Methamphetamine, or

at least ~~70~~ 100 G but less than ~~100~~ 300 G of Methamphetamine (actual), or at least ~~70~~ 100 G but less than ~~100~~ 300 G of "Ice";
At least ~~7~~ 10 G but less than ~~10~~ 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least ~~280~~ 400 G but less than ~~400 G~~ 1.2 KG of Fentanyl;
At least ~~70~~ 100 G but less than ~~100~~ 300 G of a Fentanyl Analogue;
At least ~~700 G~~ 1,000 KG but less than ~~1,000~~ 3,000 KG of Marihuana;
At least ~~140~~ 200 KG but less than ~~200~~ 600 KG of Hashish;
At least ~~14~~ 20 KG but less than ~~20~~ 60 KG of Hashish Oil.

(6) At least ~~400~~ 700 G but less than ~~700 G~~ 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 28
At least ~~2~~ 3.5 KG but less than ~~3.5~~ 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least ~~20~~ 35 G but less than ~~35~~ 50 G of Cocaine Base;
At least ~~400~~ 700 G but less than ~~700 G~~ 1 KG of PCP, or at least ~~40~~ 70 G but less than ~~70~~ 100 G of PCP (actual);
At least ~~400~~ 700 G but less than ~~700 G~~ 1 KG of Methamphetamine, or at least ~~40~~ 70 G but less than ~~70~~ 100 G of Methamphetamine (actual), or at least ~~40~~ 70 G but less than ~~70~~ 100 G of "Ice";
At least ~~4~~ 7 G but less than ~~7~~ 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least ~~160~~ 280 G but less than ~~280~~ 400 G of Fentanyl;
At least ~~40~~ 70 G but less than ~~70~~ 100 G of Fentanyl Analogue;
At least ~~400~~ 700 KG but less than ~~700~~ 1,000 KG of Marihuana;
At least ~~80~~ 140 KG but less than ~~140~~ 200 KG of Hashish;
At least ~~8~~ 14 KG but less than ~~14~~ 20 KG of Hashish Oil.

(7) At least ~~100~~ 400 G but less than ~~400~~ 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 26
At least ~~500 G~~ 2 KG but less than ~~2~~ 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least ~~5~~ 20 G but less than ~~20~~ 35 G of Cocaine Base;
At least ~~100~~ 400 G but less than ~~400~~ 700 G of PCP, or at least ~~10~~ 40 G but less than ~~40~~ 70 G of PCP (actual);
At least ~~100~~ 400 G but less than ~~400~~ 700 G of Methamphetamine, or at least ~~10~~ 40 G but less than ~~40~~ 70 G of Methamphetamine (actual), or at least ~~10~~ 40 G but less than ~~40~~ 70 G of "Ice";
At least ~~1~~ 4 G but less than 4 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least ~~40~~ 160 G but less than ~~160~~ 280 G of Fentanyl;
At least ~~10~~ 40 G but less than ~~40~~ 70 G of a Fentanyl Analogue;
At least ~~100~~ 400 KG but less than ~~400~~ 700 KG of Marihuana;
At least ~~20~~ 80 KG but less than ~~80~~ 140 KG of Hashish;
At least ~~2~~ 8 KG but less than 8 14 KG of Hashish Oil.

(8) At least ~~80~~ 100 G but less than ~~100~~ 400 G of — Level 24

Heroin (or the equivalent amount of other Schedule I or II Opiates);
At least ~~400~~ 500 G but less than ~~500 G~~ 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 4 ~~5~~ G but less than ~~5~~ 20 G of Cocaine Base;
At least ~~80~~ 100 G but less than ~~100~~ 400 G of PCP, or at least 8 ~~10~~ G but less than ~~10~~ 40 G of PCP (actual);
At least ~~80~~ 100 G but less than ~~100~~ 400 G of Methamphetamine, or at least 8 ~~10~~ G but less than ~~10~~ 40 G of Methamphetamine (actual), or at least 8 ~~10~~ G but less than ~~10~~ 40 G of "Ice";
At least ~~800 MG~~ 1 G but less than ~~1~~ 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least ~~32~~ 40 G but less than ~~40~~ 160 G of Fentanyl;
At least 8 ~~10~~ G but less than ~~10~~ 40 G of a Fentanyl Analogue;
At least ~~80~~ 100 KG but less than ~~100~~ 400 KG of Marihuana;
At least ~~16~~ 20 KG but less than ~~20~~ 80 KG of Hashish;
At least ~~1.6~~ 2 KG but less than ~~2~~ 8 KG of Hashish Oil.

(9) At least ~~60~~ 70 G but less than ~~80~~ 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 22
At least ~~300~~ 350 but less than ~~400~~ 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least ~~3~~ 3.5 G but less than 4 ~~5~~ G of Cocaine Base;
At least ~~60~~ 70 G but less than ~~80~~ 100 G of PCP, or at least 6 ~~7~~ G but less than 8 ~~10~~ G of PCP (actual);
At least ~~60~~ 70 G but less than ~~80~~ 100 G of Methamphetamine, or at least 6 ~~7~~ G but less than 8 ~~10~~ G of Methamphetamine (actual), or at least 6 ~~7~~ G but less than 8 ~~10~~ G of "Ice";
At least ~~600~~ 700 MG but less than ~~800~~ 1,000 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least ~~24~~ 28 G but less than ~~32~~ 40 G of Fentanyl;
At least 6 ~~7~~ G but less than 8 ~~10~~ G of a Fentanyl Analogue;
At least ~~60~~ 70 KG but less than ~~80~~ 100 KG of Marihuana;
At least ~~12~~ 14 KG but less than ~~16~~ 20 KG of Hashish;
At least ~~1.2~~ 1.4 KG but less than ~~1.6~~ 2 KG of Hashish Oil.

(10) At least 40 G but less than ~~60~~ 70 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); — Level 20
At least 200 but less than ~~300~~ 350 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 2 G but less than ~~3~~ 3.5 G of Cocaine Base;
At least 40 G but less than ~~60~~ 70 G of PCP, or at least 4 G but less than 6 ~~7~~ G of PCP (actual);
At least 40 G but less than ~~60~~ 70 G of Methamphetamine, or at least 4 G but less than 6 ~~7~~ G of Methamphetamine (actual), or at least 4 G but less than 6 ~~7~~ G of "Ice";
At least 400 MG but less than ~~600~~ 700 MG of LSD

(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 16 G but less than ~~24~~ 28 G of Fentanyl;
At least 4 G but less than ~~6~~ 7 G of a Fentanyl Analogue;
At least 40 KG but less than ~~60~~ 70 KG of Marihuana;
At least 8 KG but less than ~~12~~ 14 KG of Hashish;
At least 800 G but less than ~~1.2~~ 1.4 KG of Hashish Oil.".

Section 3B1.2 is amended by deleting the Commentary and inserting new Commentary as detailed below:

"§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

Commentary

Application Notes:

1. This section provides a downward adjustment in offense level for a defendant who has a minimal role (4-level reduction) or a minor role (2-level reduction) in the criminal activity for which the defendant is accountable under §1B1.3 (Relevant Conduct). In cases falling between (a) and (b), a 3-level reduction is provided.

2. One factor that determines whether a defendant warrants a mitigating role is the defendant's role and relative culpability in comparison with the other participants in the criminal activity for which the defendant is accountable pursuant to §1B1.3 (Relevant Conduct). The fact that the conduct of one participant warrants an upward adjustment for an aggravating role (§3B1.1) or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating (minimal, or minor) role. See the definition of "participant" in Note 1 of §3B1.1.

3. Subsection (b) (4-level reduction) applies to a defendant who plays a minimal role in concerted activity. To qualify for a minimal role adjustment under subsection (b), the defendant must be one of the least culpable, but not the least culpable, of the participants in the criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating (minimal, or minor) role listed in Note 6.

4. To qualify for a minor role adjustment under subsection (c) (2-level reduction), the defendant plainly must be one of the less culpable participants in the criminal activity, but have a role that cannot be described as minimal.

5. The following is a non-exhaustive list of characteristics that ordinarily are associated with a mitigating (minimal, or minor) role:

(a) the defendant performed only unskilled and unsophisticated tasks;
(b) the defendant had no decision-making authority or responsibility;
(c) total compensation to the defendant was small in amount, generally in the form of a flat fee; and
(d) the defendant did not exercise any supervision over other participant(s).

6. With regard to offenses involving contraband (including controlled substances), a defendant who

(a) sold, or negotiated the terms of the sale of, the contraband;
(b) had an ownership interest in any portion of the contraband;
(c) financed any aspect of the criminal activity; or
(d) transported contraband as a courier

shall not receive a mitigating (minimal, or minor) role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, owned, or transported, or for that aspect of the criminal activity that the defendant financed because, with regard to those acts, the defendant has acted as neither a minimal, nor a minor participant. For example, a street dealer who sells 100 grams of cocaine and who is held accountable under §1B1.3 (Relevant Conduct) for only that quantity shall not be considered for a mitigating (minimal, or minor) role adjustment. In contrast, a street dealer who sells 100 grams of cocaine, but who is held accountable, pursuant to §1B1.3, for a jointly undertaken criminal activity involving 5 kilograms of cocaine may, if otherwise qualified, be considered for a mitigating (minimal, or minor) role adjustment, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendant sold.

7. Consistent with the structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating (minimal, or minor) role adjustment. In determining whether a mitigating (minimal or minor) role adjustment is warranted, the court should consider all of the available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In weighing the totality of the circumstances, a court may consider a defendant's assertion of facts that supports a mitigating role adjustment. However, a court is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

Background: This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a), subsection (b) or subsection (c), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.".

PRACTITIONERS ADVISORY GROUP - MODIFIED AMENDMENT #39

(Changes noted are relative to the version of amendment #39 published in the Federal Register at the request of the Practitioners Advisory Group)

39. **Synopsis of Proposed Amendment:** *This amendment reduces the maximum offense level for drug quantity from 42 to ~~38~~36 (36 was the maximum offense level in the original sentencing guidelines); provides an additional enhancements for weapon usage~~, principal organizers of large scale organizations, and obtaining substantial resources from engaging in the criminal activity by a defendant with an aggravating role~~; places a cap on the offense level for defendants with mitigating roles; reduces the offense levels associated with higher drug quantities ~~by 2 levels~~; ~~provides a greater reduction for a significantly minimal participant;~~ and provides additional guidance for the determination of mitigating role. (Related amendment proposals: 8, 9, 48, and 60).*

Proposed Amendment: Section 2D1.1(a)(3) is amended by inserting the following at the end:

"Provided, that if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role) and -- ~~the offense involves any of the controlled substances listed below, the base offense level shall not exceed level 32:~~

(i) the offense involves any of the controlled substances listed below, the base offense level shall not be greater than 32:
(a) Heroin (or the equivalent amount of other Schedule I or II Opiates);
(b) Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
(c) Cocaine Base;
(d) ~~Phencyclidine (PCP);~~
(e) ~~Lysergic Acid Diethylamide (LSD)~~ (or the equivalent amount of other Schedule I or II Hallucinogens);
~~(f) N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;~~
(f) ~~Marihuana;~~ Fentanyl; or
(g) Fentanyl Analogue.
(h) Methamphetamine or "Ice".

(ii) the offense involves only controlled substances other than those listed in subdivision (i) above, the base offense level shall not be greater than level 24."

~~*Provided*, that if the offense involves any controlled substance other than those listed in subparagraphs (a) through~~

~~(g) above, and the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role), the base offense level shall not be greater than level 24. If an offense involves both the above listed controlled substances and other controlled substances, apply the offense level specified in the Drug Quantity Table set forth in subsection (c) below, but the base offense level shall not exceed 32 if the defendant qualifies for a mitigating role adjustment pursuant to §3B1.2 (Mitigating Role).".~~

Section 2D1.1(b) is deleted and the following inserted in lieu thereof:

"(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was ~~actually~~ possessed ~~by the defendant~~, ~~or the defendant induced or directed another participant to actually possess a dangerous weapon,~~ increase by 2 levels.

(2) If a dangerous weapon (including a firearm) was actually ~~brandished or displayed or fired~~ used by the defendant, or the defendant induced or directed another participant to ~~brandish, display, or fire~~ use a dangerous weapon, increase by 4 levels.

~~(3) If a dangerous weapon (including a firearm) was actually used by the defendant and as a result someone other than the defendant received serious bodily injury, or if the defendant induced or directed another participant to use a dangerous weapon and someone other than that participant received serious bodily injury, or if the defendant created a substantial risk of death or serious bodily injury, or induced or directed another participant to participate in activity that created a substantial risk of death or serious bodily injury, increase by 6 levels.~~

(4) If the defendant is convicted of violating 21 U.S.C. § 960(a) under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

~~(5) If the defendant was the principal organizer or leader of criminal activity that involved 15 or more participants, increase by 2 levels.~~

~~(6) If the defendant engaged in criminal activity from which he obtained substantial income or resources, and the defendant qualifies for an aggravating role adjustment pursuant to §3B1.1 (Aggravating Role), increase by 2 levels.".~~

Section 2D1.1(c) is amended by deleting subdivisions 1-11; by renumbering subdivisions 12-19 as 9-16; and by inserting the following as subdivisions 1-8:

(1) 100 KG or more of Heroin Level 38
(or the equivalent amount of other Schedule I or II Opiates);
500 KG or more of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);
5 KG or more of Cocaine Base;
100 KG or more of PCP, or 10 KG or more of PCP (actual);
100 KG or more of Methamphetamine, or 10 KG or more of Methamphetamine (actual), or 10 KG or more of "Ice";
1 KG or more of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
40 KG or more of Fentanyl;
10 KG or more of a Fentanyl Analogue;
100,000 KG or more of Marihuana;
20,000 KG or more of Hashish;
2,000 KG or more of Hashish Oil.

"(2) At least 30 KG but less than 100KG of Heroin Level 36
(or the equivalent amount of other Schedule I or II Opiates);
At least 150 KG but less than 500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 1.5 KG but less than 5 KG of Cocaine Base;
At least 30 KG but less than 100 KG of PCP, or at least 3 KG but less than 10 KG of PCP (actual);
At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of Methamphetamine (actual), or at
least 3 KG but less than 10 KG of "Ice";
At least 300 G but less than 1 KG of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);
At least 12 KG but less than 40 KG of Fentanyl;

At least 3 KG but less than 10 KG of a Fentanyl Analogue;
At least 30,000 KG but less than 100,000 KG of Marihuana;
At least 6,000 KG but less than 20,000 KG of Hashish
At least 600 KG but less than 2,000 KG of Hashish Oil.

(3) At least 10 KG but less than 30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 34
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 PCP (actual);
At least 10 KG but less than 30 KG of Methamphetamine, or at least 1 KG but less than 3 KG or more of Methamphetamine (actual), or at least 1 KG but less than 3 KG or more of "Ice";
At least 100 G but less than 300 G or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 4 KG but less than 12 KG or more of Fentanyl;
At least 1 KG but less than 3 KG or more of a Fentanyl Analogue;
At least 10,000 KG but less than 30,000 KG or more of Marihuana;
At least 2,000 KG but less than 6,000 KG or more of Hashish;
At least 200 KG but less than 600 KG or more of Hashish Oil.

(3) At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 32
At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 150 G but less than 500 G of Cocaine Base;
At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
At least 3 KG but less than 10 KG of Methamphetamine, or at least 300 G but less than 1 KG of Methamphetamine (actual), or at least 300 G but less than 1 KG of "Ice";
At least 30 G but less than 100 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 1.2 KG but less than 4 KG of Fentanyl;
At least 300 G but less than 1 KG of Fentanyl Analogue;
At least 3,000 KG but less than 10,000 KG of Marihuana;

At least 600 KG but less than 2,000 KG of Hashish;
At least 60 KG but less than 200 KG of Hashish Oil.

(4) At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 30
At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 50 G but less than 150 G of Cocaine Base;
At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
At least 1 KG but less than 3 KG of Methamphetamine, or at least 100 G but less than 300 G of Methamphetamine (actual), or at least 100 G but less than 300 G of "Ice";
At least 10 G but less than 30 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 400 G but less than 1.2 KG of Fentanyl;
At least 100 G but less than 300 G of a Fentanyl Analogue;
At least 1,000 KG but less than 3,000 KG of Marihuana;
At least 200 KG but less than 600 KG of Hashish;
At least 20 KG but less than 60 KG of Hashish Oil.

(5) At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 28
At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 35 G but less than 50 G of Cocaine Base;
At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
At least 700 G but less than 1 KG of Methamphetamine, or at least 70 G but less than 100 G of Methamphetamine (actual), or at least 70 G but less than 100 G of "Ice";
At least 7 G but less than 10 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 280 G but less than 400 G of Fentanyl;
At least 70 G but less than 100 G of Fentanyl Analogue;
At least 700 KG but less than 1,000 KG of Marihuana;
At least 140 KG but less than 200 KG of Hashish;
At least 14 KG but less than 20 KG of Hashish Oil.

(6) At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 26
At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

At least 20 G but less than 35 G of Cocaine Base;
At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
At least 400 G but less than 700 G of Methamphetamine, or at least 40 G but less than 70 G of Methamphetamine (actual), or at least 40 G but less than 70 G of "Ice";
At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 160 G but less than 280 G of Fentanyl;
At least 40 G but less than 70 G of a Fentanyl Analogue;
At least 400 KG but less than 700 KG of Marihuana;
At least 80 KG but less than 140 KG of Hashish;
At least 8 KG but less than 14 KG of Hashish Oil.

(7) At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 24
At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 5 G but less than 20 G of Cocaine Base;
At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
At least 100 G but less than 400 G of Methamphetamine, or at least 10 G but less than 40 G of Methamphetamine (actual), or at least 10 G but less than 40 G of "Ice";
At least 1 G but less than 4 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 40 G but less than 160 G of Fentanyl;
At least 10 G but less than 40 G of a Fentanyl Analogue;
At least 100 KG but less than 400 KG of Marihuana;
At least 20 KG but less than 80 KG of Hashish;
At least 2 KG but less than 8 KG of Hashish Oil.

(8) At least 70 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 22
At least 350 but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 3.5 G but less than 5 G of Cocaine Base;
At least 70 G but less than 100 G of PCP, or at least 7 G but less than 10 G of PCP (actual);
At least 70 G but less than 100 G of Methamphetamine, or at least 7 G but less than 10 G of Methamphetamine (actual), or at least 7 G but less than 10 G of "Ice";
At least 700 MG but less than 1,000 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 28 G but less than 40 G of Fentanyl;

At least 7 G but less than 10 G of a Fentanyl Analogue;
At least 70 KG but less than 100 KG of Marihuana;
At least 14 KG but less than 20 KG of Hashish;
At least 1.4 KG but less than 2 KG of Hashish Oil.".

(9) At least 40 G but less than 70 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 20
At least 200 but less than 350 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 2 G but less than 3.5 G of Cocaine Base;
At least 40 G but less than 70 G of PCP, or at least 4 G but less than 7 G of PCP (actual);
At least 40 G but less than 70 G of Methamphetamine, or at least 4 G but less than 7 G of Methamphetamine (actual), or at least 4 G but less than 7 G of "Ice";
At least 400 MG but less than 700 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 16 G but less than 28 G of Fentanyl;
At least 4 G but less than 7 G of a Fentanyl Analogue;
At least 40 KG but less than 60 KG of Marihuana;
At least 8 KG but less than 14 KG of Hashish;
At least 800 G but less than 1.4 KG of Hashish Oil.".

~~The Commentary to §2D1.1 captioned "Application Notes" is amended by inserting the following additional note:~~

~~"16. In defining substantial income or resources the Court should refer to the body of definitional law that has developed in interpreting Title 21 U.S.C. § 848(e)(2)(B).".~~

Section 3B1.2 is deleted in its entirety and the following inserted in lieu thereof:

"§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

~~(a) If the defendant was a significantly minimal participant in any criminal activity, decrease by 6 levels.~~

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in

any criminal activity, decrease by 2 levels.

~~In cases falling between (a) and (b), decrease by 5 levels.~~

In cases falling between (a) and (b), decrease by 3 levels.

Commentary

Application Notes:

1. This section provides a downward adjustment in offense level for a defendant who has a ~~significantly minimal role (6 level reduction), a~~ minimal role (4-level reduction) or a minor role (2-level reduction) in the criminal activity for which the defendant is accountable under §1B1.3 (Relevant Conduct). In cases falling between (a) and (b), ~~a 5 level reduction is provided, and in cases falling between (b) and (c),~~ a 3-level reduction is provided.

2. ~~To determine whether a defendant warrants a mitigating (significantly minimal, minimal, or minor) role adjustment requires an assessment of~~ One factor that determines whether a defendant warrants a mitigating role ~~is~~ the defendant's role and relative culpability in comparison with the other participants in the criminal activity for which the defendant is accountable pursuant to §1B1.3 (Relevant Conduct). The fact that the conduct of one participant warrants an upward adjustment for an aggravating role (§3B1.1) or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating (~~significantly minimal,~~ minimal, or minor) role. See the definition of "participant" in Note 1 of §3B1.1.

3. ~~Subsection (a) (6 level reduction) applies to a defendant who plays a significantly minimal role in concerted activity. To qualify for significantly minimal role under subsection (a), the defendant must be the least culpable of the participants in the criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating role listed in Note 6 and must be the least culpable. If more than one defendant equally qualifies as the least culpable, both defendants qualify for this reduction.~~

34. Subsection (b) (4-level reduction) applies to a defendant who plays a minimal role in concerted activity. To qualify for a minimal role adjustment under subsection (b), the defendant ~~plainly~~ must be one of the least

culpable, but not the least culpable, of the participants in ~~the~~ criminal activity. Such defendants ordinarily must have all of the characteristics consistent with a mitigating (~~significantly minimal,~~ minimal, or minor) role listed in Note 6.

4~~5~~. To qualify for a minor role adjustment under subsection (c) (2-level reduction), the defendant plainly must be one of the less culpable participants in the criminal activity, but have a role that cannot be described as minimal.

5~~6~~. The following is a non-exhaustive list of characteristics that ordinarily are associated with a mitigating (~~significantly minimal,~~ minimal, or minor) role:

(a) the defendant performed only unskilled and unsophisticated tasks;
(b) the defendant had no decision-making authority or responsibility;
(c) ~~total compensation to the defendant was small in amount, generally in the form of a flat fee must be small in relation to the compensation or gain realized by those persons who do not have a mitigating role in the offense and should ordinarily not exceed $5,000 and generally should be paid as a flat fee~~; and
(d) the defendant did not exercise any supervision over other participant(s).

6~~7~~. With regard to offenses involving contraband (including controlled substances, a defendant who

(a) sold, or negotiated the terms of the sale of, the contraband;
(b) had an ownership interest in any portion of the contraband;
(c) financed any aspect of the criminal activity; or
(d) transported contraband ~~as a courier~~

shall not receive a mitigating (~~significantly minimal,~~ minimal, or minor) role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, owned, or transported, or for that aspect of the criminal activity that the defendant financed because, with regard to those acts, the defendant has acted as neither a ~~significantly minimal,~~ minimal, or minor participant. For example, a street dealer who sells 100 grams of cocaine and who is held accountable under §1B1.3 (Relevant Conduct) for only that quantity shall not be considered for a mitigating (~~significantly~~

~~minimal,~~ minimal, or minor) role adjustment. In contrast, a street dealer who sells 100 grams of cocaine, but who is held accountable, pursuant to §1B1.3, for a jointly undertaken criminal activity involving 5 kilograms of cocaine may, if otherwise qualified, be considered for a mitigating (~~significantly minimal,~~ minimal, or minor) role adjustment, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendant sold.

~~7~~8. Consistent with the structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating (~~significantly minimal,~~ minimal, or minor) role adjustment. In determining whether a mitigating (~~significantly minimal,~~ minimal or minor) role adjustment is warranted, the court should consider all of the available facts, including any information arising from the circumstances of the defendant's arrest that may be relevant to a determination of the defendant's role in the offense. In weighing the totality of the circumstances, a court may consider a defendant's assertion of facts that supports a mitigating role adjustment. However, a court is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

Background: This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a), subsection (b) or subsection (c), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.".

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CHIEF POSTAL INSPECTOR
INSPECTION SERVICE

March 15, 1993

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

Attention: Public Information

Gentlemen:

The U.S. Postal Service respectfully submits its comments on the 1993 proposed guideline amendments. As an overview, we disagree with the proposed guidelines on money laundering (Amendment 20) and the guideline commentary on public trust (Amendment 23), and request the adoption of the proposed amendments submitted by the Postal Service relating to the theft of mail (Amendment 44), and the public trust enhancement for offenses committed by postal employees (Amendment 46). In addition, we strongly urge the Commission to consider the future formulation of a "multiple victim" adjustment guideline (Amendment 45). Our comments are explained more fully in the following:

Proposed Amendment 20, § 2S1.1, § 2S1.2. We disagree with the proposed revisions to the money laundering guideline based on the statutory purpose of 18 U.S.C. §§ 1956, 1957. The legislative intent of these statutes is to create a separate crime offense to deter criminals from attempting to profit from their illegal activities and to impose a higher penalty for this type of criminal misconduct. To accomplish this, the statutes prescribe criminal penalties separate from and higher than those of the underlying criminal offense which gave rise to the monies, property or proceeds involved in the money laundering. This legislative intent would in effect be vitiated by the revision to the guideline. Because the underlying offense and the money laundering are two separate crimes, we believe the guidelines should likewise maintain this

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separateness and that the concept of "closely related" offenses should not apply. The commentary of the proposed guideline also draws a distinction which is not supported by the legislative intent or statutory definitions of "actual money laundering" as compared to "other money laundering." Simply stated, we believe if the government proves the elements of the statute, the defendant should be sentenced accordingly, without a further analysis of the criminal intent by the sentencing court. In view of our concerns with these proposed amendments, we support the existing guidelines which provide for a separate and higher offense level for money laundering not tied to the offense level of the specified unlawful activity. For the above reasons, the Postal Service endorses the position of the Department of Justice to maintain higher levels for money laundering offenses.

Proposed Amendment 23, § 3B1.3. We disagree with this proposed amendment's application to employees of the Postal Service, and submit in the alternative a revision to the commentary portion of this section which would make the public trust guideline specifically applicable to postal employees **(Amendment 46)**. Historically, postal employees have held a special fiduciary relationship with the American public because their personal correspondence is entrusted to the care and custody of the agency. This special trust is corroborated in the oath of employment and the long-standing federal criminal statutes which relate to the theft or obstruction of mail and embezzlement which apply exclusively to postal employees. In addition, these types of crimes significantly impair the Postal Service function and negatively impact on the public's trust in the institution.

Our proposed revision to the commentary would make the public trust guideline apply to employees of the Postal Service sentenced for theft or obstruction of United States Mail, (18 U.S.C. §§1703, 1709); embezzlement of Postal Service funds (18 U.S.C. §1711); and

theft of Postal Service property (18 U.S.C. §§1707, 641). To make this amendment comport to guideline commentary format, the statute citations are deleted. Application Note 1 is amended by inserting the following paragraph at the end:

> "This adjustment, for example, will apply to postal employees who abuse their position to steal or obstruct U.S. Mail, embezzle Postal Service funds, or steal Postal Service property."

It is our opinion the enhancement is justified because these crimes disrupt an important governmental function--the nation's postal system--as prescribed in § 5K2.7. Moreover, without the offense enhancement provided by § 3B1.3, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused by the offense under similar rationale discussed in § 2B1.3, comment (n.4). For example, the theft or destruction of mail by employees of the Postal Service necessarily impacts numerous victims, while the total dollar loss may be minimal.

Our proposal clarifies that the special trust relationship a postal employee has with the public and its written correspondence is significantly different from that of the employment relationship of the ordinary bank teller as cited by example in §3B1.3, comment (n.1), of the current guideline. Adoption of our proposed amendment would also provide for consistency in the application of this guideline in light of several court decisions, United States v. Milligan, 958 F.2d 345 (11th Cir. 1992) (court held that a postal clerk who embezzled funds had occupied a position of trust); United States v. Lange, 918 F.2d 707 (8th Cir. 1990) (postal employee who had access to certified and Express Mail was in a position of trust); United States v. Arrington, 765 F. Supp. 945 (N.D.Ill 1991)(a casual mail handler

was not in a trust position), and obviate the need of detailed analysis by the court of the specific duties and responsibilities of the defendant as qualifying the particular position occupied as one of "public trust."

Proposed Amendment 44, § 2B1.1(b)(4). The current guidelines applicable to mail theft are based on the dollar value of the loss. Although the guideline increases the offense level if mail is involved, we do not feel this adequately addresses the seriousness of the offense and its impact on the victims and on the essential governmental function of mail delivery. The proposed amendments take these factors into consideration by initially increasing the offense level to a level 6, and then adding the appropriate level increase corresponding to the total dollar loss associated with the theft. In order to conform with similar guideline language, the amendment should be reworded to read:

> "If undelivered United States Mail was taken, increase by two levels. If the offense is less than level 6, increase to level 6."

In addition to this amendment to the mail theft guideline, we have proposed § 2B1.1(b)(8) to address theft schemes involving large volumes of mail. Frequently, these volume thefts are conducted as a gang-related crime to steal the mail and then fraudulently negotiate or use those items contained within. In most instances, a substantial volume of stolen mail is necessary to obtain a minimal number of checks, credit cards, negotiable instruments or other items of value. The dollar loss of these types of thefts does not accurately reflect the scope of the crime in terms of the number of victims affected and the operations of the government's postal system. Our proposed amendment would address the more serious nature of these schemes to steal large volumes of mail by increasing the offense level to a 14.

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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."

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[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.

EEI believes that the proposed application note focuses too narrowly on a person's status in the employment context. In relevant part, the proposed note provides that:

> "Special trust" refers to a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than an employee whose responsibilities are primarily ministerial in nature.

EEI recommends that the reference to "professional or managerial discretion" be eliminated from the proposed amendment. This reference is likely to confuse a sentencing court because it focuses on employment-related abuses of trust and does not mention non-employment abuses of trust. There are numerous situations where a personal "special trust" is violated (for example, sexual abuse of a child by a relative or clergyperson). But such situations are not reflected in the proposed amendment.

Furthermore, the proposed amendment suggests that persons in professional or managerial positions in companies generally are in positions of trust that would warrant a sentence enhancement, provided that their positions "contributed in some significant way to facilitating the commission or concealment of the offense." This seems too casual a linkage between a person's status in a company and enhancement of that person's sentence. At a minimum, there should be some intent by an individual to use a position of special trust to further commission or concealment of an offense before this forms the basis for enhancing their sentence.

The proposed application note also should be clarified to ensure that the provision does not automatically imbue corporate managers with an aura of "special trust." For example, a corporate manager who is responsible for compliance with a particular area of the law should not be in a position of special trust with respect to violations of other areas of the law. The proposed amendment should require that the individual be in a position of special trust directly relevant to the underlying offense before this sentence enhancement is applicable.

Also, the trust should be one owed to the victim of the offense for which a sentence is being imposed, and should be reasonably relied on by the victim in the context of the offense. Corporate managers should not be liable for a perceived

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

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

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.

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[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.

V. Amendment No. 45, Multiple Victims

The United States Postal Service requests that the Commission create in Chapter Three, Part A, a new victim-related general adjustment to take into account increased harm caused when there is more than one victim.[8] The proposed amendment is as follows:

> If the offense affected more than one victim, increase the offense level by 2 levels. If the offense affected 100 victims or more, increase the offense by 2 levels for every 250 victims.
>
> | No. of victims | Increase in offense level |
> |---|---|
> | 2 - 99 | 2 |
> | 100-349 | 4 |
> | 350-649 | 6 |
> | more than 650 | 8 |

The Postal Service specifically recommended that this departure be included as a victim-related adjustment applicable to all offenses involving multiple victims rather than limited to specific types of offenses.[9]

First of all, courts need to look to the statute and regulations that define the offense for which a defendant is being sentenced to determine whether "number of victims" is a relevant factor in sentencing. If the statute or regulations identify factors for the court to consider in setting the level of fine or imprisonment for an offense, and do not list "number of victims" as a relevant factor, it may not be appropriate for the court to consider. Furthermore, even if number of victims is a relevant factor, in many cases it will have been addressed by the prosecutor bringing multiple counts against the defendant. For the court to enhance the defendant's sentence based on "number of victims" in such cases would be to penalize the defendant twice for the same conduct.

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[8] Amendment No. 45, Notice at 62,853.

[9] Letter to the Honorable William W. Wilkins, Jr. from Chief Postal Inspector K.J. Hunter, dated November 27, 1992.

In addition, EEI is concerned that the proposed amendment would prove too vague and, thus, difficult for sentencing courts to apply. Specifically, the proposed amendment does not define under what circumstances an "affected" party would be deemed a victim or the degree to which a party would have to be "affected" in order to be deemed a victim. In this regard, EEI is particularly concerned about the impact of the proposed amendment on persons convicted of offenses involving the environment. In such cases, more than one individual may be affected by an offense, but this may not correlate to degree of actual harm experienced by any of those individuals, and the effects may be an indirect consequence of the conduct for which the defendant is being sentenced.

Moreover, unlike other adjustments in Chapter 3, Part A -- vulnerable victims, official victims, and restraint of victims -- the proposed amendment deals not with knowing conduct aimed at particular victims but with possible unforeseen impacts on unintended victims. While such an adjustment may be desirable when applied to specific offenses, particularly offenses intended to affect multiple victims, its application across a wide variety of offenses without such constraints would inject an unacceptable degree of uncertainty into the sentencing process.

Therefore, EEI recommends that the Commission reject the proposed amendment as being too broad and ill-defined. At a minimum, the Postal Service should be required to identify the types of offenses directly of concern to it in proposing the amendment, and the amendment should be limited to those types of violations. Also, even as to those types of violations, the Commission needs to provide guidance about who qualifies as a victim. Furthermore, courts should be instructed to consider whether "number of victims" is relevant under the statute and regulations being enforced and given the facts of the case, including the number of counts brought by the prosecutor and the defendant's state of mind in committing the offense.

Thank you for considering our views on these matters.

Very truly yours,

Peter B. Kelsey

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March 10, 1993

United States Sentencing Commission
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One Columbus Circle North East
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Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments

To The Honorable United States Sentencing Commission:

I write to you, in as brief a form as possible, to express my comments on the proposed amendments in the sentencing guidelines. The fact that I am an assistant federal public defender for approximately 13 years makes me both a well informed and biased source, of which I am sure you are cognizant.

I applaud and encourage the thought and effort made to amend the loss tables and deal with the problem of more "than minimal planning" insofar as it has resulted in disparate treatments and a considerable amount of litigation. With respect to the additional issues for comment in this section, I definitely believe that the loss tables should have fewer and larger ranges in the lower ends. The loss tables at the higher ends are so large as to be beyond my experience and have no opinion as to whether they need adjustment.

Although more work would need to be done, I would encourage the Commission to modify the definition and approach to a more than minimal planning enhancement as opposed to building it into the loss table or, alternatively, building it into the loss table further from the bottom ranges, maintaining the lesser enhancement as long as possible and perhaps adding a third and additional level increase at the far end.

With respect to redefining more than minimal planning, I do have some suggestions:

1. Build in a two level decrease for spur of the moment or sudden temptation conduct;

2. Do not provide for multiple victim enhancement until the number of victims has reached an appreciably large level i.e. 15 or 20 and perhaps make this enhancement an additional one or two levels at an additionally large number such as 40 or 50;

3. Require, by example, truly more than the ordinary conduct to commit the offense before an enhancement is added. Few if any types of fraud or theft escape the current definition.

The proposal with respect to U.S.S.G. § 3B1.2 (role in the offense) is also an improvement. I would suggest option one is the most preferable of the options under Note 7 reading as follows: Option 1 is prefered because it affords the sentencing judge the most flexibility in determining whether or not to apply the two level adjustment for minor role and, unlike option 2, does not repeat the Application Note position contained in Note 8 concerning burden of pursuasion.

The firearms amendments are mostly technical and it would be useful for the Commission to have a period where it does not amend the firearms guideline. I do believe that an appropriate differentiation can be made between different weapons including weapons that fall within 26 U.S.C. § 5845 and its various subdivisions. Whether the differentiation should be made by different offense levels, by placement of the sentence within a the guideline range, or by a Commission-guided departure, depends on the weapon involved. It would seem that a fully automatic machine gun is different from a sawed-off shotgun which is different from a sawed-off rifle which is different from other weapons such as tear gas "pen guns," all of which are prohibited in Title 26.

I have no great critism of the proposed amendment § 3B1.3 abuse of position of special trust or use of special skill. However, perhaps the time has come to separate these two concepts into separate adjustment sections. It would seem to me be best to leave special trust as a Chapter 3 adjustment with appropriate illustrations in the application notes rather than adding it as a specific offense characteristic in a hit or miss fashion to various guidelines relating to fraud or embezzlement or in general to the embezzlement guideline. Certainly the proposed amendment is superior to the additional issue for comment, particularly as it relates to deleting the example regarding "ordinary bank tellers".

The proposal relating to 5K1.1 - issue 24 - will apply to very few cases if it is intended to exclude "crimes of violence" where that concept includes drug offenses. It also has limited usefulness because of the exclusion of anyone who is not a "first offender".

At least it should include all category I offenders and perhaps all category I and category II offenders. The injustice which it is intended to address is not related or necessarily related to whether the defendant is category I or category VI, but the proposal is at least some improvement over the current requirement for a government motion.

I should add with respect to § 5K that I have, as have other attorneys, experienced cases in which this proposed amendment could well have made a difference.

With respect to the proposal number 25 relating to § 6B1.2 the idea is commendable. Perhaps a stronger word than "encourages" should be utilized. I would suggest a policy statement that requires the government to make such the disclosures at either option point and provides as a ground for downward departure the intentional failure of the government to do so. Experiences has taught that toothless platitudes rarely modify prosecutorial behavior in an adversary system.

The Commission should act on issue for comment number 40 relating to the mandatory minimum and distinction between cocaine and cocaine base. Significant support exists not only from the interjection of the Commissions expertise, but also other sectors of the criminal justice system for the elimination of this distinction.

Proposed numbers 44, 45 and 46 are all poor ideas, poor policy, and should not result in favorable action. They would increase unwarranted disparities and would not further the purposes of sentencing indicated by Congress.

Proposal number 57 submitted by the Department of Justice should not be acted upon. It is an attempt to accomplish exactly the opposite of what it purports to do. The Department of Justice obviously intends to utilize its proposed amendment, if it becomes the guideline, as the Commission's position which ought to be followed by the Courts in prohibiting attacks on prior convictions. It is my understanding that the Commission wishes to take no position and allow the courts to develop their own procedures. If the Commission does intend to take a position on this procedural question, it should study the matter, invite additional comment, and it is hoped, ultimately recommended that the courts permit collateral attacks on prior convictions utilized to enhance sentences.

I had promised to make this letter brief. There are many other things I could or should say, but will not. I will say that the last two cycles of amendments have been encouraging insofar as they have addressed problems of harshness and not simply been "fixes" of guidelines which appear to be too low to some other components of the criminal justice system.

Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/tmw

National Association
of Manufacturers

James P. Carty
Vice President, Government Regulation,
Competition & Small Manufacturing

March 4, 1993

The Honorable William Wilkins
Chairman
United States Sentencing Commission
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Washington, D.C. 20002-8002

Dear Chairman Wilkins:

On behalf of the more than 12,000 members of the National Association of Manufacturers (NAM), we are submitting this comment letter in response to a request for comments that appeared in the December 31, 1992, *Federal Register.* We have confined our comments to Amendments # 23, 24, 31, 45 and 47.

Amendment # 23 -- Abuse of Position of Trust

It appears the intent of the amendment is to clarify that the Abuse of Position of Trust (Sec. 3B1.3) adjustment should be used only in certain narrow circumstances. As drafted, it is not clear the amendment achieves that goal. We believe the amendment wrongly focuses on the employment sphere to define the process of determining special trust cases. Although there are cases involving defendants who have abused their managerial or professional discretion, there are any number of cases outside the employment realm involving abuse of special trust. For example, sexual abuse of a minor by a "big brother" or "big sister" would clearly violate a special trust as would similar abuse of a parishioner by a clergyman, or a boy scout by his troop leader. None of these examples falls directly within the workplace, yet each plainly implicates relationships of special trust. To use the employment situation as a global explanation of abuse of special trust is, therefore, potentially confusing and could be misleading to a court. As an alternative, we recommend the following.

> " 'Special trust' refers to a position of public or private trust characterized by substantial discretionary judgment that is ordinarily given considerable deference. Positions of special trust are often within an employment context involving professional or managerial discretion, but may frequently fall outside the employment context. For this section to apply, the position of special trust must have contributed in some substantial way to facilitating the commission or concealment of the offense. This section will apply to a narrow class of

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where the trust relationship is special and where breach of that trust is ordinarily met with heightened societal opprobrium."

Amendments # 24, 31 and 47 -- Substantial Assistance to Authorities

Each of these amendments raises the legitimate issue of whether the government should be interposed as a "gatekeeper" between the defendant and the court on questions of fact bearing on sentence administration. At present, the question of whether the defendant has rendered substantial assistance to authorities can be placed before the court if and only if the government so moves. This ground for departure stands alone in requiring a government motion to put the issue before the court.

The NAM believes there is no compelling reason to treat this basis for departure different from all others. Although we are unaware of any empirical evidence suggesting that wrongdoing is occurring to an appreciable degree, the current system holds the potential for abuse. The prosecutor can act arbitrarily and capriciously toward the defendant, and can erect unreasonably high hurdles for agreeing to move for a reduction of sentence. It strikes us that the possibility for abuse is sufficiently great so as not to outweigh any countervailing need to retain the government in the role of "gatekeeper."

It is not sufficient to argue, furthermore, that the exclusive government motion is necessary because the government's testimony is crucial in arriving at a factual determination that the defendant has rendered substantial assistance. Current guidelines provide that "[s]ubstantial weight should be given to the government's evaluation of the extent of the defendant's assistance." Sec. 5K1.1, comment (n.3). There is thus an existing mechanism that assures that departures will occur only in cases where there is sufficient evidence that the defendant has in fact rendered substantial assistance.

To preclude abuse and assure fairness, the court should be permitted in all cases to consider a motion to depart by the defense as well as the government. We therefore believe that either amendment # 31 or 47 will accomplish the goal but that amendment # 24 is overly narrow in its application and would exclude such motions in far too many deserving cases.

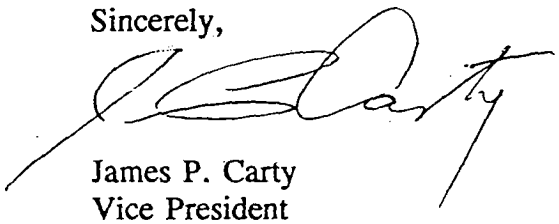
Amendment # 45 Multiple Victims

Amendment # 45 would establish a new adjustment based upon the number of persons "affected" by the offense. We oppose its adoption. The language of the amendment is exceedingly and dangerously vague and the amendment introduces a novel concept into sentencing policy that is of questionable wisdom. Is an "affected" party a victim? Can one be "affected" and not be a victim? What is the definition of "affected." Can it entail emotional effects?

Focusing on the consequences of an offense is problematic. Punishment based on unforeseeable outcomes wrongly interjects chance into the criminal justice system and, as a result, undermines the purpose of sentencing guidelines. Cases involving multiple victims are currently, and should continue to be, dealt with by increasing the number of counts leveled against the defendant. See, e.g., Sec. 2N1.1(d)(1)(Tampering With Consumer Products).

We appreciate having the opportunity to comment. If we can be of any assistance in the future, please do not hesitate to call on us.

Sincerely,



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Chambers of
Alicemarie H. Stotler
United States District Judge

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March 03, 1993

Judge Billy W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
One Columbus Circle, N.E., Ste. 2-500
Washington, D.C. 20002-8002

Re: 1993 Proposed Amendments

Dear Chairman Wilkins:

I wish you and the Commission and the Judicial Working Group a productive March 8th conference.

I submit herewith comments on the proposed amendments for the 1993 cycle. As always, silence is ambiguous and may signify one or more of the following: approval; no opinion; deference to others more knowledgeable; no experience; no clue. One almost overriding consideration governs my responses: everyone complains when changes occur and therefore only absolutely necessary changes should be made. Those, we recognize by the vague notion of "consensus," untoward appellate attention, and by the insights contained in comments by Sentencing Commission "consumers."

On separate pages, then, numbered to match with the number of the proposed amendment, I comment where (1) I cannot restrain myself; (2) where I feel certain that reasonable minds will differ and I want my vote recorded; (3) where I feel qualified to take issue with the need for any change at all; and, (4) where I disagree for reasons stated.

If any member of the Commission/staff reviewing these remarks wishes further explanation, please call.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler
United States District Judge

Amendment 27

This is a vote for the **Synopsis.** I have not the time, patience, or skill to spin out each proposed change; but I like what the Synopsis says it will do.

These giant "healing" amendments are going to be scarce, I hope. Now that the Section 3582(c) "Motions for Modification" are upon us (primarily on account of the additional level for early acceptance of responsibility -- which motions, of course, do not beget sentence modification), the prospect of tinkerings with numerous substantive offense levels makes me nervous.

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March 10, 1993

United States Sentencing Commission
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Washington, D.C. 20002-8002

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Sincerely,

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Assistant Federal Defender

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January 26, 1993

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1331 Pennsylvania Avenue, N.W.
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Washington, D.C. 20004

Dear Judge Wilkins:

Bill Osteen, Jr., has discussed with me his letter to you regarding the Section 4B1.1 career offender enhancement. I would like to second his proposal that the Government give notice that such an enhancement may be applied.

This would facilitate frank discussion between attorneys and their clients and between attorneys and U.S. Attorneys seeking to resolve cases.

As Bill notes, the Government has better and easier access to a defendant's record and this disclosure would not be an undue burden.

Sentences fashioned under the Guidelines are sufficiently stunning without the surprise application of this enhancement. Anything the Commission might do to alleviate this situation would be helpful to all parties concerned.

Very truly yours,

HARRISON, NORTH, COOKE & LANDRETH

A. Wayland Cooke

AWC:cak

United States District Court
Middle District of North Carolina
Post Office Box 3485
Greensboro, North Carolina 27402

Chambers of
William L. Osteen, Sr.
Judge

January 15, 1993

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:

Not too long ago while I was still engaged in defense practice I realized that the "career offender guideline" posed a real difficulty in dealing with my clients. I should have mentioned it to the Sentencing Commission at the time, but for some reason failed to do so.

It was interesting recently to find that my son, Bill, has run into the same difficulty. I asked him to write for your consideration. He has done so and after reading his letter, I have no additional comments except that I concur completely with his analysis of the problem and suggested solution. This should not impose an additional effort upon the U. S. Attorney, but even if it does, when compared to the tremendous adverse effect on the defendant under the system, it seems that such effort could be justified.

Please give the enclosed letter the consideration which it richly deserves.

Thanks for all the good efforts your Commission brings to the sentencing process.

Sincerely,

William L. Osteen

William L. Osteen, Sr.

WLO,sr:ajv

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OF COUNSEL

January 13, 1993

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

Dear Judge Wilkins:

I am writing to request that the Sentencing Commission consider amending the guidelines to correct what I believe is a difficult, if not unfair, situation under the career offender guideline.

Section 4B1.1 of the guidelines deals with the career offender. The penalties pursuant to that section result in greatly increased guideline ranges for certain defendants. It is my belief that a defendant should be given notice by the government prior to entry of plea or trial if such penalties may be imposed. This could be done pursuant to a framework similar to that required under 21 U.S.C. §841 and §851 for enhanced penalties.

I bring this to the Commission because of a recent difficulty encountered in one of my own cases. My client was charged with bank robbery. My preliminary calculations led me to believe a sentencing range of six to eight years was possible, unless the career offender enhancement applied. If applicable, my defendant's sentence could be in the 17 to 20 year range, close to the maximum possible. I was unable to advise my client effectively with respect to his alternatives.

Knowledge of a defendant's prior criminal record is a matter almost exclusively within the government's control prior to trial or plea. Neither a criminal defendant nor his counsel have access to resources such as the NCIC or other records of criminal convictions. Most defendants, as a practical matter, do not have a clear recollection of prior convictions. There is not sufficient time, prior to trial or plea, for a defense attorney to accurately investigate prior records particularly if a defendant has lived in another jurisdiction.

I recognize that the guidelines treat a defendant that accepts responsibility favorably. Nevertheless, acceptance is a factor determined following entry of a plea; a defendant is not assured of that reduction. Realistically, most defendants want to understand their maximum exposure in making a decision as to whether to plead or go to trial. Defense counsel wants to inform the defendant of his alternatives to the fullest extent possible.

Although the enhanced penalties pursuant to 21 U.S.C. §841 increase the minimum and maximum sentences applicable, I believe the notice theory contained therein should apply to §4B1.1 as well. There is no practical distinction between §841 and §4B1.1.

One of the problems defense attorneys run into if they recognize that the career offender provisions apply is that often a defendant cannot believe or accept their applicability after being so advised. Notice by the government prior to entry of a plea would alleviate that problem, at least in part.

Second, when a defendant is caught by surprise at the career offender adjustment in the presentence report, he is often antagonistic to both his lawyer and the system, and will subsequently seek appellate or other relief. I believe a notice requirement would alleviate this problem by giving a defendant advance notice of the stricter penalty.

Rather than cause more cases to go to trial, I believe prior notice of a career offender enhancement will induce more defendants to cooperate. It would give a defendant a tangible reason to believe he will receive such a sentence.

Even in cases in which the government failed to notify a defendant, criminal history points would be assessed to take into account the convictions; a trial court could depart upward if the career offender guideline was not noticed based on the trial court's discretion. I believe the trial court should have some discretion in dealing with these sentences.

It is my belief that such a provision of notification would promote more fairness in the criminal process, and lead to more informed pleas.

I further believe that such notice could be given with relatively little 'extra work' by the United States. Usually government agents will make some effort to ascertain a defendant's

record during the investigation. Following indictment, the probation office investigates a defendant's record for purposes of pretrial release. These probation records may or may not be disclosed to the defendant; if disclosed, they have to be returned to that office immediately following the detention hearing. The United States Attorney can order an NCIC check; any information contained therein which is unclear can be checked out quickly through law enforcement resources.

I realize courts have generally held that application of the career offender guidelines is not a basis for the defendant to withdraw his plea. I do not believe that such a holding means the current system cannot be changed to promote additional fairness.

My bank robbery case is awaiting resolution. I am still uncertain as to whether the career offender adjustment will apply. Before entry of the plea, the government ordered an NCIC check, but would not voice an opinion on the applicability of the career offender adjustment. One conviction noted a burglary arrest but said "adj. wth." I contacted an attorney in Florida; their investigator could only find four adult convictions which did not give rise to the career offender adjustment. My client assures me he only has one adult felony conviction for a crime of violence or drug offense. I remain uncertain. We will wait and see.

Thank you for your time and consideration.

Sincerely,

William L. Osteen, Jr.

William L. Osteen, Jr.

WLO:cam

Before the
UNITED STATES SENTENCING COMMISSION
One Columbus Circle, N.E., Suite 2-500
Washington DC 20002-8002
Attention: Public Information

----------X

In the Matter of

Proposed Amendment of the Sentencing Guidelines for the United States, Section 2F2.1, Applicable to Violations of the Computer Fraud and Abuse Act

----------X

TO: The Commission

COMMENTS OF THE SOCIETY FOR ELECTRONIC ACCESS

The Society for Electronic Access ("SEA") submits these comments in the above-captioned proceeding, which concerns the proposed amendments to the United States Sentencing Guidelines ("U.S.S.G.") concerning Computer Fraud and Abuse [57 Fed. Reg. 62832 (1992) (to be codified at U.S.S.G sec. 2F2.1) (proposed Dec. 31, 1992)]. We strongly urge you not to adopt these amendments because the penalties specified therein are unduly harsh, overly broad, and vague.

These amendments violate due process by providing harsher penalties for activities more properly related to computing than to crime. For example, proposed U.S.S.G. sec. 2F2.1.b.1 states:

"If the defendant altered information, increase by 2 levels"

where alteration is defined in Commentary #9 as including:

> "...all changes to data, whether the defendant added, deleted, amended or destroyed any or all of it."

It is almost impossible to use a computer without performing one or more of these functions. Merely logging on to another

computer fits this definition of alteration because this changes the information kept in its system logs, even if the user never requested that a specific file or record be accessed. Furthermore, the effect of these data alterations may not be directly related to severity of a crime: if a voyeur looks at protected files and leaves a note telling that he or she was there, that is very different from a vandal's deletion of a credit file. Yet, under these amendments both situations are treated as activities of equal seriousness. It is absurd to think that the alteration itself, absent other factors, requires an increase in the severity of the minimum sentence, or that all alterations affect criminality equally.

These amendments violate due process by including overly broad standards for determining the severity of a crime. For example, proposed U.S.S.G. sec. 2F2.1.b.5 states:

> "If an offense was committed for the purpose of malicious destruction or damage, increase by 4 levels."

where malicious destruction or damage, as defined in Commentary #11:

> ". . . includes injury to business and personal reputations."

The effect of so broad a category of activity being contained in a single sentencing adjustment would be to group the trivial with the heinous, and punish them equally. Breaking into a person's computer account and publicly posting information which disrupts his or her ability to conduct business is very different matter

from copying and publicly posting materials from that person's account that simply make the person look foolish, yet the amendment groups these actions together as offenses of equal seriousness.

Furthermore, this language allows for the punishment of speech without requiring a determination that the speech does not enjoy the protection of the First Amendment. The Supreme Court has always erected extremely stringent standards for the kinds of speech that can be found unprotected by the First Amendment, and these amendments to the Sentencing Guidelines err by allowing speech to be punished if it is found to damage someone's "personal reputation" under less stringent standards of proof, which would be introduced at the sentencing, rather than at the trial itself.

These amendments violate due process by mandating overly harsh punishments. To use an example derived from the recent past (see Salinger v. Random House, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987)), if a defendant (willfully and for the purposes of commercial advantage or private financial gain) wrote something for publication which included sections of J.D. Salinger's private correspondence, the defendant could be convicted of criminal copyright infringement, and fined. See 17 U.S.C. sec. 506 and 18 U.S.C. sec. 2319. It stretches the imagination, however, to suggest that if the defendant had either obtained or distributed these materials electronically, no matter how limited the scope of the distribution, this copyright

infringement would be transformed into a crime so severe that the defendant would, as a first time offender, face a sentence of fifteen to twenty-one (15-21) months in prison.

Proposed U.S.S.G. sec. 2F2.1.b.2 states:

> "...if the defendant disclosed protected information to the public by means of a general distribution system, increase by six levels."

where the definition of "general distribution system" as defined in Commentary #10 includes:

> "...electronic bulletin board and voice mail systems, newsletters and other publications, and any other form of group dissemination, by any means."

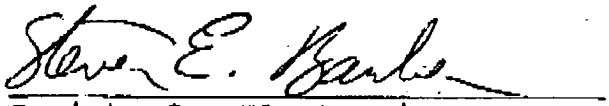
These amendments suggest that crimes for which the trial judge has heretofore had the latitude to impose probationary sentences or fines or both must now receive minimum sentences harsher than those mandated by the Federal Sentencing Guidelines for assault where the use of a dangerous weapon was threatened [U.S.S.G. sec. 2A2.3.a.1], sexual abuse of a ward [U.S.S.G. sec. 2A3.3.9.a] or trespassing on government property with a firearm [U.S.S.G. sec. 2B2.3.B.1 - .2]. Of all the potential violations of due process contained in these amendments, this potential for mandating unduly harsh sentences is the most shocking and the most clear.

In President Clinton's statement, "Technology for America's Economic Growth: A New Direction to Build Economic Strength" he says "Government telecommunication and information policy has not kept pace with new developments in telecommunications and computer technology. As a result, government regulations have

tended to inhibit competition and delay deployment of new technology." These amendments are part of that problem.

By simultaneously rendering the Guidelines both harsher and more vague, these amendments would create a chilling effect on perfectly legal uses of computers by private citizens, by creating an environment in which the potential criminality of an action would be impossible to ascertain in advance. Therefore, the SEA strongly urges you not to adopt the amendments to United States Sentencing Guidelines proposed at 57 Fed. Reg. 62832.

Respectfully submitted,



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March 15, 1993

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-9002
Attention: Public Information

Re: Proposed Amendent #59 to the Sentencing Guidelines for United States Courts, which creates a new guideline applicable to violations of the Computer Fraud and Abuse Act of 1988 (18 U.S.C. 1030)

Dear Commissioners:

The Electronic Frontier Foundation (EFF) writes to state our opposition to the new proposed sentencing guideline applicable to violations of the Computer Fraud and Abuse Act of 1988, 18 U.S.C. 1030 (CFAA). We believe that, while the proposed guideline promotes the Justice Department's interest in punishing those who engage in computer fraud and abuse, the guideline is much too harsh for first time offenders and those who perpetrate offenses under the statute without malice aforethought. In addition, promulgation of a sentencing guideline at the present time is premature, as there have been very few published opinions where judges have issued sentences for violations of the CFAA. Finally, in this developing area of the law, judges should be permitted to craft sentences that are just in relation to the facts of the specific cases before them.

The Proposed Guideline Is Too Harsh.

The proposed CFAA sentencing guideline, with a base offense level of six and innumerable enhancements, would impose strict felony liability for harms that computer users cause through sheer inadvertence. This guideline would require imprisonment for first time offenders who caused no real harm and meant none. EFF is opposed to computer trespass and theft, and we do not condone any unauthorized tampering with computers -- indeed, EFF's unequivocal belief is that the security of private computer systems and networks is both desirable and necessary to the maintenance of a free society. However, it is entirely contrary to our notions of justice to brand a computer user who did not intend to do harm as a felon. Under the proposed guideline, even a user who painstakingly attempts to avoid causing harm, but who causes harm nonetheless, will almost assuredly be required to serve some time in prison.

The proposed guideline, where the sentencing judge is given no discretion for crafting a just sentence based on the facts of the case, is too harsh on less culpable defendants, particularly first time offenders. As the Supreme Court has stated, the notion that a culpable mind is a necessary component of criminal guilt is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952). In the words of another court, "[u]sually the stigma of criminal conviction is not visited upon citizens who are not morally to blame because they did not know they were doing wrong." *United States v. Marvin*, 687 F.2d 1221, 1226 (8th Cir. 1982), *cert. denied*, 460 U.S. 1081 (1983).

There Is Not Yet Enough Caselaw to Warrant a Guideline.

The Sentencing Commission itself has recognized the importance of drafting guidelines based on a large number of reported decisions. In the introduction to the Sentencing Commission's *Guidelines Manual*, the Commission states:

> The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a

> significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions, and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented pre-sentence reports, the parole guidelines, and policy judgments.

United States Sentencing Commission, *Guidelines Manual*, Chap. 1, Part A (1991).

At the present time, there are only five reported decisions that mention the court's sentencing for violations of the Computer Fraud and Abuse Act. *See, United States v. Lewis*, 872 F.2d 1030 (6th Cir. 1989); *United States v. Morris*, 928 F.2d 504 (2d Cir. 1991), *cert. denied,* 112 S. Ct. 72 (1991); *United States v. Carron*, 1991 U.S. App. LEXIS 4838 (9th Cir. 1991); *United States v. Rice*, 1992 U.S. App. LEXIS 9562 (1992); and *United States v. DeMonte*, 1992 U.S. App. LEXIS 11392 (6th Cir. 1992). New communications technologies, in their earliest infancy, are becoming the subject of precedent-setting litigation. Overly strict sentences imposed for computer-related fraud and abuse may have the effect of chilling these technologies even as they develop. Five decisions are not enough on which to base a guideline to be used in such an important and growing area of the law.

The Commission itself has recognized that certain areas of federal criminal law and procedure are so new that policy statements, rather than inflexible guidelines, are preferable. *See, e.g.,* United States Sentencing Commission, *Guidelines Manual*, Chap. 7, Part A (1990) (stating the Commission's choice to promulgate policy statements, rather than guidelines, for revocation of probation and supervised release "until federal judges, probation officers, practitioners, and others have the opportunity to evaluate and comment. . . ."). A flexible policy statement, rather than a specific sentencing guideline, is a more appropriate way to handle sentencing under the Computer Fraud and Abuse Act until there has been enough litigation on which to base a guideline.

Judges Must Be Permitted to Craft Their Own Sentences for Cases Involving Special Circumstances.

Individual sentencing decisions are best left to the discretion of the sentencing judge, who presumably is most familiar with the facts unique to each case. To promulgate an inflexible sentencing guideline, which would cover all crimes that could conceivably be prosecuted under the Computer Fraud and Abuse Act, is premature at this time.

As discussed above, there have only been five reported decisions where the Computer Fraud and Abuse Act has been applied. In three of these reported CFAA cases, the judges involved used their discretion and fashioned unique sentences for the defendants based on the special facts of the case. *See, Morris,* 928 F.2d at 506 (where the judge placed Defendant Morris on probation for three years to perform 400 hours of community service, ordered him to pay fines of $10,050, and ordered him to pay for the cost of his supervision at a rate of $91 a month); *Carron* at 3 (where the judge found that Defendant Carron's criminal history justified a sentence of 12 months incarceration followed by 12 months of supervised release and restitution to the two injured credit card companies); and *DeMonte* at 4 (where the trial court judge held that Defendant DeMonte's "extraordinary and unusual level of cooperation" warranted a sentence of three years probation with no incarceration). Judges must be permitted to continue fashioning sentencing that are just, based on the facts of a specific case.

Computer communications are still in their infancy. Legal precedents, particularly the application of a sentencing guideline to violations of the Computer Fraud and Abuse Act, can radically affect the course of the computer technology's future, and with it the fate of an important tool for the exchange of ideas in a democratic society. When the law limits or inhibits the use of new technologies, a grave injustice is being perpetrated. The Electronic Frontier Foundation respectfully asks the Commission to hold off promulgating a sentencing guideline for the Computer Fraud and Abuse Act until there are enough prosecutions on which to base a guideline.

Thank you in advance for your thoughtful consideration of our concerns. We would be pleased to provide the Commission with any further information that may be needed.

Sincerely yours,

Shari Steele

Shari Steele
Staff Attorney

The Electronic Frontier Foundation is a privately funded, tax-exempt, nonprofit organization concerned with the civil liberties, technical and social problems posed by the applications of new computing and telecommunications technology. Its founders include Mitchell Kapor, a leading pioneer in computer software development who founded the Lotus Development Corporation and developed the Lotus 1-2-3 Spreadsheet software.

CPSR

March 15, 1993

Chairman William W. Wilkins, Jr.
US Sentencing Commission
One Columbus Circle, NE
Suite 2-500
South Lobby
Washington, DC 20002-8002

Dear Mr. Chairman:

We are writing to you regarding the proposed amendments to sentencing guidelines, policy statements, and commentary announced in the Federal Register, December 31, 1992 (57 FR 63832). We are specifically interested in addressing proposed item 59, regarding the Computer Fraud and Abuse Act of 1988 (18 U.S.C. 1030).

CPSR is national membership organization of professionals in the computing field. We have a particular interest in information technology, including the protection of civil liberties and privacy. We have sponsored a number of public conferences to explore the issues involving computers, freedom, and privacy.[1]

We have also testified before the House of Representatives and the Senate regarding the federal computer crime law.[2] It is our position that the government must be careful not to extend broad criminal sanctions to areas where technology is

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1 See, e.g., The First Conference on Computers, Freedom & Privacy (IEEE Computer Society Press 1991), The Second Conference on Computer, Freedom & Privacy (Association for Computing Machinery 1992). A third report will soon be out on the third Conference on Computers, Freedom & Privacy. All three volumes contain "reports from the field" that may be helpful in understanding more fully the issues related to the protection of computer systems, the conduct of computer crime investigations, and the appropriate penalties for computer crime.

2 Computer Virus Legislation, Hearing before the Subcomm. on Criminal Justice, Comm. on the Judiciary, U.S. House of Rep., 101st Cong., 1st Sess. 62 (1989), The Computer Abuse Amendments Act of 1990, Hearing before the Subcomm. on Technology and the Law of the Comm. on the Judiciary, United States Senate, 101st Cong., 2d Sess. 62 (1990).

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rapidly evolving and terms are not well defined.[3]. We believe that such efforts, if not carefully considered, may ultimately jeopardize the use of new information technology to promote education, innovation, commerce, and public life.

We also remain concerned that criminal sanctions involving the use of information technologies may unnecessarily threaten important personal freedoms, such as speech, assembly, and privacy. It is the experience of the computing profession that misguided criminal investigation and the failure of law enforcement to fully understand the use of computer technology will have a detrimental impact on the entire community of computer users.

For example, you may wish to review the recent decision of Steve Jackson Games v. Secret Service,[4] involving a challenge to the government's conduct of a particular computer crime investigation. The court found that the Secret Service's conduct "resulted in the seizure of property, products, business records, business documents, and electronic communications equipment of a corporation and four individuals that the statutes were intended to protect."[5] The court, clearly concerned about the government's conduct, recommended "better education, investigation, and strict compliance with the statutes as written."

Clearly, the decisions made by the Sentencing Commission regarding those factors that may increase or decrease a criminal sentence will have an important impact on how computer crime is understood and how the government conducts investigations. We therefore appreciate the opportunity to express our views on the propose changes to the guidelines for 18 U.S.C. 1030.

For the reasons stated below, it our belief that the proposed guidelines regarding the Computer Fraud and Abuse Act now under consideration by the Sentencing Commission place emphasis upon the wrong factors, and may discourage the use of computer technology for such purposes as publication, communication, and access to government information. For these reasons, CPSR hopes that the current proposal will not be adopted.

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3 S. Rep. 544, 101st Cong., 2d Sess. 4 (1990).

4 No. A-91-CA-346-SS (W.D. Tex. Mar. 12 1993).

5 Id. at 26-27.

The Proposed Guidelines Will have a Chilling Effect on Constitutionally Protected Activities

The proposed amendment would treat as an aggravating factor the alteration, obtaining, or disclosure of "Protected information." This term is defined in the proposed guidelines as "private information, non-public government information, or proprietary commercial information." The term is nowhere mentioned in the statute passed Congress.

We oppose this addition. It has been the experience of the computer profession that efforts to create new categories of information restriction invariably have a chilling impact on the open exchange of computerized data. For example, National Security Decision Directive 145, which gave the government authority to peruse computer databases for so-called "sensitive but unclassified information," was widely opposed by the computing community, as well as many organizations including the Information Industry Association and the American Library Association. The reason was that the new designation allowed the government to extend classification authority and to restrict the free flow of information and ideas.[6]

Clearly, this proposal to increase the sentence for a violation of a particular federal statute is not as sweeping as a Presidential order. Nonetheless, we believe that the problems posed by efforts to create new categories of computer-based information for the purpose of criminal sentencing will raise similar concerns as did NSDD-145. It is not in the interest of those who rely on information systems for the purpose of public dissemination to encourage the development of such classifications.

The proposed guidelines would also treat as an aggravating factor the alteration of public record information. This proposal may go directly against efforts to promote public access to electronic information and to encourage the use of computer networks for the conduct of government activities. For example, computer bulletin boards have been established by agencies, such as the Department of Commerce and Environmental Protection Agency, precisely for the purpose of encouraging public use of on-line services and to facilitate the administration of agency business.

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[6] See Military and Civilian Control of Computer Security, Hearing before the Legislation and National Security Subcomm. of the Comm. on Government Operations, House of Rep., 101st Cong., 1st Sess. (1989).

Much of the problem may well be with the use of the term "alter" without any further discussion of the nature of the alteration. Computer systems are by nature interactive. Any user of a computer system "alters" the data on the system. System operators may control the status of a particular file by designating it as a "read only" file or a "read-write" file. When a file is "read only," a user may access the file but is technically unable to alter the files contents. However a file that is "read-write" may allow users to both review files and to alter them.

Certainly, there are many other factors that relate to computer system security, but this particular example demonstrates that in many instances altering a public file may in fact be the intended outcome of a system operator. Failing to distinguish between permissible and impermissible alterations of a computer file in the sentencing guidelines misses entirely the operation of many computer systems.

The proposed amendment would also discourage the publication of information in electronic environments. The amendment recommends that the sentence be increased by 4 levels where "the defendant disclosed protected information to any person" and by six levels where "the defendant disclosed protected information to the public by means of a general distribution system."

Both of these proposals would punish the act of publication where there is no economic advantage to the defendant nor any specific harm indicated. Such provisions could be used to discourage whistle-blowing in the first instance, and subsequent dissemination of computer messages by system operators in the second.[7]

For this reason, we strongly oppose the inclusion of comment 10 which states that a "general distribution system" includes electronic bulletin boards and voice mail systems. This particular comment could clearly have a chilling effect on operators of electronic bulletin boards who may become reluctant to disseminate information where such dissemination could be considered an aggravating factor for the purpose of the federal computer crime law.

Current guidelines

It is our view that the current guidelines are a reasonably fair articulation of the specific harms that might warrant additional stringency, at least in the area of computer crime. We believe that it is appropriate to impose additional sanction where there is "more than minimal

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[7] See Steve Jackson v. Secret Service, supra.

planning" or "scheme to defraud more than one victim," as currently stated in the Guidelines. One of our concerns with the application of 18 U.S.C. 1030 after the decision in U.S. v. Morris, 928 F.2d 504 (2d Cir. 1991) is that the provision does not adequately distinguish between those acts where harm is intended and those where it is not. For this reason, provisions in the sentencing guidelines which help to identify specific harms, and not simply the disclosure of computerized information, may indeed be helpful to prosecutors who are pursuing computer fraud cases and to operators of electronic distribution systems.

For similar reasons, we support the current §2F1.1(4) which allows an upward departure where the offense involves the "conscious or reckless risk of serious bodily injury." Again, it is appropriate to impose a greater penalty where there is risk of physical harm

The Commission may wish to consider at some future date a provision which would allow an upward departure for the disclosure of personally identifiable data that is otherwise protected by federal or state statute. We believe that privacy violations remain an important non-economic harm that the Commission could address. For instance, the disclosure of credit reports, medical records, and criminal history records, by means of an unauthorized computer use (or where use exceeds authorization) may be an appropriate basis for the imposition of additional sanctions.

We suggest that the Commission also consider whether a downward departure may be appropriate for those defendants who provide technical information about computer security that may diminish the risk of subsequent violations of the computer fraud statute. Such a provision may lead to improvements in computer security and the reduced likelihood of computer-related crime.

We recognize that the Commission is currently considering factors that should be considered in the imposition of federal sentencing, and that this process should not be equated with the creation of new criminal acts. Nonetheless, the decisions of the Commission in this area may well influence subsequent legislation, and the ability of computer users to make use of information systems, to access government information, and to disseminate electronic records and files. It is for these reasons that we hope the Sentencing Commission will give careful consideration as to potential impact on the user community of these proposed changes to the federal sentencing guidelines.

We appreciate the opportunity to provide these comments to the Commission and would be pleased to answer any questions you might have. Please contact me directly at 202/544-9240.

Sincerely yours,

Marc Rotenberg, director
CPSR Washington office

Enclosure

S. HRG. 101-1276

THE COMPUTER ABUSE AMENDMENTS ACT OF 1990

HEARING

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY AND THE LAW

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 2476

A BILL TO AMEND TITLE 18 OF THE UNITED STATES CODE TO CLARIFY AND EXPAND LEGAL PROHIBITIONS AGAINST COMPUTER ABUSE

JULY 31, 1990

Serial No. J-101-91

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Senator LEAHY. Thank you, Mr. Jerger.
Go ahead, Mr. Rotenberg.

STATEMENT OF MARC ROTENBERG, COMPUTING AND CIVIL LIBERTIES PROJECT, COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY, WASHINGTON, DC

Mr. ROTENBERG. Mr. Chairman, Senator Humphrey, thank you for the opportunity to testify today.

My name is Marc Rotenberg. I am director of the Washington office of Computer Professionals for Social Responsibility. I will speak briefly on three issues regarding S. 2476.

The first point I would like to make is that CPSR supports the proposed adoption of the recklessness provision in the computer crime law. We believe that this is a sensible way to send a message to the computing community that those acts which even though may not be malicious, which nonetheless result in harm because of someone's disregard for the needs of other users should be punished. For this reason, we would support the recklessness provision and the expansion of the scope of the computer crime law to cover those types——

Senator LEAHY. Expansion of——

Mr. ROTENBERG. Expand the scope of the law to cover those acts that involve clear recklessness.

Having said that, I should point out that while this provision is based in part on the experience with the *Morris* case, it is worth noting that the current law did cover the *Morris* case quite well. Robert Morris was convicted of a felony act, and under the Federal sentencing guidelines would have received a sentence of almost 2 years. So at least to those who say that the law is not adequate for the Morris situation, I think the facts suggest otherwise.

My second point is regarding the civil liberties implications of computer crime investigations. And, as you indicated earlier, Senator, the recent experience with Steve Jackson Games in Texas and with the Craig Neidorf prosecution in Chicago, suggests that at least in some instances Federal prosecutors have reached too far in the conduct of computer crime investigations. And I believe part of the reason for this may be a matter of terminology. We have become so accustomed to the thought that computer hacking is necessarily malicious or necessarily criminal that when the word "hacking" comes up, prosecutors appear to leap and look for an opportunity to conduct an investigation.

The point I would like to make is that there is nothing in title 18 that criminalizes computer hacking. Title 18 criminalizes unauthorized access to computer systems, and that is an important distinction that must be made so that prosecutors stay focused on the target and that people who have not committed an unlawful activity do not get swept up within the investigative net.

And my final point is simply this: There is clearly a problem of computer crime in this country. Estimates losses run between $3 billion and $5 billion a year, but losses of those amounts are tied to acts of individuals who for malicious purposes or purposes of self-gain take from others what is not rightfully theirs. Those are the acts th[illegible]ederal prosecutors should be focusing on. Those are the

acts which cause the greatest harm to our economy. And we hope that in the ongoing work of the law enforcement agencies they will make sure that their priorities are in accord with that need.

Thank you, Mr. Chairman.

[The prepared statements of Mr. Rotenberg follow:]

Prepared Testimony
and
Statement for the Record

of

Marc Rotenberg
Director, Washington Office

Computer Professionals for
Social Responsibility (CPSR)

on

S. 2476
The Computer Abuse
Amendments Act of 1990

before

The Subcommittee on Technology and Law,
Committee on the Judiciary,
United States Senate

July 31, 1990

Mr. Chairman, members of the Committee, thank you for the opportunity to testify today on the Computer Abuse Amendment Acts of 1990. My name is Marc Rotenberg and I am the director of the Washington Office of Computer Professionals for Social Responsibility.

CPSR is a national organization of computer scientists and other specialists that seek to inform the public about the social impact of computer systems. Our membership includes a Nobel Laureate and four winners of the Turing Award, the highest honor in computer science.

I also want to thank you, Senator Leahy and the other members of the Committee, for taking the lead on the computer virus issue. Your hearing last March with Cliff Stoll and FBI Director William Sessions has helped the public understand the complex issues of computer crime and has laid the foundation for appropriate Congressional action.

I have a lengthy statement that I ask be entered into the hearing record. This afternoon I would like to focus on three points regarding the proposed legislation and computer crime.

First, CPSR supports the proposed addition of a recklessness provision in the criminal code. This change should help deter those computer acts, which though not malicious, are outside the bounds of responsible computing and place other computer users at risk. CPSR believes that this provision will heighten the sense of ethical accountability within the computer user community. At the same time, we have some questions about other provisions in the bill that would expand the scope of law enforcement authority, define the term "access," and create an action for civil damages.

Second, the conduct of computer crime investigations will necessarily raise civil liberties concerns. There is already evidence that the Secret Service conducted a poorly conceived search of a small business in Austin, Texas. And there are unanswered questions about the impact of the recent Secret Services raids on the operation of computer bulletin boards and freedom of speech. We need to be sure

that there are adequate procedural safeguards to ensure that important civil liberties interests – freedom of speech, privacy of communication, and due process protections – are not diminished in the efforts to respond to computer crime.

Third, even as the public continues to worry about highly publicized incidents of computer "hacking," it is important to restate that the majority of computer crime is committed by authorized users who embezzle company funds, steal proprietary information, and destroy corporate records. These crimes, though they rarely receive the attention of the national papers, should remain the primary concern of the law enforcement agencies.

PROPOSED CHANGES TO SECTION 1030

Creation of Recklessness Provision

CPSR supports the creation of the recklessness misdemeanor provision contained in S. 2476. We believe that such a provision is necessary to discourage acts with computer systems which, though not intended to cause harm, demonstrate such an extraordinary disregard for the sensible use of a computer system and that such harm in fact results.

Computer users today are increasingly operating in an interconnected world. Individual terminals are linked together through local networks and national networks. These networks facilitate the exchange of information and increase the utility of computer systems for all users. Most systems are designed to encourage open access and to promote the rapid exchange of data. The potential risk with this arrangement is that it leaves users vulnerable to viruses, worms, and similar programs that could cause harm to individual user's systems.

The Cornell Worm demonstrated the risk of a rogue program on a computer network. Individual users were required to disconnect from the network. During the period of time that the network was down, users could not exchange electronic mail, could not transfer files, and could not access information in other systems that might be necessary for their work.

The law should make clear to computer users that potentially dangerous experiments cannot be conducted in an environment that places other users at risk. The computing community is based on trust. When a user acts with disregard for the needs of others, he or she has destroyed that trust. For this reason, we will support legislation that expands the scope of computer crime law to cover acts of clear recklessness.

Let me note, however, that while this provision is clearly based on the Cornell Worm incident, it is intended to provide prosecutors with an alternative method of prosecuting cases; it is not intended to "fill a gap" in the law. In the Cornell case, Mr. Robert Morris, Jr. was convicted of a felony act, and, under the federal sentencing guidelines. would have received a sentence of about two years. Current law covered the Morris case. The reason for the recklessness provision is to make clear to computer users that they should not engage in experiments that place other users at risk.

Change in Scope of Computer Crime Law

CPSR would oppose the extension of computer crime law to computers "used in interstate commerce or communication." We believe that the scope of the current law which is based on a "federal interest computer system" is adequate and that the Justice Department has failed to show that it is necessary at this time to expand the scope of computer crime law.

Very few cases have been brought under the section of the criminal code that would be amended by the Act now under consideration by this Committee. In fact, the Morris case was the first jury trial for a section 1030 indictment. Before expanding the scope of this provision, it is critical to show that the current law is not adequate and that reasonable law enforcement goals cannot be addressed adequately in the current framework.

It is also clear, as the indictments following the Secret Service raid demonstrated, that there are a variety of ways to prosecute computer crime. Section 1030 is simply one tool available to law enforcement officials. We need more case law to determine whether the many prosecutorial theories outlined in the Justice

Department manual on computer crime are adequate before expanding the scope of section 1030.

There is a further problem with the proposed change and that is that computers are so ubiquitous that criminalizing unauthorized access to computer systems could apply to virtually any act in today's world. This provision would go much further than the federal wiretap law. Without clear contours and bright lines, such a law may fail to serve any useful purpose.

We would say that unless the Justice Department can demonstrate the need for this change, based on a clear and compelling need, the Congress should await the development of further case law under the current statute. But if the Department of Justice is granted additional authority then we would strongly urge the Committee to consider the creation of additional procedural safeguards to ensure that civil liberties and due process interests are not undermined in the course of the investigation of computer-related crime.

Creation of Access Definition

We support the effort to define the term "access" in section 1030. At the same time, we must caution against vague and ambiguous phrases that provide little guidance to computers users or system operators. Under the proposed definition, a user who simply glances at a computer screen has effectively gained access to that system, yet may have no ability to alter the contents of the system or to otherwise affect its operation. Such a definition is clearly too broad for any reasonable purpose.

One of the points that should be stressed here is that the definition of access will vary widely depending on the environment in which the system exists. Access restrictions for system maintained by an intelligence agency will be far more extensive than for a university which is still more restricted than a computer in one's home. The law needs to take account of these varying standards to ensure that the expectations for the system user and the system operator in a particular environment correspond with the legal requirements. There must almost be clear notice of access restrictions for computer users so that anyone who might be charged under this provision understands the law and is able to comply with it.

We would be happy to work with the Committee to see if it might be possible to draft a definition that is clearer in its purpose and more limited in its scope.

Creation of Civil Liability Provision

CPSR takes no position on the proposed creation of a civil action for acts under section 1030. If this change will encourage institutions to improve security practices, then it is worthwhile and should be adopted. At the same time, we do not want the fear of civil liability to curtail the use of computers and the exchange of information.

We do need to find incentives to improve computer security and user accountability. Criminal sanctions alone are probably too harsh a penalty and unlikely to lead to the institutional changes that are necessary if computer security is to be improved. For this reason, civil liability may be a reasonable alternative.

CIVIL LIBERTIES CONCERNS RAISED BY COMPUTER CRIME INVESTIGATIONS

Operation Sun Devil

Mr. Chairman, I would like to turn the recent series of searches conducted by the Secret Service. Although it has been just a few months since this raid was undertaken – and much of the relevant information has not yet been disclosed – it raises a number of significant civil liberties questions we hope the Committee will bear in mind as it considers whether to expand the scope of the Computer Fraud and Abuse Act.

During the last two year, the Secret Service undertook an extensive investigation of computer "hackers," culminating in a nationwide raid on May 7 that involved 150 Secret Service agents in 24 cities. So far, these searches have led to only six arrests. In Atlanta, three men pled guilty last month to gaining illegal entry to BellSouth Computers. But at least two cases have raised troubling questions about the scope and conduct of Operation Sun Devil.

In March of this year, the Secret Service raided the offices of Steve Jackson, a small businessman in Austin, Texas, who produces fantasy role-playing games,

similar to Dungeons and Dragons. The Secret Service seized three of Mr. Jackson's computers as well as the materials for his new game, GURPS CYBERPUNK. As a result of the raid, Mr. Jackson, was forced to lay-off half of his staff and to incur substantial business losses.

In a second case, in Chicago, Illinois, Craig Neidorf, a twenty-year-old college student and the publisher of an electronic newsletter was charged by the government with distributing an administrative document obtained from BellSouth. Although the federal government initially alleged an extraordinary conspiracy involving unauthorized computer access and the national phone network, last Friday federal prosecutors in Chicago decided to drop the case against Mr. Neidorf.

Both the Jackson and Neidorf cases raised significant civil liberties and First Amendment issues. For if the First Amendment extends to electronic speech, then it would be impermissible for the government to attempt a prior restraint on publication. We know from the Pentagon Papers case that the government could not reach into the printing room of the newspaper and attempt to turn off the presses. Yet, in these more recent cases involving computer-based publishing, the government actually confiscated the "presses" in an effort to suppress dissemination of information that would be widely available, if printed in paper form .

Mitchell Kapor, one of the pioneers of the personal computer industry, and John Perry Barlow established an organization, the Electronic Frontier Foundation, Inc., in part to examine some of the civil liberties issues that might be raised by Operation Sun Devil and related investigations. The Jackson and Neidorf cases demonstrate the importance of this effort and the need for adequate Congressional oversight to ensure that overly zealous law enforcement officials do not take advantage of the current climate of public concern to undertake investigations that are unsound or misguided.

Although we will have a great many more cases before the application of the First Amendment to digital media is determined, this recent introduction suggests the importance of watching these developments closely.

Implications of Computer Crime Investigations for Privacy

A related problem is tc ensure that there are adequate safeguards in place so that computer crime investigations are properly tailored to a specific, well-defined purpose. On the one hand, evidence of computer crime may be more easily concealed than other types of crime. Data is easily encrypted. Files can be readily copied and just as easily destroyed. There are various techniques to remove data from disks before a new user is able to gain access. For these reasons, law enforcement officials argue that changes in the law may be necessary to conduct investigations of computer crime.

At the same time, searches of computer systems are almost necessarily broader than searches of physical spaces. Much of the information that can be easily obtained is unrelated to the investigation. Where the computer operates as a bulletin board or messaging gateway, electronic mail of hundreds or thousands of users could be accessible. Also, the ease of copying data may encourage law enforcement agents to make a copy of all the electronic media taken in a search to see if there is evidence of other types of crime, unrelated to the initial investigation for which a warrant was obtained.

Most significant is that computer communications are particular vulnerable to surveillance and monitoring. Computer mail unrelated to a particular investigation could be swept up in the government's investigation if the law is not carefully tailored. Back-up tapes may contain copies of thousands of electronic messages and files.

This is not a matter of speculation. Based on a letter from the Secret Service to Members of the House Judiciary Committee, we know that the Secret Services has developed a Computer Diagnostics Center to scan the contents of electronic media seized in computer crime investigations. We would like to know if there are any restrictions on the use of the CDC, and whether, for example, the CDC is used to scan the contents of public bulletin boards in those cases where no warrant has been obtained.

Congress recognized the potential problem of searches of electronic media when it first considered the proper scope of electronic surveillance. That is the reason for the extensive system of procedural safeguards and the fundamental goal

of minimizing the scope of searches that is mandated by section 2518 of the criminal code. These principles were carried forward and updated in the revisions that you, Mr. Chairman, helped enact with the Electronic Communication Privacy Act. ECPA drew a reasonable balance between the needs of law enforcement investigators and the rights of all computer users.

We would oppose any efforts at this time to modify the restrictions in ECPA, absent a showing that the law enforcement needs cannot be accommodated in some other fashion that does not undermine the privacy and security of computer systems.

We hope, at some point, that the Committee will conduct an oversight hearing on the ECPA and determine whether law enforcement officials are following the standards established in the 1986 law.

COMPUTER CRIME PROBLEM IS WIDELY MISUNDERSTOOD

My last point, Mr. Chairman, is to urge the Committee and the law enforcement community to direct its energies to those forms of computer-related crime that cause the greatest harm and that are based on malicious intent. These are the crimes of fraud, embezzlement, and theft that make up an estimated loss of $3 to $5 billion annually in this country.

It is a popular misconception that computer crime is caused primarily by young kids, technically skilled. One state assistant attorney general has actually stated that there is little difference between a teenager with a computer modem and a criminal with a handgun. And the FBI is now encouraging parents to help identify the early warning signs of "computer hacking."

The Secret Service has painted its case in broad strokes. "Computer hacking" is not a crime. Gaining unauthorized access to a federal interest computer system under section 1030 is. It is critical that this distinction not be lost. Once we lose our focus on prosecutable crime, the image blurs, and anyone may become the target of a law enforcement investigation.

Those people who have violated the law should be held accountable. But so too should law enforcement officials who are bound by oath of office. It is a core principle of our constitutional form of government that the investigation of unlawful activity must be conducted by lawful means.

Thank you, Mr. Chairman, for the opportunity to testify today. I would be pleased to answer your questions.

Prepared Testimony and Statement for the Record on Computer Virus Legislation*

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Mr. Chairman, members of the Committee, thank you for the opportunity to testify on legislation regarding computer viruses. My name is Marc Rotenberg and I am the director of the Washington Office of Computer Professionals for Social Responsibility (CPSR).

CPSR is a national membership organization of computer scientists and other specialists that seek to inform the public about the social impact of computer systems. Our membership includes a Nobel Laureate and five Turing Award winners, the highest honor in computer science. CPSR members have examined several national computing issues and prepared reports on funding priorities in computer science, the Strategic Defense Initiative, computer risk and reliability, and the proposed expansion of the FBI's records system.[1]

You have asked me to examine legislation that has been introduced in the House of Representatives related to computer viruses. I appreciate this opportunity and am glad that you have taken an interest in this subject.

It was just a year ago last week that the Cornell "virus" swept through the Internet.[2] For many people in this country it was the first that they had heard of computer viruses and similar programs that could bring a nation-wide computer system to a halt. Even as system managers were clearing the code out of their computers, discussions about the vulnerabilities of computer systems and the rights and responsibilities of computer users were taking place all across the country.

CPSR Members Address the Computer Virus

In Palo Alto, California CPSR members met shortly after the Internet virus to discuss the significance of the event. Over the course of several days our members discussed the wide-ranging issues raised by the incident.[3] The discussion revealed many concerns about network security, ethical accountability, and computer reliability. It also revealed a division within our organization about the moral responsibility of the virus author. Some of our members believed that the person responsible for the virus had performed a great service for the computer community by drawing attention to the security flaws in the Internet, particularly the UNIX operating system. Others felt strongly that this person had violated a fundamental understanding within the computer community not to exploit known security flaws and had caused great damage to users of the Internet. The division within our organization reflected a division within the computer science community.[4]

In the end we issued a statement on the computer virus that has been widely circulated in the computer community and republished in computer journals.[5] I have attached the CPSR statement to my testimony and ask that it been entered into the hearing record.

On the issue of the culpability of the person responsible for the virus we said clearly that the act was irresponsible and should not be condoned. The author of the virus had treated the Internet as a laboratory for an untested experiment in computer security. We felt this was very risky, regardless of whether data was altered or destroyed.

But we did not view our task primarily as sitting in judgement over the author of the Internet virus. There had been other viruses in the past, and there would be more in the future. More important, we believed, was to set out the various concerns of our organization for the public, policy makers, and others within the profession who were examining the significance of the computer virus and considering various responses. We reached the following conclusions:

First, we emphasized individual accountability as the cornerstone of computer ethics. We said that the openness of computer networks depends on the good will and good sense of computer users. Criminal penalties may be appropriate for the most pernicious acts of computer users. But for the vast majority of cases, far more would be accomplished by encouraging appropriate ethical guidelines.

Second, we said that the incident underscored our society's growing dependence on complex computer networks. Although the press and the public tended to focus on the moral culpability of the virus writer, we believed that the incident also raised significant policy questions about our reliance on computer systems. Since its inception, CPSR has been particularly concerned about the development of complex computer systems, especially in the military, that are difficult to test and may produce misplaced trust. There is little that tougher criminal penalties can do to correct the problems of computer risk and reliability.

Third, we opposed efforts to restrict the exchange of information about the computer virus. Shortly after the virus incident, officials at the National Security Agency (NSA) attempted to limit the spread of information about the computer virus and urged Purdue University to destroy copies of the virus code.[6] We thought this was short-sighted. Since that time, several technical reports and the widespread exchange of information through the Internet have helped users in the computer community more fully understand how the virus operated and provided the necessary data to correct security flaws.[7] We continue to believe that the needs of network users will be better served through the open and unrestricted exchange of technical information.

* Before the Subcommittee on Criminal Justice, Committee on the Judiciary, US House of Representatives.

The importance of open computer networks was also demonstrated recently during the earthquake in the San Francisco Bay area. Before the national networks were able to report on the unfolding events, computer users were dialing up networks to search for friends and to reassure relatives. According to one account, a user of the Prodigy service in the Bay Area sent a message out through the network to subscribers in central Kansas, asking that someone pass the word on to his son, a soldier based at Fort Riley, that everybody back home was ok. The soldier, who had been unable to reach home, received the message from a complete stranger.[8]

Fourth, we encouraged a public discussion about the vulnerabilities of computer networks and the various technical, ethical, and legal questions raised by the incident. Since the meeting, CPSR members, along with others in the computer community, have been involved in a variety of activities, hosting panel discussions on the virus incident, drafting papers, and encouraging an examination of ethical standards. We believe that these efforts will help develop a broader understanding of the rights and responsibilities of network users.

Complexity of the Virus Problem

I will this morning describe some of the concerns of the computer community and make several recommendations about what Congress might do to respond to the problem of computer viruses. I will also address some of the potential problems posed by proposed federal legislation. At the outset, I should make one fundamental point: The problems raised by computer viruses are far-reaching and complex. There is no simple technical or legal solution. In many ways, we are confronting a whole new series of policy questions that raise fundamental issues about privacy and access, communications and accountability. Public policy must be brought up to date with new technologies, but in the effort to ensure that our laws are adequate Congress should not reach too far or go off in directions that are mistaken or may ultimately undermine the interests we seek to protect.

There are several issues that should be considered in the efforts to develop appropriate legislation to respond to malicious code. First is the increased interdependence of computer systems. The technological developments that makes possible the spread of computer viruses also makes possible the transfer of vast amounts of computer information. Through computer networks, we are now able to send electronic mail, research findings, and tips on security fixes far more rapidly than ever before. Efforts to restrict the exchange of computer viruses run the risk of limiting the flow of this valuable information.

Throughout the computer community, there is a deep concern that solutions to computer security problems not destroy the trust between computer users. Ken King, the President of EDUCOM has warned against short-sighted solutions.[9] Cliff Stoll, the Berkeley astronomer turned computer security expert, speaks of the need to preserve honesty and trust within the computer community and warned against measures that could restrict exchange of computer communications.[10]

As computer networks have developed, so has our concern about the reliability of computer systems. We must reexamine our growing dependence on complex computer networks, particularly in the military. Simply put there are too many computer systems in use today that are dangerously unstable.[11] A report produced recently by the staff of the Subcommittee on

Investigations and Oversights of the House Science Committee highlights the enormous risk of the current software development process.[12] We are automating too many complex problems with the expectation that computer systems can solve problems that we ourselves don't fully understand. In areas that involve life critical functions, the consequences of computer error could be great.[13]

I raise these issues because there is a need to be wary of quick legal or technical fixes that do little to address the underlying problems we must confront. There is a widely shared belief among computer security experts that there is no "silver bullet" that will solve the problem of computer viruses.[14] Though there is much that can be done to improve computer security and operations, it should be understood that no system will ever be one hundred percent secure.

Need for Teaching Computer Ethics

A large part of the task that lies ahead is to develop a system of ethics that teaches computer users about the appropriate uses of computer systems. We need to discourage computer users from making use of shared resources in ways that make systems less useful to others. To suggest an approach to computer ethics that avoids some of the shortcomings of legislation based on rapidly changing technical terms or ambiguous legal phrases I would like to set out an elaborate analogy. The more I have tried to understand this issue, the more I have been struck by the similarity between our evolving computer networks and interconnected databases, and our public libraries.

A library provides a great wealth of information for its users, but not all information is equally accessible. In many libraries, I can freely roam the stacks and pull out what I need. But other libraries might require that I put my request on paper before the materials are delivered. Certain materials at a reference desk are only accessible after I have spoken with the appropriate person and obtained permission.

A computer system operates in much the same way. On many systems, I am allowed to look through large reams of data without harm to anyone. But for certain information, I need permission. If I were to reach over the reference librarian's desk to take an article I wanted or to look at circulation records, I would be violating a library rule. So too, does the computer user violate a computer rule when he or she enters a system's operating system, knowing that only system managers and other privileged users are authorized. We need to remind system users about the difference between space that is public and that which is private.[15]

There are also other users in the library. In some libraries, users might be asked to leave books in study carrels so that others can find them. But my right to look at a book in another person's carrel would not extend to a right to go through the person's book bag. Similarly, it may be perfectly appropriate to look at another person's computer files it if is clear that they are publicly accessible, as long as I do not go through the person's private files.

A library also relies on the trust and good will of its users. A person who steals a book, or tears a page out of a magazine has not just caused harm to the library, but has deprived other users of the library of a valuable resource. Computer users, like users of a library, must increasingly understand the consequences of their actions in terms of the needs and activities of others.

Of course it is worth noting that there are laws against theft of library materials and destruction of library resources. But neither these laws nor the threat of prosecution have much effect on the habits of library users, since the likelihood of prosecution is so remote. When sanctions are imposed, it is by the library and not the federal government.

Partial Solutions

The complexity of the computer virus problem requires a multi-part approach. Computer users, system managers, vendors, professional organizations, educators, and the government all have a role to play.

In the federal government much is happening, though more could be done.[16] The National Institute of Standards and Technology (NIST) recently prepared a special publication on computer viruses intended for managers of federal computer systems that is useful and easy to read.[17] It should be made widely available for all of the federal agencies.

Another step that has been taken is the development of the Computer Emergency Response Team (CERT). The proposal was developed last December at a closed-door session with UNIX users and vendors at the National Computer Security Center.[18] While it is good to see the cooperative undertaking between the federal government and the user community, it is not an ideal arrangement. CERT operates through the National Security Agency and the Department of Defense. Military control of computer security is precisely what Congress tried to avoid with the passage of the Computer Security Act.[19] As CPSR has noted in the past, broad claims of national security should not provide carte blanche for the Department of Defense and intelligence agencies to extend their authority over computer security.[20]

Moreover, it is not even clear that CERT's advice is error-free. A recent posting to the "Risks" computer bulletin board on the Internet noted that CERT had mistakenly sent out an advisory to network users recommending the use of potentially infected system utilities to correct known security flaws. As one computer user noted, this was not good advice.[21]

The General Accounting Office (GAO) produced a useful overview of virus issues in a report released in June.[22] The GAO recommended that the White House Science Adviser assume responsibility for improving computer security. Although the GAO's concerns about lax security practices is well taken, I suspect that many users in the computer science community would object to centralizing authority for computer security for several reasons. Based on the experience with the Internet, it seems that the university and research community, Berkeley and MIT in particular, were more effective in responding to the virus than the federal agencies.[23]

One of the lessons of the Internet virus is that responses should be developed at the host level and not the network level. As Jeff Schiller, the manager of the MIT Network and Project Athena Operations Manager, has said "anybody can drive up to your house and probably break into your home, but that does not mean we should close down the road or put armed guards on exit ramps."[24]

The great value of the Internet for the user community is its decentralized structure. Like the phone network, it provides rapid access for users across the country. System security requirements will vary from site to site, depending

on whether the user is located at a university, in private industry, or a military agency. If the GAO recommendations are followed, it should only be to strengthen the flow of information about network security. Any steps to create a coercive authority in the White House for computer security on the Internet, such as the creation of a computer security czar, would be a serious mistake.

Universities and research institutions can also take steps to ensure that adequate policies are established to minimize the risk of computer viruses. Universities that fail to take reasonable steps to ensure that their systems are not used for the perpetration of a virus may find themselves civilly liable under tort law.[25] Many universities have already established policies that outline the responsibilities of users of computer facilities, which can serve as models for other schools.[26]

Research in computer ethics will also help reduce the likelihood of computer misuse. The National Science Foundation is planning a major conference to bring together leaders in the computer science community and philosophers to discuss how more might be done to incorporate ethics into computer education. This is a sensible undertaking and should build upon the work that has already been done to improve computer ethics.[27] At the same time, it is important to note that much of the discussion about computers and ethics focuses on the responsibilities of individual users of computer systems and not on the large organizations or institutions that maintain and operate these systems. A coherent system of ethics that binds a community of users, like a system of democratic government, must be based on an implied contract between the individual and the institution. The individual will uphold his or her responsibility if the institution does as well. Concerns about privacy, security, data quality and accountability should also be addressed as institutions move foreward with their recommendation for computer ethics.

Review of Legislation

The last five years has been a period of rapid development in computer security legislation. Congress has three times passed laws designed to extend criminal statutes to computer technology.[28] Virtually all of the states have adopted new statutes, and many are looking at possible changes and additions.[29] There are available to prosecutors today a wide range of theories to base criminal charges for computer related crime.[30]

Based on the views of CPSR members, the experience of the Internet virus, and our general concern about protecting open computer networks, I will describe the potential problems with the proposed federal legislation.

It is important to remember that a computer virus may also be a form of speech, as was the Aldus Peace Virus, and that to criminalize such activities may run afoul of First Amendment safeguards. Restrictions on speech should be carefully examined to ensure that free expression is not suppressed. Computer networks are giving rise to new forms of communication. The public debates in the town square of the eighteenth century are now occurring on the computer networks that will take us into the twenty-first century. These are fragile networks, and the customs and rules are still evolving. The heavy hand of the government could weaken the electronic democracy that is now emerging.[31]

Our legal system protects the fundamental right of free speech in a democratic society and gives special attention to laws that may unduly restrict

the exchange of information. It would be wrong to criminalize a computer communication if the communication caused no damage, even if the communication did not follow traditional pathways. It is often those individuals and organizations without great resources who turn to these alternative methods of communication to convey a message.

I wonder also if in casting such a broad net, these statutes might not meet constitutional challenge on overbreadth grounds.[33] A criminal law should clearly distinguish between prohibited and permissible conduct. If it fails to do this, it grants too much discretion to law enforcement officials to choose which cases to prosecute. Where speech is involved, such a law might unnecessary chill protected speech.

Some of the state statutes are poorly conceived. Those with the software trade association who have been pushing to extend the reach of computer security statutes might consider whether the products of their own members violate restrictions on "alteration of data" or "unauthorized use of resources."[34] To some extent, every computer program takes control of the user's systems. If the program acts as intended, then there are no problems. But if the program misfires, as it sometime does, software developers may be criminally liable.

A further problem lies in the attempt to define the criminal act in terms of a technical phrase such as a "virus." A virus is not necessarily malicious. Some viruses may only display a Christmas greeting and then disappear without a trace.[35] Other viruses might alter or destroy data on a disk. To treat the two acts as similar because an identical technique is involved would be similar to punishing all users of cars because some cars might cause the death of a person. It is the "state of mind" of the actor and the harm that results which should be the two guiding principles for establishing criminal culpability.[35]

More interesting from a technical viewpoint is that computer viruses may be used both to enhance computer security and to facilitate the exchange of computer information.[36] Although computer security experts have said that such programs are potentially as dangerous as the disease they are designed to cure,[37] it is not clear the disseminating a benign virus should necessarily be a criminal act. Hebrew University used a computer virus to identify and delete a malicious virus that would have destroyed data files across Israel if it had remained undetected.[38]

I would recommend that the Congress wait until there is more case law under the 1986 Act and until more of the state statutes have been tested, before enacting new computer security legislation. Congress should also obtain information from the Justice Department about the effectiveness of the current laws, and see whether state courts can develop common law analogies to prosecute the computer equivalents of trespassing, breaking and entering, and stealing.[39] This is a process that happens gradually over time. The extension of common law crimes to their computer equivalents may provide a more durable and lasting structure than federal statutes that must be updated every couple of years.

Funding

It is difficult to talk about the role of Congress in improving computer security without noting the importance of funding to implement the Computer Security Act, the law passed by Congress designed to address the computer security needs of the federal agencies. I was very disturbed to learn two weeks ago that the conference committee cut the proposed appropriation for NIST from $6 million to $2.5 million, even after OMB had approved the funding for NIST and encouraged NIST's new role as the lead agency for civilian computer security.[40] According to one news account, the cut came at the urging of a Member who had tried unsuccessfully to redirect part of NIST's 1989 appropriation to a special research testing facility in his home state. If this news account is accurate, then that Member's shortsighted and parochial concerns may cost the federal agencies dearly in needed assistance with computer security.

Conclusion

I believe that Peter Neumann, a computer Security experience at SRI and a member of CPSR, described the problem best when he said:

> Better laws that circumscribe malevolent hacking and that protect civil and constitutional rights would be of some help, but they cannot compensate for poor systems and poor management. Above all, we must have a computer-literate populace — better educated, better motivated and more socially conscious.[41]

Tougher criminal penalties may help discourage malicious computer activities that threaten the security of computer networks, but they might also discourage creative computer use that our country needs for technological growth.[42] Though we have a great deal of criminal law that could potentially apply to the acts of computer users, it is still very early in the evolution of computer networks. In the rush to criminalize the malicious acts of the few we may discourage the beneficial acts of the many and saddle the new technology with more restrictions than it can withstand.[43]

Footnotes

[1] More information about CPSR is available from the CPSR National Office (P.O. Box 717, Palo Alto, CA 94302, (415) 322-3778) and the CPSR Washington Office (1025 Connecticut Ave., NW, Suite 1015, Washington, DC 20036, (202) 775-1588).

[2] It should be noted that there is a debate within the computer community about the correct term to apply to the program that travelled across the Internet. Purists, following the established taxonomy of computer security, prefer the term "worm" because the Internet program did not attach itself to another program, as viruses technically do, but rather was a free-standing program that infiltrated the network. However, the broad scope and rapid rate of the program's impact suggested to many that the term "virus" was more descriptive than "worm." The press and many within the computer community followed this usage.

[3] John Schmeridewaind, "The Virus Perpetrator: Criminal or Hero?" *The San Francisco Chronicle*, November 23, 1988, at C1.

[4] Compare Aaron Haber, "Give No Quarter to Creator of Computer Virus," *PC Week*, December 5, 1988, editorial, "Faint Praise," *Computerworld*, November 14, 1988, at 24, Edwards A. Parrish, "Breaking Into Computers Is A Crime - Pure and Simple", *Los Angeles Times*, December 4, 1988 (Dr. Parrish is dean of the Vanderbilt University School of Engineering and President of the IEEE Computer Society), Jon A. Rochlis and Mark W. Eichin, "With Microscope and Tweezers: The Worm from MIT's Perspective," 32 *Communications of the ACM* 689, 697 (June 1989).

[5] "CPSR Statement on the Computer Virus," 7 *The CPSR Newsletter* 2-3 (Winter 1989), reprinted in 32 *Communications of the ACM* 699 (June 1989). The virus incident caused several other organizations to examine the need for ethical standards. See, e.g., "NSF Poses [sic] Code of Networking Ethics," 32 *Communications of the ACM* 688 (June 1989) (National Science Foundation code), "Teaching Students About Responsible Use of Computers," 32 *Communications of the ACM* 704 (June 1989) (describing the statement of ethics for MIT's Project Athena), "Ethics and the Internet," 32 *Communications of the ACM* 710 (June 1989) (Internet Activities Board code).

Several national data processing, computer, and engineering organizations had well established codes prior to the virus incident. See "DPMA Code of Ethics, Standards of Conduct and Enforcement Procedures," (Data Processing Management Association), "ACM Code of Professional Conduct: Procedures for the Enforcement of the ACM Code of Professional Conduct," (Association for Computing Machinery), "IEEE Code of Ethics," (Institute of Electrical and Electronics Engineers), reprinted in part in *Proceedings of the 12th National Computer Security Conference* 547-52 (1989).

[6] John Markoff, "U.S. Moving to Restrict Access to Facts About Computer Virus," *The New York Times*, November 11, 1988.

[7] See, e.g., Jon A. Rochlis and Mark W. Eichin, "With Microscope and Tweezers: The Worm from MIT's Perspective," 32 *Communications of the ACM* 689 (June 1989), Don Seeley, "A Tour of the Worm" (November 1988) (Department of Computer Science, University of Utah), Eugene H. Spafford, *The Internet Worm Program: An Analysis, Purdue Technical Report* CSD-TR-823 (Nov. 28, 1988), reprinted in 19 *Computer Communications Review* 1 (January 1989). See also Spafford, "Crisis and Aftermath," 32 *Communications of the ACM* 678 (June 1989), John Markoff, "The Computer Jam: How It Came About," *The New York Times*, November 9, 1988, at D10. See generally, *Proceedings: 1988 IEEE Symposium on Security and Privacy*, *Proceedings: 1989 IEEE Symposium on Security and Privacy*.

Two computer conferences on the Internet have been a valuable source of information about computer security. Conference subscribers send information to the conference moderator, who then compiles the messages and sends postings to all subscribers. The "Virus-L" conference, moderated by Ken van Wyk at Lehigh University, contains information about specific viruses. The internet address for the conference is VIRUS-L@IBM1.CC.LEHIGH.EDU and administrative questions should be sent to krvw@SEI.CMU.EDU. The "Risks" conference ("Forum on Risks to Public in Computers and Related Systems") provides more general information about computer risk and reliability. The moderator is Peter Neumann at SRI. The internet address is RISKS@CSL.SRI.COM.

[8] T.R. Reid, "Bulletin Board Systems: Gateway to Citizenship in the Network Nation," *The Washington Post*, November 6, 1989, at 27 (Washington Business section).

[9] King, K.M. "Overreaction to External Attacks on Computer Systems could be More Harmful than the Viruses Themselves," *Chronicle of Higher Education*, November 23, 1988, at A36.

[10] Cliff Stoll, *The Cuckoo's Egg* 302-03, 311 (1989). See also, Cliff Stoll, Testimony on Computer Viruses, The Subcommittee on Technology and the Law, Committee on the Judiciary, United States Senate, May 15, 1989.

[11] See, e.g., "Proposed NORAD Computer System Called Flawed," *The Washington Post*, December 16, 1988, at A22.

[12] "Bugs in the Program: Problems in Federal Government Computer Software Development and Regulation," Staff study by the Subcommittee on Investigations and Oversight, Committee on Science, Space, and Technology, U.S. House of Representatives, August 3, 1989. See also Evelyn Richards, "Study: Software Bugs Costing U.S. Billions: Document is Critical of Government's Role," *The Washington Post*, October 17, 1989, at D1.

CPSR has been engaged in an ongoing review of the problems of computer risk and reliability, particularly in defense-related systems. See, e.g., *Computers in Battle: Will They Work?* (1987) (edited by Gary Chapman and David Bellin), *Risk and Reliability: Computers and Nuclear War* (1986) (videotape available from CPSR), and *Losing Control?* (1989) (videotape available for CPSR).

[13] Peter G. Neumann, "A Glitch in Our Computer Thinking: We Create Powerful Systems With Pervasive Vulnerabilities," *The Los Angeles Times*, August 2, 1988, part II, at 7. See also Ken Thompson, "Reflections on Trusting Trust," 27 *Communications of the ACM* 761 (August 1984) (1983 ACM Turing Award Lecture).

[14] John Markoff, "Virus Outbreaks Thwart Computer Experts," *The New York Times*, May 30, 1989, at C1.

[15] Computer security experts take a slightly different approach to this problem. They speak of "least privilege" which means allowing users to have access to only those files of the system for which they are authorized. Following this approach, it is possible to develop elaborate security schemes, based on a hierarchy of privileges, that clearly describe the privileges of each user. This model is appropriate for many large systems, but may be too formal for other computer systems, such as community bulletin boards, where there is little difference in the status of various system users.

[16] Even as new programs are being developed to respond to computer viruses, it is disappointing to see that some system managers have failed to correct known security flaws that were exposed by the Internet virus last year. A rogue program recently attacked the same security holes at NASA that had been exploited last fall. John Markoff, "Computer Network at NASA Attacked by Rogue Program," *The New York Times*, October 7, 1989.

[17] John P. Wack and Lisa J. Carnahan, *Computer Viruses and Related Threats: A Management Guide* (August 1989) (NIST Special Publication 500-166). The report can be ordered from NIST at (202) 783-3228 or through the Superintenent of Documents, Washington, DC 20402-9325 (stock number 003-003-02955-6). See also Stanley A. Kurzban, "Viruses and Worms — What Can you Do?" 7 *ACMSIG Security Audit and Control Review* 16 (Spring 1989). For more general information about computer security policy, see Charles K. Wilk, *Defending Secrets Sharing Data: New Locks and Keys for Electronic Information* (October 1987) (Office of Technology Assessment), Louise G. Becker, Computer Security: An Overview of National Concerns (February 1983) (Congressional Research Service).

[18] Martin Marshall, "Virus Control Center

Proposed," *Infoworld*, December 12, 1989, at 8. See also General Accounting Office, *Computer Security: Virus Highlights Need for Improved Internet Management* 24-25 (June 1989) (GAO/IMTEC-89-57).

[19] See Computer Security Act of 1987: Hearings on H.R. 145 Before a Subcommittee of the Committee on Government Operations, House of Representatives, 100th Cong., 1st Sess. 525-26, 456, 23 (statements of Congressman Brooks, Congressman Glickman, and Congressman English).

Prior to passage of the Computer Security Act, President Reagan attempted to establish primary computer security authority at the National Security Agency and to expand government classification authority under NSDD-145. Agents visited private information vendors and public libraries, and the free flow of information diminished. See Bob Davis, "Federal Agencies Press Data-Base Firms to Curb Access to 'Sensitive' Information," *The Wall Street Journal*, January 28, 1987, Judith Axler Turner, "Pentagon Planning to Restrict Access to Public Data Bases," *The Chronicle of Higher Education*, January 21, 1987; Connie Oswald Stofko, "Inquiry by FBI Causes Libraries to Assess Records, *SUNY Reporter*, February 12, 1987; Jerry J. Berman, "National Security vs. Access to Computer Databases: A new Threat to Freedom of Information," 2 *Software Law Journal* 1 (1987). The NSA also approached election officials and investigated computerized vote-counting software. Burnham, "US Examines if Computer Used in '84 Elections is Open to Fraud," *The New York Times*, September 24, 1985, at A17.

Library associations, public interest organizations, and experts on information policy described the risks of reduced access to information under NSDD-145. See American Library Association, *Less Access to Less Information by and about the U.S. Government* (1988); Steven L. Katz, "National Security Controls, Information, and Communications in the United States," 4 *Government Information Quarterly* 63 (1987); People For the American Way, *Government Secrecy: Decisions without Democracy* (1987); John Shattuck & Muriel Morisey Spence, *Government Information Controls: Implications for Scholarship, Science and Technology*, excerpted in "When Government Controls Information," 91 *Technology Review* 62 (April 1988).

The Computer Security Act followed widespread public opposition to NSDD-145. See House Committee on Science, Space, and Technology, H.R. Rep. No. 153, pt. 1, 100th Cong., 1st Sess. 18, 19, 19 (1987), reprinted in 1988, U.S. Code Congressional and Administrative News 3133, 3134, 3133 (Statement of Jack W. Simpson, President, Mead Data Central; statement of John M. Richardson, Chairman, Committee on Communications and Information Policy, Institute of Electrical and Electronic Engineering; statement of Cheryl W. Helsing, American Bankers Association). See generally Marc Rotenberg, Testimony on the Computer Security Act, Before the Subcommittee on Legislation and National Security, Committee on Government Operations, U.S. House of Representatives 2-5, May 4, 1989.

[20] See Mary Karen Dahl, "'Sensitive, Not 'Secret': A Case Study," 5 *CPSR Newsletter* 1 (Fall 1987), Marc Rotenberg, Testimony on the Computer Security Act, Before the Subcommittee on Legislation and National Security, Committee on Government Operations, U.S. House of Representatives, May 4, 1989, Letter to Representative Dan Glickman from Marc Rotenberg regarding NSA efforts to suppress dissemination of encryption technology, August 18, 1989. See also "Computer Security Questioned," *The Baltimore Sun*, April 10, 1989, at A7.

[21] Anonymous, "Warning About CERT Warnings," 9 *Forum on Risks to the Public in Computers and Related Systems* 36 (October 27, 1989) (Internet computer conference) (moderated by Peter Neumann).

[22] General Accounting Office, *Computer Security: Virus Highlights Need for Improved Internet Management* (June 1989) (GAO/IMTEC-89-57). See also statement of Jack L. Brooks, Director, Government Information and Fiscal Management Issues, Information Management and Technology Division, Hearing Before the Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, House of Representatives, July 20, 1989.

[23] Jon A. Rochlis and Mark W. Eichin, "With Microscope and Tweezers: The Worm from MIT's Perspective," 32 *Communications of the ACM* 687, 697 (June 1989).

[24] Ibid.

[25] See American Council on Education and United Educators Insurance, *A White Paper on Computer Viruses* (May 1989) (prepared by David R. Johnson, Thomas P. Olson, and David G. Post). See also "The Computer Worm: A Report to the Provost of Cornell University on an Investigation Conducted by the Commission of Preliminary Enquiry" (February 1989) (Cornell University).

[26] See, e.g., *Handbook for Students, Harvard College 1987-1988* 85 ("Misuse of Computer Systems").

[27] See, e.g., Donn B. Parker and Bruce N. Baker, "Ethical Conflicts in Information and Computer Science, Technology and Business" (August 1988), Deborah Johnson and John W. Snapper, *Ethical Issues In the Use of Computers* (1985), Glenda Eoyang, "Acquisition and Maintenance of Ethical Codes," and John Ladd, "Ethics and the Computer Revolution," *DIAC-88: Directions and Implications of Advanced Computing* 102, 108 (Computer Professionals for Social Responsibility 1988) (edited by Nancy Leveson and Douglas Schuler).

[28] In October 1984, the Computer Fraud and Abuse Act was signed into law. P.L. 99-473 and 99-474 codified at 18 U.S.C. 1030. In 1986 the law was amended and expanded to include "federal interest computers." A companion statute addresses fraud and related activity in connection with an access devices. 18 U.S.C. 1029. See also Electronic Communications Privacy Act of 1986, particularly 18 U.S.C. 2510 ("Wire and electronic communications and interception oral communications") and 18 U.S.C. 2701 ("Unlawful access to stored communication").

[29] See Anne W. Branscomb, *Rogue Computer Programs - Viruses, Worms, Trojan Horses, and Time Bombs: Pranks, Prowess, Protection or Prosection?* 20-28, 33-42 (September 1989) (Program on Information Resources Policy, Harvard Center for Information Policy Research). Another useful source is the Congressional Research Service report by Robert Helfant and Glenn J. McLoughlin, "Computer Viruses: Technical Overview and Policy Considerations" (August 15, 1988) (88-556 SPR).

[30] See Branscomb at 28-31. See also Department of Justice, *Computer Crime: Legislative Resource Manual* (Bureau of Justice Statistics).

[31] A compelling argument for the need to avoid restrictions on electronic communication can be found in Ithiel de Sola Pool, *Technologies of Freedom* (1983).

[32] See Lawrence Tribe, *American Constitutional Law* 1022-39 (2nd ed. 1988).

[33] The president of an organization of programmers called the Software Development Council has stated, "release a virus, go to jail." "Invasion of the Data Snatchers!" *Time*, September 26, 1989, at 67.

[34] The so-called Aldus Peace Virus is an example of a benign virus. See Anne W. Branscomb, *Rogue Computer Programs - Viruses, Worms, Trojan Horses, and Time Bombs: Pranks, Prowess, Protection of Prosecution?* 5-6 (September 1989) (Program on Information Resources Policy, Harvard Center for Information Policy Research).

[35] See Wayne R. LaFave and Austin W. Scott, Jr., *Criminal Law* 5-6 (1972).

[36] Indeed, someday a computer virus might be needed to free society from tyrannical rule. John Brunner, *The Shockwave Rider* (1975).

[37] John Markoff, "Computer Virus Cure May Be Worse Than Disease," *The New York Times*, October 7, 1989, at A1.

[38] Anne W. Branscomb, *Rogue Computer Programs - Viruses, Worms, Trojan Horses, and Time Bombs: Pranks, Prowess, Protection or Prosecution?* 41 (September 1989) (Program on Information Resources Policy, Harvard Center for Information Policy Research).

[39] See Statement of Senator Patrick Leahy, Hearing on Computer Viruses, Senate Subcommittee on Technology and the Law, Committee on the Judiciary, United States Senate, May 15, 1989.

[40] Vanessa Jo Grimm, "Hill Halves NIST Budget For Security," *Government Computer News*, October 30, 1989, at 1.

[41] Peter G. Neumann, "A Glitch in Our Computer Thinking: We Create Powerful Systems with Pervasive Vulnerabilities," *The Los Angeles Times*, August 2, 1988, part II, at 7. A similar view was expressed by Professor Pamela Samuelson:

> Probably more important than new laws or criminal prosecutions in deterring hackers from virus-related conduct would be a stronger and more effective ethical code among computer professionals and better internal policies at private firms, universities, and government institutions to regulate usage of computing resources. If hackers cannot win the admiration of their colleagues when they succeed at their clever stunts, they may be less likely to do them in the first place. And if owners of computer facilities make clear (and vigorously enforce) rules about what is acceptable and unacceptable conduct when using the system, this too may cut down on the incidence of virus experiments.

"Can Hackers Be Sued for Damages Caused by Computer Viruses?" 32 *Communications of the ACM* 666, 668-69 (June 1989).

[42] The heads of many top U.S. computer companies could probably have been classified as "hackers" in their younger days. See generally Steven Levy, *Hackers* (1984). In fact, the chief scientist at the National Security Agency was

one of the early pioneers of Core Wars, the precursor to today's computer "virus." There has already been discussion within the computer community about how to redirect the energies of hackers toward socially beneficial goals. See, e.g., John A.N. Lee, Gerald Segal, Rosalie Steier, "Positive Alternatives: A Report on an ACM Panel on Hacking," 29 *Communications of the ACM* 297 (April 1986).

[43] Other countries are also confronting the question of whether to develop new laws for computer crime. In Great Britain at least one journal has questioned the wisdom of rushing foreward with new legislation. "Halting Hackers," *The Economist*, October 28, 1989, at 18 ("Laws that try to make untenable distinctions between computer crime and ordinary crime are neither fair nor comprehensible.").

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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.
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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."

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[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.

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[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.

University of Colorado at Boulder

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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.

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:

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

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

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

PROBATION OFFICE

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

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

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

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

*****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 Commisson 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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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 Registar 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!

U.S. Department of Justice

Drug Enforcement Administration

Washington, D.C. 20537

MAR 1 5 ...

Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
Washington, D.C. 20002-8002

Dear Judge Wilkins:

We have reviewed paragraph number 10 of the proposed amendments to the Sentencing Guidelines. That paragraph would amend the guidelines so as to exclude the amount of any uningestible, unmarketable portions of drug mixtures.

As the head of the Office of Forensic Sciences of the Drug Enforcement Administration (DEA), I wish to express a particular concern that we have about the ability of DEA laboratories to conduct procedures which may be expected as a result of this amendment. Please note that this letter concerns only the ability of DEA to separate the relevant parts of controlled substance mixtures from the excluded part, pursuant to the proposed amendment. We have expressed certain other concerns about this proposed amendment to the Criminal Division of the Department of Justice, and we understand that they will communicate them to you.

It is often not possible for DEA chemists to extract all of the controlled substance(s) from a "mixture" such as a suitcase or a statue that has been saturated with or bonded to the controlled substance. Our chemists must work within reasonable safety and health standards which do not permit them to utilize methods of extraction that may be utilized by those trafficking in illegal controlled substances. Such extractions will often necessitate, for example, the use of such large amounts of solvents as to pose a substantial health risk to the chemist.

Our chemists will be able to identify the nature of the controlled substance(s) present, and will often be able to make reasonably accurate extrapolations or estimates of the likely amount of the controlled substance(s) in the particular item. I am informed by our Office of Chief Counsel that such evidence is often considered sufficient for purposes of sentencing. See, e.g., United States v. Uwaeme, 975 F.2d 1016 (4th Cir. 1992); United States v. Clonts, 966 F.2d 1366 (10th Cir. 1992); United States v. Hilton, 894 F.2d 485 (1st Cir. 1990). However,

I am concerned that the implication of this proposed amendment is that such separation of all of the controlled substance(s) from the excluded part will usually or always be possible. Therefore, it is our request that you acknowledge this problem in the commentary to the amended paragraph, and explicitly refer to the possible necessity to rely upon reasonably supportable estimates of the amount of the controlled substance(s) present in such "uningestible, unmarketable mixtures."

Thank you very much for your consideration of our comments on this matter. Please do not hesitate to contact us if we can provide any further information.

Sincerely,

Aaron P. Hatcher III
Deputy Assistant Administrator
Office of Forensic Sciences

FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF CALIFORNIA
17TH FLOOR FEDERAL BUILDING - BOX 36106
450 GOLDEN GATE AVENUE
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BARRY J. PORTMAN
Federal Public Defender

Telephone (415) 556-7712

March 15, 1993

BY FAX

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

ATTN: Public Information

Dear Commissioners:

I am writing to implore you to correct the terribly unfair, and indeed cruel, LSD guidelines that require the weight of the carrier medium to be weighed in the determination of the offense level for LSD offenses. The weight of the paper, cardboard or sugar cube obviously has nothing to do with the culpability of the defendant or, more importantly, the weight of the LSD involved in the crime.

I have witnessed the harsh results of this ridiculous offense level methodology first-hand. One of my clients, a single mother of two adolescent children, is currently serving a 24 year sentence. She has no prior record. She is not a drug kingpin and has never hurt anybody, to my knowledge. Yet, under the Draconian LSD guidelines, her children will be about 30 years old before she sees them outside of prison walls. I have enclosed a copy of the Eighth Circuit's decision affirming her conviction and sentence. I urge your particular attention to the dissent's discussion of the sentence for just one illustration of how ridiculous the bases for LSD sentencing can be.

Wouldn't a simple rule to just include the amount of pure LSD make sense?

Sincerely,

BARRY J. PORTMAN
Federal Public Defender

BRIAN P. BERSON
Assistant Federal Public Defender

BPB:pt
Enclosure

LAW OFFICES
OF
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A PROFESSIONAL CORPORATION
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J. W. COYLE III
GLOYD L. McCOY

TELEPHONE
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(405) 272-9859

March 15, 1993

VIA FAX (202) 273-4529

United States Sentencing Commission
1 Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
ATTN: Public Information

To: Honorable Sentencing Commission:

I am an active criminal defense lawyer and am writing to comment on two of the most serious areas of abuse that I have personally witnessed in my law practice.

AMENDMENT NO. 20 - (pg. 25) - Money Laundering (Chapter Two, Part S) - Consolidate Sections 2S1.1 and 2S1.2 in Sections 2S1.4 and 2S1.4; Ties offense level closer to seriousness of offenses.

In the area of white collar crime this area of the guidelines is the one most frequently abused by prosecutors. In plea bargaining negotiations, we are frequently told "if you don't plead to the mail fraud, then we will charge him with money laundering". It is very unfair when someone can get 6 to 10 months for a mail fraud scheme, and then 40-something months for depositing the check that was the object of the mail fraud. In the first place it does not make good sense, and in the second place it is a very unfair advantage for the Government. Further, it does not in any way mete out fair punishment.

It is very simply an arrow that should be removed from the Government's quiver.

AMENDMENT NO. 40 - (pg. 63) - 100 to 1 Ratio of Crack vs. Powder Cocaine; There is in fact little scientific support for the 100 to 1 Ratio, and unquestionably black persons are impacted by this very unfair requirement. I proved in the case of United States v. Hutchinson, in the United States District Court for the Western District of Oklahoma, Case No. CR-92-31-T, that of all

crack cases since the guidelines (November 1, 1987) in the Western District, 94.39% of the defendants were black.

The enormous disparity in sentences, and the unduly harsh requirements of the guidelines have resulted in the life imprisonment of many persons who deserve a substantially shorter sentence. This should be done immediately, and retroactively.

Thank you for the opportunity to comment on the guidelines.

Respectfully yours,

J. W. Coyle, III

JWC/sm
L-JW.SC

P.C.

MAPLEMOOR

March 12, 1993

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 2002-8002

Dear Honorable Commissioners:

I read with interest the February 3, 1993, issue of THE CRIMINAL LAW REPORTER published by the Bureau of National Affairs.

It is my opinion that the federal sentencing guidelines indeed are worthy of refinement. In general, the courts have assumed too much in accepting prosecutors' statements of related circumstances as they relate to sentencing. In my observation, these "related circumstances" are often no more than allegations which have not been investigated. Therefore, resulting sentences have been more harsh than warranted.

The specific purpose in writing this letter is to support the proposed amendment to subsection (c) of Section D 1.1. There should be no question as to whether or not only the actual weight of the LSD itself should be counted. It is the actual drug activity itself, after all, that harms society. To penalize citizens for their selection of a carrier medium is absurd. The practical effect of the existing sentencing guideline is to further overcrowd our prison system and to actually inflict unwarranted injustices upon guilty persons and their innocent families.

I offer you this comment not without sympathy for the overall Drug War or for those who fight it. My first front line experiences with the control of illegal substances was in the late 1960's as a U. S. Military officer. For quite some time I shouldered the responsibility for drug control enforcement in a large Army Tank Unit. The ruthless greed and violence are things that can never be described adequately.

Much later in my civilian career, I served as the Executive Director of Drug Free America. Despite some monumental efforts by those involved, that National not-for-profit organization was forced to close its doors, as were many others engaged in similar efforts, because public support simply could not find consensus in how to defeat the problems which drugs inflict on our civilization.

However, there were some concerns that were voiced consistently by many constituencies. Among them was the fear of over-punishing the relatively low volume players (intermediaries to sellers and users).

MAPLEMOOR CORPORATION, 1360 BEVERLY ROAD, SUITE 305, MCLEAN, VA 22101 703-821-3544 FAX 703-448-1236

While an argument certainly can be made for attempting to cripple the drug supply system by discouraging the participation of intermediaries and users by holding over them the system's enforceable threat of awful, costly penalties for their participation no one ever argued seriously that such penalties would do much more than simply force the major players to change their marketing and distribution methods; a delaying tactic to permit the "system" to find other, more effective "solutions." The real rub comes in the fact the problem is not strictly a business one. It is not simply a matter of economically discouraging an established sales and distribution system. It is a matter too of balancing the rights of individuals within the context of very fundamental philosophies underlying our entire legal system.

The foregoing is not a suggestion that the rights of individuals always outweigh those of society as a whole. However, when we include as a component of the definition of a criminal act the physical weight of the container of an illegal substance, we fabricate an irrelevant, alternative meaning for the word "severity" which is inconsistent with the harm or potential harm of the act. For any sentencing guidelines framework to work in a truly just system, the very definition of the crime must be accurate, and consistent based upon sound reasoning. The proposed amendment of subsection (c) of section 2D1.1 will ensure that penalties under the Sentencing Guidelines will be consistently applied relative only to the actual weight of the illegal substance itself. In my opinion, the Sentencing Guidelines must be amended as proposed. I strongly urge the Commission to accept that proposal.

Sincerely,

William V. Burke

William V. Burke
President

Post-it ™ brand fax transmittal memo 7671 | # of pages ▸ 1

To PUBLIC OPINIONS	From V. CONROY
Co. U.S. SENTENCING COMM.	Co.
Dept.	Phone # 314-781-8160
Fax # 202-273-4529	Fax #

March 12, 1992

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

Dear Commissioners:

This letter concerns the series of proposed amendments to the sentencing guidelines. I am writing to advocate the passage of proposed Amendment 50, which will eliminate the weight of the carrier in LSD cases, allowing the actual weight of the drug, not the carrier weight, in determining the offenders sentence.

I believe Amendment 50 will correct the current inequity in the sentencing of LSD offenders. I believe that LSD offenders are being and have been sentenced far in excess of what justice requires due to the inclusion of the carrier medium.

I also advocate passage of proposed amendment 56, which would allow for the correction of the previous guidelines, which were enacted with good intent, but in practice have proven to be at at odds with Congress's mandate to the Sentencing Commission to promote uniformity of sentencing.

Thank you for your consideration regarding this matter.

Sincerely,

Virginia L. Conroy
2187 Clifton
St. Louis, MO 63139

PACDL

Pennsylvania Association of Criminal Defense Lawyers

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Legislation
Robert N. Tarman
Long Range Planning
Arthur T. Donato, Jr.
George H. Newman
Membership
Joseph P. Green, Jr.
Newsletter
Jeanne M. Ginsburg
Public Relations
David M. McGlaughlin
Sentencing Committee
Caroline M. Roberto
Strategic Litigation
S. Lee Ruslander, II
Women and Minorities
Marilyn J. Gelb

March 12, 1993

Honorable William Wilkins, Jr.
Federal Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
South Lobby
Washington, DC 20002-8002

In Re: Proposed Amendments By The Practitioners Advisory Group

Dear Judge Wilkins:

The Board of Directors of the Pennsylvania Association of Criminal Defense Lawyers wishes to express our approval of the proposed amendments to the Federal Sentencing Guidelines as submitted by the Practitioners Advisory Group. As practitioners, we experience first-hand the impact of the Guidelines not only on our clients but on the entire judicial system.

In stating our support, we draw particular attention to the following:

Proposed Amendment 35. Treatment of acquitted conduct under §1B1.3 Relevant Conduct. PACDL prefers Option 1 yet recognizes that the majority of conduct deemed relevant conduct for sentencing purposes is generally not included in acquitted counts but is most often "uncharged conduct". Further, we believe that any conduct used for sentencing should meet the beyond a reasonable doubt standard and should be submitted to the trier of fact during trial.

Proposed Amendment 36. Rule 11 procedure. PACDL supports the recommendation in this comments. It should also be noted that the Federal Court section of the Allegheny County Bar Association is recommending that the local rules for the Western District of Pennsylvania be amended to require a pretrial conference including the Government prosecutor, the defendant and the probation officer in order to disclose the facts and circumstances of the offense and the offender characteristics applicable to the Sentencing Guideline range.

Proposed Amendment 39. Reduction of offense level for drug quantity. PACDL supports the overall scheme of this proposed amendment and believes that a maximum offense level of 36 achieves the purpose of the Sentencing Guidelines system.

The proposed amendments by the Practitioners Advisory Group are a definite improvement upon the Federal Sentencing Guidelines as they presently exist. The input of attorneys who work with the Guidelines on "the front line" must always be given high priority. PACDL supports the efforts of the Advisory Group.

Very sincerely,

Caroline M. Roberto

Caroline M. Roberto
Board Member and Chair of the
Sentencing Committee

CMR:abs

KAREN S. WILKES
ATTORNEY AT LAW
201 BROAD STREET, SUITE 404

P.O. BOX 6274
ROME, GEORGIA
30162-6274

TELEPHONE:
(404) 291-0336

March 11, 1993

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

Dear Commissioners:

As a young trial attorney and taxpaying citizen, I send you a resounding vote of confidence for the proposed amendments to the Sentencing Guidelines.

Although I question the wisdom and legality of the Guidelines, I commend the Commission's efforts to bring back some degree of common sense and fairness to the sentencing process. As we have all seen, the current system has led to a most deplorable paradox: the ringleaders and most notorious criminals actually serve less prison time because they have more information to "assist" the government. This is not justice.

The drastic sentences that are now imposed for drug offenses are equally deplorable. Non violent drug offenders are needlessly crowding our prisons and costing us billions of dollars. So, I particularly encourage you to support the proposed amendments to the drug quantity table in Section 2D1.1.

Finally, I urge you to reconsider the definition and penalty enhancements for "career offenders." The current definition is much too inclusive to result in such harsh penalties. Two different types of crimes committed within 15 years is hardly a "career" in crime, and hardly justifies adding ten or more years to a sentence.

This became painfully clear to me in a recent case where one of my clients was sentenced under the Guidelines for conspiracy to distribute 5 kilograms of cocaine. No cocaine was seized; no witness bought cocaine from my client or sold cocaine to my client. The only cocaine allegedly received by my client was the result of a mistaken

delivery of a kilogram instead of an ounce. For this, my client was sentenced to 360 months.

No one deserves this sentence, regardless of his past, and I urge you to make every effort to put an end to this type of disproportionate punishment. You should pass the proposed changes to the drug quantity table, and you should apply them retroactively. Nothing less will repair injustices like this one.

Please keep my words, and the plight of my client, in mind as you consider the proposed amendments. Also, listen carefully to the representatives of Families Against Mandatory Minimums (FAMM). They have horror stories just like mine.

I will watch closely as you debate the proposals, and I pray that justice will be done.

A friend of Liberty,

Karen S. Wilkes

KSW/kvd

KLINGER, ROBINSON, MCCUSKEY & FORD
ATTORNEYS AT LAW
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Mailing Address: P.O. Box 10020
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March 10, 1993

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

ATTENTION: *PUBLIC INFORMATION*

Dear Sirs:

It is my understanding that there is currently a proposal to take the carrier weight out of LSD sentencing before the Sentencing Commission with respect to the United States Sentencing Guidelines.

I have seen in connection with my representation of people charged with LSD-related offenses the impact that adding the carrier weight in has. In one particular case that I am aware of, it increased the number of grams from slightly in excess of 11 to over 300. As you can tell, the impact such an increase would have would be substantial.

I think to remove the requirement of the carrier weight would bring LSD offenders more in line with offenders in other drug-related cases as contemplated by the Federal Sentencing Guidelines.

I want to thank the Sentencing Commission for its review of this matter.

Very truly,

KLINGER, ROBINSON, McCUSKEY & FORD

Gary L. Robinson

GLR:jsak

March 10, 1993

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

Dear Commissioners:

I am writing to you today to express my interest and support of the 33 proposed amendments that would reduce drug sentences. My interest is personal as well as a concerned taxpayer.

My son was sentenced to 30 years under the Criminal Career law. At the time when the arrests were taken, my son was at work. The codefendants that were arrested all pleaded guilty. Not one of them received the time my son did. The person that the DEA was investigating had prior felonies also, but he didn't receive such harsh sentencing.

I spent everyday at the trial and was astonished as to how the judicial system has failed. The judge apologized for having her hands tied by the sentencing guidelines. This is disgraceful for a judge to be striped of their expertise.

This just makes me wonder what type of respect can our youths expect of our government, when I see the government has no respect for human life.

I worked hard to raise my sons properly. I'm a caring, responsible, and level thinking individual. I just can't imagine my sons life being destroyed by a law that can be revised.

I believe there are other alternatives to this issue. I'm not saying don't punish an individual, I'm saying, let the time fit the crime. I very rarely hear of the government setting up treatment programs, or prevention programs for this nationwide problem on drugs. I believe the drug game is a sickness like anything else, such as a tooth ache. It must be treated.

I would greatly like to believe in my government, but its extremely difficult.

I'm not only concerned for my son, I'm also concerned for first time offenders who are given outrageous sentences.

Let's get these issues resolved and use these tax paying dollars for treatment, prevention, and educate our people.

Respectfully,

Brenda Smith
4508 15th Street, N.W.
Washington, D.C. 20011

/bs

cc: President Clinton-White House

FIRST NATIONAL BANK
CAPITAL CITY GROUP

P.O. Box 900 Tallahassee, Florida 32302-0900
(904) 224-1171

March 10, 1993

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

Dear Members:

* We support proposed amendments to reduce drug sentences as endorsed by Families Against Mandatory Minimums. Please give their representatives every consideration. They know the problems we families face.

Our 39 year old son was convicted in a drug conspiracy case because a government-arranged "sting" group discussed locations at his homesite. He received a 10 year sentence! He is a non-violent first time offender. The real victim is his son, our totally blameless 3 1/2 year old grandson. We are helping our daughter-in-law raise this innocent child. We hope for relief on appeal. We have NOT received the justice in which we were raised to believe. PLEASE help our family and others like us help ourselves.

Thank you for your attention.

Sincerely yours,

Newell & Richard Lee

Newell M. and Richard M. Lee
413 East Park Avenue
Tallahassee, Florida 32301
(904) 222-1155

cc: Families Against Mandatory Minimums (202) 457-5790, Julie Stewart
Bill Clinton, United States President
Bob Graham, Florida Senator
Connie Mack, Florida Senator
Pete Peterson, Florida Representative
Clyde Taylor and Judge Griffin Bell, Attorneys

Re: George Martin Croy - 09645-017
Case No. 92-00300405 LAC
U. S. District Court for the Northern District of Florida, Pensacola Division

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH, PENNSYLVANIA 15219

CHAMBERS OF
DONALD 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

Donald E. Ziegler

ef

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

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CURE-NH
William J. Manseau, D.Min.
Chairperson
6 Daniel Webster Highway S.
Nashua, NH 03060
Phone: 603-888-3559

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

March 10, 1993

Attention: Public Information

To Whom It May Concern:

I wish to express my full support for proposed amendment #50 to the Federal Sentencing Guidelines for 1993 which reads as follows: "In determining the weight of LSD, use the actual weight of the LSD itself. The weight of any carrier medium, e.g. blotter paper, is not to be counted."

I urge you to specify that it be fully retroactive and that you submit it to the Congress on or before May 1, 1993. There are approximately 2,000 individuals incarcerated in the federal system to date, the majority of which are first-time, non-violent offenders, who have already been unjustly sentenced to outrageous amounts of time in LSD offenses for the sheer weight of carrier mediums.

Also, I wish to state my support for the Edwards Bill, The Sentencing Uniformity Act of 1993. Please work to repeal the mandatory minimum sentencing law and restore sentencing justice to all.

Thank you.

Sincerely,

William J. Manseau, D.Min.
Chairperson, CURE-NH

WJM/

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 Registar 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!

3/10/93

Dear Sirs,

I wish to express my full support for proposed Ammendment Number 50 to the Federal Sentencing Guidelines for 1993 which reads as follows: "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".

I urge you to specify that it be fully retroactive and that you submit it to Congress on(or before) May 1st 1993.

This Ammendment could affect the fates of approximately 2000 inouviduals currently incarcerated within the Federal Penetentiary System. These Inouviduals need to be resentenced justly and proportionately for their crimes as many are first offendors and the cost to us, the American Taxpayers, is roughly $25000.00 per inmate, per year to incarcerate them. This is NOT an acceptable expenditure of our tax dollars!

In addition to this, I also fully support the Edwards Bill (The Sentencing Uniformity Act of 1993) as well.

Please work to repeal the Mandatory Minimum Sentencing Law and restore Sentencing Justice for all Americans.

I thank you for your attention and concern in this matter.

Sincerely,
Ernie Voegtlin

GraybaR
ELECTRIC COMPANY, INC.
P.O. BOX 1670
WEST PALM BEACH, FLORIDA 33402
Attn: E. Voegtlin

BROWN & MOREHART

ATTORNEYS AT LAW

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*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 is 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

The Law Offices of

Richard T. Marshall, P.C.

6070 GATEWAY BOULEVARD EAST
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TELEFAX: (915) 779-6671

March 8, 1993

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

Attention: Public Information

Re: Proposed Amendments to the Federal Sentencing Guidelines

To the Members of the Commission:

I urge you to act decisively in amending subsection (c) of §2D1.1 of the Guidelines by adding the proposed paragraph requiring that in determining the weight of LSD the actual weight of the LSD itself be used, and not that of the carrier medium.

My only son, Stanley, is presently rounding out his fifth year of a 20-year sentence, as a first offender, caught up in a sting operation, and involving a minor amount of LSD. At his sentencing, adding the weight of the blotter paper to the imposition of a mandatory minimum sentence resulted in a bizarre and inhumane sentence for an individual who poses no threat to society. Stanley is now 35 and cannot expect to see freedom until the age of 48.

Stanley expressed himself far better than I could, in a written statement on mandatory minimums and the use of the weight of the carrier medium in determining LSD sentences, and he has requested me to submit the enclosed article, *Hard Time for Heavy Paper,* as written testimony for the hearing scheduled for March 22nd. In addition, I respectfully request you to accept this letter as written testimony.

Yours sincerely

RICHARD T. MARSHALL

xc: MR. STANLEY J. MARSHALL
07832-026-UW
9595 West Quincy Avenue
Littleton, CO 80123

RTM:m
ENCL.
STAN\SENTCOMM.LTR

HARD TIME FOR HEAVY PAPER . . . . . *by Stanley Marshall*

The United States is the world's leading jailer. We imprison more persons per capita than Russia, Iraq and Haiti. Out of every 100,000 American citizens, 455 are imprisoned. South Africa is a distant second, with 311. The 19th Century notion that penitentiaries were secure facilities designed for rehabilitation of offenders is today nothing more than a historical footnote. Today it is universally conceded that America's prisons are a return to the dungeons of yore -- places for warehousing human beings, like so much nuclear waste; to get them out of sight and out of mind.

Why does America differ from England, France, Germany, Canada, Australia..and all the other democratic countries in maintaining a monumental prison population? The reason is obvious: the War on Drugs. In Federal prisons, 56% of the inmates are drug offenders. By 1995, that figure will be 70% Nearly ten years ago President Reagan declared America's second War on Drugs, and Congress enacted the Sentencing Reform Act of 1984. What this act did was to set Mandatory Minimums for federal judges to apply as punishment terms for drug offenders. Judges were not permitted to set lesser sentences than the absolute lower limits set out in the Sentencing Reform Act, no matter what the extenuating circumstances.

The Act also provided for sentencing guidelines. The effect of these rigid guidelines has been, over the years, to further pigeonhole the convicted offender into numerous series of sentencing ranges, depending upon the nature of the offense, and not of the offender. The guidelines include enhancements that increase penalties, and some departures that reduce sentences. Despite these guidelines, no federal judge may sentence any offender to less than what is prescribed by the mandatory minimum. One of the very few downward departures is the one granted to an offender who assists prosecutors and federal agents in a sting operation or set-up of another prospective offender. If the offender testifies that the offense was the brain child of the prospective offender, the first offender gets a further downward departure from his sentence, and the prospective offender is due for a substantial upward enhancement of his sentence. To say these guidelines encourage a doubling of the prison population would seem appropriate. Incidentally, they certainly seem to encourage a proliferation of bad tips, which result in defective search warrants, under which the homes of innocents have been raided. In some of these raids agents have shot and killed law-abiding homeowners. The United States is facing damages of millions of dollars in lawsuits arising out of these mistakes. Under the guidelines, however, furnishing such information, no matter how inaccurate it may be, is about the only way to get a sentence reduced. On the other hand, there are far more ways a sentence can be enhanced.

Compounding this state of affairs is the wide range of federal conspiracy statutes. Minor participants, including those even marginally or peripherally connected to a drug transaction, are subject to a range of punishments comparable to those meted out to the persons who financed, orchestrated and profited from the crime. Of course, the kingpin is thus in an excellent position to bargain with his prosecutors for downward

departures, because he can testify against all his underlings, including some who may not even have been aware of their roles at the time of the offense. Thus, under the Sentencing Reform Act and the sentencing guidelines, it is not unusual to witness the bizarre result of drug lords receiving relatively lesser punishment than minor offenders. The concept of a mandatory minimum sentencing scheme was not new in 1984. It had been enacted back in 1970, but was quickly repealed. Ironically, George Bush, at that time a congressman from Texas, was one of the voices calling for repeal. Of course, that was before the Willie Horton era, when it became politically expedient to maintain the appearance of being tough on crime at any cost in the midst of the War on Drugs.

Federal judges are almost unanimous in their opposition to Mandatory Minimums. A number have taken senior status, when faced with the grossly unjust sentences they were being forced to impose. A few judges have ignored the mandatory minimums, running the risk of being reversed on appeal. What outrages the judges is the fact that the Mandatory Minimums have relegated learned judges into rubber stamp roles. They no longer judge. They apply a formula from a chart. They are prohibited from taking into account any human, economic or societal factors, in sentencing. They are no better than computer terminals.

The Sentencing Reform Act of 1984 also abolished parole for drug offenders. Nobody gets one third or more off their time anymore. The only remaining good behavior incentive is a maximum of 54 days of "good time" each year, which is 14.79% of the time assessed. That means that an inmate sentenced for a single minor drug transaction to 10 years will have to serve at least 85% of his sentence, and can hope for a maximum good time reduction of 17 months and 21 days, after being locked up for eight years, six months and nine days. It is amazing that our federal prisoners are as well behaved as they are, considering this almost total lack of good behavior incentive.

I am a drug offender. I'm serving four years for selling LSD, and an extra 16 years because of the paper it was on, because Congress unintentionally failed to distinguish blotter paper, upon which LSD is marketed, from common adulterants used in the marketing of heroin and cocaine. Heroin and cocaine are cut with powdered milk or similar substances, thus enhancing the profits of the drug dealers, who sell those drugs by *weight*. LSD is sold on the basis of the *number of doses*. Congress apparently was unaware of this when it permitted the use of language which could be interpreted as including the weight of the paper, or capsule, or sugar cube, along with the LSD. The result, in the case of LSD, where the weight of the paper, which is not an adulterant, but merely a carrier medium, adds no value and is hundreds or thousands of times the weight of the drug, was characterized as bizarre, by the five members of the Seventh Circuit Court of Appeals who dissented from the affirmance of my conviction.

When I was sentenced we had tried to explain this distinction to the trial judge, but he found that I had been guilty of selling 100 grams of an illegal drug. This was even after a government witness, a chemist, had testified that there was only 67% of one

gram of LSD involved in the transaction. At my appeal, we argued that it was irrational to impose upon me the same sentence for 10,000 hits of LSD that I would have received for selling two million doses of heroin, or $5 million worth of cocaine. In a dissenting opinion, one of the appellate judges wrote, "To base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant."

A case similar to mine was argued before the Supreme Court. It was explained to the Justices that because the weight of the carrier medium was included, someone who sold three doses of LSD on sugar cubes would receive the 10-year mandatory minimum, while a kingpin who distributed 19,999 doses of LSD in its pure crystalline form would not be required to serve any mandatory minimum sentence at all. Despite this argument, seven members of the Court upheld the sentence, based on a "positivistic" or literal view of the wording of the law. In his dissent, Justice John Paul Stevens said, "The consequences of the majority's construction [of the statute] are so bizarre that I cannot believe they were intended by Congress." Congress clearly stated that its aim was to punish those who sell large quantities of drugs more severely than those who sell small quantities. Weighing the carrier medium for the purposes of enhancing punishment clearly thwarts the purpose of Congress.

Since the Supreme Court has chosen to apply a narrow interpretation of the wording of the law, I am condemned to serving 17 years, five months, at the very least. I have been locked up five years so far. Reason demands that Congress refine its definition of "a mixture or substance" to more precisely indicate an adulterant and not a carrier medium. Along with others in my situation and their families, I look forward to a review by Congress of this tragic oversight.

The sentencing guidelines are due for revision this year. We have a new president. We have a new Congress. We have new members on the judiciary committees in both houses, including two women, for the first time, on the Senate Judiciary Committee. It's time for a new, pragmatic look at a problem which has evoked only knee jerk reactions in the past dozen years.

Our federal prisons are now operating at 147% of their rated maximum capacities. At the present rate of convictions, we'll have to build fifty new 2000-bed facilities in the next decade. It costs over $20,000 per year to keep one inmate in federal prison. Convictions are on the rise and sentences are longer and longer. This year's budget for the Bureau of Prisons is $2,134,297,000. Can we really afford to build more prisons? We can only hope for a return to rational laws and realistic and compassionate sentencing, keeping in mind that people who break the law are still people.

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March 9, 1993

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

Attention: Public Information

Re: Proposed Amendments to the Federal Sentencing Guidelines

To the Members of the Commission:

This letter is to supplement the letter I sent you yesterday, urging you to act decisively in amending subsection (c) of §2D1.1 of the Guidelines by adding the proposed paragraph requiring that in determining the weight of LSD the actual weight of the LSD itself be used, and not that of the carrier medium.

On December 17, 1992, *USA Today* published an article entitled, *Quirk in law weighs heavily on sentences*, which states the case most succinctly and most effectively. It is interesting to note, also, that, according to *USA Today*, this weight-of-the-carrier quirk was recognized by Congress in 1989, when remedial language was included in the 1989 crime bill.

I enclose a copy of page 11A of the December 17, 1992 issue of *USA Today*, including this item, and others pertaining to LSD, and I respectfully request that you include the same in the Commission's record of written testimony on this proposed amendment to the Guidelines.

Yours sincerely

RICHARD T. MARSHALL

xc: MR. STANLEY J. MARSHALL
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GRATEFUL DEAD FOLLOWERS

Attack on Deadheads is no hallucination

Band's followers handed stiff LSD sentences

By Dennis Cauchon
USA TODAY

David Chevrette was a young, free-spirited hippie.

His only possessions were his clothes, a dog and a 1970 Volkswagen bus painted with peace signs. For fun, he followed the Grateful Dead rock group on concert tours.

Then, the 20-year-old got busted for selling LSD in 1990 to a guy he met on the beach.

Now, he's doing 10 years without parole in federal prison — a longer sentence than those given in federal court to rapists, armed robbers and some big drug dealers.

Chevrette is a victim of a concerted crackdown on Grateful Dead fans — dubbed Deadheads — and a quirk in federal drug law.

That quirk — involving whether to weigh the paper or sugar cube the LSD is stored on — has resulted in what Sen. Joseph Biden, D-Del., calls an "unintended inequity."

In short: LSD sentences are out of proportion — by a factor of 50 or more — with other drug sentences.

Chevrette's term for $1,500 worth of LSD is more severe than if he'd smuggled $100,000 worth of heroin.

The quirk — buried deep and unnoticed in a large drug law — has been turned into a bludgeon in the battle against Deadheads.

Today, 1,500 to 2,000 Deadheads are in prison, up from fewer than 100 four years ago. Most are young middle-class whites or old hippies. Many are serving mandatory no-parole prison terms of 10 or 20 years.

"We've opened a vein here," says Gene Haislip, head of LSD enforcement at the Drug Enforcement Administration. "We're going to mine it until this whole thing turns around."

The DEA has tripled spending, personnel and arrests for LSD since January 1990. "We've seen a marked pattern of LSD distribution at Grateful Dead concerts," says Haislip. "That has something to do with why so many (Deadheads) are arrested."

The Grateful Dead — top-grossing concert act last year ($34 million) — has been around since the 1960s.

Some people are weekend fans, such as Vice President-elect Gore and his wife, Tipper, who took their daughter to a June Dead show.

Others are more devoted. They wear tie-dyed shirts and catch five or 10 shows a year.

The most dedicated fans follow the band from show to show, creating a traveling village of 3,000 to 6,000 sometimes called "Deadland."

The values are pure '60s: peace, love, vegetarianism, communal living and partying. To many, mind expansion is also part of the Deadhead experience — and that means LSD.

"Yes, LSD is my sacrament," says Franklin Martz, a Haight-Ashbury-born hippie who saw his first Grateful Dead show in 1967. He's now serving a 40-year LSD sentence.

This brazen advocacy of LSD angers many parents and police.

A USA TODAY review of more than 30 Deadhead cases found they routinely have their musical tastes, dress and lifestyle used against them in the criminal justice system:

▶ **More police searches.** A University of New Hampshire police officer acknowledged to the student newspaper that he pulled over cars with Grateful Dead bumper stickers.

▶ **Bond denial.** Deadhead Janet Godwin's license plate was presented at her North Carolina bond hearing to prove she was a flight risk. The plate read RAMBROS[illegible]er the Grateful Dead song Ra[illegible]y and Rose.

▶ **Negative portray[illegible] news media.** Police told the media that Michael Thrasher's 1,984 doses of LSD had a satanic symbol — an upside down pentagram. No mention was made of the word "LOVE" stamped across the LSD paper.

The jury learned that Thrasher, 19, a college student from Portland, Ore., was in a band named Ethel & Jake's Psychedelic Jug Band, Jamboree and Wino Wrestling Team. "A big issue at my trial was my 'alternative lifestyle,'" Thrasher says.

▶ **Sentencing prejudice.** Deadhead Todd Davidson, 20, sentenced to 20 years without parole, was described in his pre-sentence report in Florida as a member of the "cult that follows the Grateful Dead."

▶ **Prison labels.** Richard Cash is classified as "gang-affiliated" in the Colorado prison system because he's a Deadhead. That label — usually reserved for Crips, Bloods and members of Aryan Nation — is used to determine where a prisoner is placed in order to curb gang violence. But Cash, a pacifist, complains: "I'm exposed to harsher conditions all because I'm a Deadhead."

Nadine Strossen of the American Civil Liberties Union says: "People shouldn't be singled out because their lifestyles or musical tastes are unpopular with the majority."

Deadheads get few breaks behind the scenes, too.

North Carolina lawyer Charles Brewer entered into what he thought were routine plea talks for a client. He was surprised to find prosecutors unwilling to deal. "They were powerfully impacted by the fact that she was a Deadhead," he says.

Deadheads often are subject to what's known as "jurisdiction shopping" — prosecuting a case where it gets the greatest punishment.

Thrasher was arrested and prosecuted entirely by local authorities.

But the case was switched from state to federal court to get a longer sentence. In state court, he would have gotten 16 months; in federal court, he got 10 years without parole.

Davidson, now 22, is scheduled to be released from prison on March 19, 2010. He'll be 40.

"I'd go back on tour in a heartbeat," Davidson says. "It was a big happy family." At least until the real world intruded.

"It's funny," says Deadhead Christopher Jones, who just finished an LSD sentence in Virginia. "Everyone is like 'We gotta be careful,' but everyone is do[illegible] same old thing. You've still [illegible] walking around shows yellin[illegible]s! Doses!'"

By Steve Slocum, AP

DOING TIME: Michael Thrasher, 19, in Sheridan, Ore., prison, where he is serving 10 years for possession of $2,000 worth of LSD — his first offense.

Quirk in law weighs heavily on sentences

People imprisoned on federal LSD charges are treated more harshly than other drug offenders because of a quirk in the law.

The 1986 law sets sentences by a drug's weight for charges of possession, sale or conspiracy. But LSD, unlike other drugs such as cocaine or heroin, isn't sold by weight. It's sold by the dose, or "hit."

A dose of pure LSD is so tiny that it's not practical to sell. A penny weighs the same as 50,000 LSD doses. To make LSD usable, producers put the drug onto something big enough to sell.

An LSD crystal is dropped into water or alcohol, and the solution is sprayed onto a "carrier," usually paper or gel. The carrier could also be dental floss, a sugar cube or a glass of juice. The carrier's weight has no relation to the drug's potency or price.

Should the carrier be weighed during sentencing?

The issue wasn't discussed during debate of the bill. There's no indication anyone even knew it mattered.

The Justice Department could have interpreted the law's wording to weigh only the drug. Then LSD penalties would be comparable with other drug sentences.

But the Reagan Justice Department said the carrier's weight should be counted. In 1991, the Supreme Court agreed, saying it was within Congress' power to make inequitable sentences.

Result: LSD sentences are set by packaging weight, not drug weight. Sentence for 100 hits, worth $100:

▶ pure LSD, 10 months.
▶ on paper, five years.
▶ on sugar cubes, 16 years.

When Sen. Joesph Biden Jr., D-Del., chairman of the Judiciary Committee, learned of the problem, he put a correction in the 1989 crime bill. The crime bill passed the Senate, but the House took no action. Nothing has happened in Congress on the matter since.

Comparing times for crimes

How the prescribed prison sentence for a first-time offender with $1,500 worth of LSD compares with sentences[1] for other federal crimes:

Crime	Minimum	Maximum
LSD possession	10.1	13.9
Attempted murder with harm	6.5	8.1
Rape	5.8	7.2
Armed robbery (gun)	4.7	5.9
Kidnapping	4.2	5.2
Theft of $80 million or more	4.2	5.2
Extortion	2.2	2.7
Burglary (carrying gun)	2.0	2.5
Taking a bribe	.5	1.0
Blackmail	.3	.8

1 – No parole is available on any sentence
Source: U.S. Sentencing Guidelines Manual; Drug Enforcement Administration

The ABCs of LSD effects

LSD became popular in the 1960s and is used by an estimated 2.8 million people annually.

A Primer of Drug Action, a classic college psychopharmacology textbook, says of LSD:

▶ Its main effect is perceptual: sounds and sights become more vivid. Laughter and sorrow are easily evoked, sometimes simultaneously.

▶ Psychotic episodes that would normally have been suppressed sometimes occur.

▶ The drug loses half its potency in three hours, but effects last 10 to 12.

▶ Occasional use of LSD for experimental purposes does not induce physical damage.

▶ No overdoses have been reported, but flashbacks, accidents and suicides have.

March 7, 1993

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

Dear Committee Members:

I would like to express my concern about a serious injustice in the American judicial system that you all can help correct. A close friend of mine is currently sentenced to 10 years in a federal facility for procession of L.S.D. His sentence was determined from the total weight of the drug and the carrier medium (paper) on which it was transported.

Proposal #50 would clarify the existing law concerning how L.S.D. would be measured by adding the following paragraph, "In determining the weight of L.S.D., use the actual weight of the L.S.D. itself. The weight of any carrier medium (blotter paper, for example) is not to be counted." Had this specific paragraph been in effect when my friend was sentenced, the outcome would have been drastically different.

As L.S.D. is a dose specific drug which is unique from other drugs such as cocaine (which can be cut with a benign substance to increase the quantity of the drug while lowering its potency), it is transported on many mediums. The L.S.D. carrier medium has been confused with these "cuts". 100 doses of L.S.D. whether on blotter paper or sugar cubes should be considered equal in terms of sentencing. Under the current judicial guidelines the following inequity exits:

Amount of Drug		Sentence
100 doses of pure LSD (approx. 5 milligrams)	=	10 months
100 doses transported on blotter paper	=	5 years
100 doses transported on sugar cubes	=	16 years

I urge to all to look favorably on and support Proposal #50 and see it as a clarification of statutory intent so that it will assist those who are currently and inappropriately sentenced.

Thank you for your time, attention and consideration.

Respectfully,

Rachelle Rose

Rachelle Rose

BENEVA CHRISTIAN CHURCH
(DISCIPLES OF CHRIST)

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4835 BENEVA ROAD, SARASOTA, FLORIDA 34233

EDD AND MARY PAT SPENCER
CO-MINISTERS

March 5, 1993

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

Attn: Public Information

Dear Madam or Sir:

Subject: Amendments 50 and 56

Please know that I feel very strongly that a people are serving unusually long prison sentences based on the weight of the paper that L.S.D. is on, not the drug weight alone.

Two of our young adult members of Beneva Christian Church received ten years minimum mandatory sentences without parole for less than $1,000 worth (street value) of L.S.D. Knowing that it was a crime that they committed, I feel it is an equal crime that they serve such a long sentence; especially in light of the fact that people who are big time drug dealers or who commit crimes of rape, abuse, and murder spend less than ten years in our federal prisons. Please note the following ***"Comparing times for crimes"*** found in the December 17, 1992 edition of USA TODAY.

Comparing times for crimes

How the prescribed prison sentence for a first-time offender with $1.5DC worth of LSD compares with sentences[1] for other federal crimes:

Crime	Minimum	Maximum
LSD possession	10.1	[illegible]
Attempted murder with harm	6.5	8.1
Rape	5.8	[illegible]
[illegible]	4.7	5.9
Kidnapping	4.2	[illegible]
Theft of $80 million or more	4.2	5.2
Extortion	2.2	2.7
Burglary (carrying gun)	2.0	2.5
Taking a bribe	.5	1.0
Blackmail	.3	.8

1 – No parole is available on any sentence
Source: U.S. Sentencing Guidelines Manual; Drug Enforcement Administration

I am in favor of weighing the drug, not the paper. Also, I am in favor of Amendment 56, which would allow changes in sentences. Thank you for your time and attention to this matter.

Sincerely,

Mary Pat Spencer

Mary Pat Spencer
Co-minister
Beneva Christian Church (Disciples of Christ)

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

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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 over-crowding 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

United States District Court
Central District of California
751 West Santa Ana Boulevard
Santa Ana, California 92701

Chambers of
Alicemarie H. Stotler
United States District Judge

714 / 836-2055
FTS / 799-2055

March 03, 1993

Judge Billy W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
One Columbus Circle, N.E., Ste. 2-500
Washington, D.C. 20002-8002

Re: 1993 Proposed Amendments

Dear Chairman Wilkins:

I wish you and the Commission and the Judicial Working Group a productive March 8th conference.

I submit herewith comments on the proposed amendments for the 1993 cycle. As always, silence is ambiguous and may signify one or more of the following: approval; no opinion; deference to others more knowledgeable; no experience; no clue. One almost overriding consideration governs my responses: everyone complains when changes occur and therefore only absolutely necessary changes should be made. Those, we recognize by the vague notion of "consensus," untoward appellate attention, and by the insights contained in comments by Sentencing Commission "consumers."

On separate pages, then, numbered to match with the number of the proposed amendment, I comment where (1) I cannot restrain myself; (2) where I feel certain that reasonable minds will differ and I want my vote recorded; (3) where I feel qualified to take issue with the need for any change at all; and, (4) where I disagree for reasons stated.

If any member of the Commission/staff reviewing these remarks wishes further explanation, please call.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler
United States District Judge

Amendments 8, 9, 11, 39, 48, and 60

The mere existence of all these options suggests that changes concerning greater latitude for minimal criminal participation (and therefore less harsh sentences) and, possibly, a distinction among offenders involved with "less dangerous" types of controlled substance are widely thought to be desirable.

Hearing the discussion of the members of the Working Group is essential to be able to cast a well-informed vote on any of these. At least one, however, seems unnecessary, and that is **Amendment 60.** One can only infer that "ghost" co-defendants have been invoked so as to justify comparative role status in some single-defendant cases.

Amendments 9 and 39 are more extensive in their reach than **Amendment 8**, but they are more complicated. If the Working Group concludes that emphasis on the role of firearms is required, then **Amendment 9** is on target.

Adoption of **Amendment 8** and possibly **Amendment 48** would show movement in the apparently desirable direction. We could work with cases under the refined definitions of "mitigated role" defendants and those whose offenses do not concern heroin and cocaine, and see if the goal for more "individualized" sentences might be achieved.

Finally, I find **Amendment 11** arbitrary. I think it was meant to be, but I prefer *status quo*.

Henry N. Blansfield, M.D.
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(203) 744-6222
Fax (203) 744-6336

February 26, 1993

United States Sentencing Commission
1 Columbus Circle, N.E., suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public information

As a physician currently engaged in providing services to psychoactive drug users in our society and concerned with reducing harm to them, I strongly support amendments to sentencing guidelines that would drastically lessen their length. I am opposed to mandatory lengths of incarceration based upon the type of illicit drug involved in felonious drug selling and its weight. There must be a return to consideration of an arrested individual's prior record and willingness to accept rehabilitation and treatment if a compulsive drug user. Most of all, leniency would seem indicated if the nature of the crime, namely selling, has not directly harmed another. Reforms in the length of sentences need to be retroactive to allow redress for those already imprisoned by previous unfair and inhumane mandatory rules of sentencing.

Working as a clinician in the drug/alcohol field for twenty years has led me to believe that chemical dependence is a disease resulting from alterations in neuron receptor - transmitter mechanisms. Paradoxically society criminalizes the use of certain agents acting on the central nervous system while permitting the legal acquisition and consumption of others that have been repeatedly shown to have morbid deleterious heath effects, i.e. alcohol and tobacco. This, in itself, is the epitome of hypocrisy.

There is increasing awareness of the adverse impact of present drug laws on society, particularly the urban minority young male population. Racism and the drug war have been addressed by Clarence Lusane in his book "Pipe Dream Blues". A study of the impact of current drug policy, from a crime and corrections standpoint, has been carried out by the Monroe County Bar Association (Rochester, New York and environs) and detailed in a report called "Justice in Jeopardy". This report can be obtained from :

James C. Gocker, Esq.
130 East Main St.
Rochester, NY 14604
(716) 232- 4448

I enclose a copy of a New York Times article dealing with alternative sentencing, a policy whose time has come. Such approaches need to be strongly considered not only because they are dictated by the evidence pointing to the failure of present drug policy involving crime and corrections to succeed in alleviating or reducing the problem, but also because alternatives may be much less costly. The crime and corrections industry will, of course, lobby strongly against any change in the 70% dollar allocation they are now receiving.

Sincerely yours,

Henry N. Blansfield, M.D.

NY Times 1/20/93

Dealing With Drug Dealers: Rehabilitation, Not Jail

Hynes Tries Alternative Approach Intended to Stop a Problem by Curing an Addiction

By FRANCIS X. CLINES

In 15 years of selling cocaine and heroin in the doorways and abandoned buildings of Brooklyn's pervasive Borough Park narcotics mart, Guillermo Rios developed an entrepreneurial sense of a good deal, even as he indulged his own deep addiction.

Mr. Rios, who once managed seven tidy street outlets, had to hurriedly put his deal-maker's sense to good use 20 months ago when he was caught, fix in hand, selling drugs to undercover detectives. At the arraignment, District Attorney Charles J. Hynes of Brooklyn offered him a deal he never expected:

Either complete an experimental long-term rehabilitation program and be treated like an addict with all the struggle of self-reform, or face mandatory prison time as just another common criminal with all the attendant lost freedom and wasted life.

Limited Experiment

It was a deal that Mr. Rios and more than 200 other addicted drug dealers in Brooklyn have taken gladly but warily over the last two years in an unusual program that is attracting attention from other law-enforcement officials who are intent not so much on declaring a truce in the war on drugs as in attempting a little creative triage.

The Brooklyn program is a limited experiment, but it is showing enough progress at retaining phlegmatic addicts in long-term treatment in lieu of prison that the state has decided to extend it to the other city prosecutors' offices this

Continued on Page B2

Joyce Dopkeen/The New York Times

"What I am learning is to finally begin valuing my life," said Guillermo Rios, left, who chose an experimental rehabilitation program after being caught selling drugs. He talked with Ed Hill of Daytop Village in Swan Lake, N.Y.

Dealers' Deal: Rehabilitation, Not Jail

Continued From Page B1

year. Mr. Rios, who is finishing his first year in rigorous rehabilitation, said, "I had already been in jail and that just made me a little crazier."

He remains free, as ever, to walk away from the deal. But if he does, a special pursuit team will try to track him down and put him back on the narcotics court treadmill toward the overwhelming likelihood of serving long years in prison, with no second chance at mercy from Mr. Hynes.

The program is intended to deal with the legions of drug dealers who basically underwrite their own addiction with the money they make selling. Second offenders like Mr. Rios face very tough laws providing mandatory prison time and no easy plea bargains. Prison reformers say such second-felony laws are unrealistically harsh, but Mr. Hynes is exploiting the harshness, in effect, in his new carrot-and-stick program.

Half the states have comparable drug crackdown laws mandating prison time for repeat offenders and these have been instrumental in the mushrooming of prison populations and expenses across the nation through a high turnover in drug arrests. This growth has not necessarily focused on the more violent criminals who are at the heart of the public's alarm and the politicians' enactment of harsh remedies.

Up to 2 Years

With prisons becoming glutted, some criminal-justice officials are looking for cheaper, more productive alternatives. Few new programs besides Mr. Hynes's Drug Treatment Alternative to Prison offer such a powerful combination of seduction and penalty to try to change addicts who have been carefully screened and not merely to detain them behind bars until they come out to deal again.

Under the program, arrested dealers who spend up to two years completing private drug-rehabilitation programs like Daytop Village and Samaritan Village are rewarded by having the drug charges for which they were arrested dropped; the arrested dealer is free to pursue a new drug-free life with one less felony blot.

But those who yield to the temptation to walk out on the rehabilitation program's rough self-examination, job training and other responsibilities immediately face the full force of New York State's predicate felony law, which mandates prison time for second-time drug offenders, with little leeway afforded sentencing judges.

For public officials, the cost of treatment versus incarceration of nonviolent drug offenders is increasingly important. The Brooklyn program costs about $17,000 a year for each dealer in treatment, less than half the cost of imprisonment, about $40,000. But the real choice in public policy is not that simple, and alternative approaches to prison can prove risky for responsible officials.

'A Terrifying Experience'

An assistant district attorney, Susan A. Powers, recalled the initial anxiety that the program, rooted in Mr. Hynes's unusual use of his case-disposal powers, might prove to be a gamble that failed, with addicts scandalously fleeing in droves. "It was a terrifying experience," she said. "But the results so far have been rather amazing." Ms. Powers pointed out that 70 percent of the addicts admitted to the program have stayed, versus a rate of about 13 percent nationally in voluntary drug-treatment programs.

"Retention is the key to success, studies show, even if you're forced to enter a program," she said. "They can change you if they can keep you,"

> 'This is the hardest thing an addict's going to do,' a director says.

providing the programs are as long term and experience proven as Daytop and Samaritan.

"This is actually a lot harder for them than jail," said Ed Hill, director of the privately run Daytop Village center in Swan Lake, in the Catskills, where Mr. Rios, ever a manager, has risen in 11 months to be the chief administrator for running the woodshop and its staff.

"This is the hardest thing an addict's going to do because it represents true and total change," Mr. Hill said. "No more the swaggering tough guy with the .45 pistol in his belt or the 9-millimeter in his boot. We're talking complete overhaul."

He stressed that society was right to want its streets cleaned of the plague of addict-dealers like Mr. Rios but that the real issue, finally faced fully by this program, was whether to try to change them or to merely guarantee a deeper problem with prison-toughened criminals.

Mr. Rios, a trim, watchful man with more than half his 29 years of life already invested in drugs, said pragmatism was as effective as idealism in Mr. Hynes's program. He conceded that he had jumped at the program mainly to avoid prison and had thought he could ease through and feign dedication when needed, as with other more casual programs that he had gone through inside prison and out.

Mr. Hill, a Daytop graduate from Brooklyn's street-drug pathology of two decades ago, smiled, noting that avid peer-pressure is only one tool intended to root out routine fakery. Mr. Rios said he eventually found change and growth in himself necessary to stay in the program.

"Here, instead of doing 7 to 15 in prison, I'm not even doing time," he said gratefully. "I'm learning a lot about myself, what a threat I am to me and to others. What I am learning is to finally begin valuing my life."

Of the 30 percent in dropouts from the program, Mr. Hynes's pursuit squad, put together especially for this program, has arrested 95 percent to resume the court process. Of 64 returned to court, 51 received felony prison terms and 11 cases were pending as of the latest tally in November. Only two received misdemeanor treatment — a tribute to the original selection of firm second-felony drug cases by the District Attorney to guarantee the harsh stick needed to complement the program's inviting carrot.

Long-range effects are yet to be measured since only the first 14 graduates have returned to their communities. "I had my hand on the doorknob several times, ready to walk," said Angelo K., a 30-year-old graduate who completed the program's residential and re-entry programs, learning to be a diesel mechanic in the process. Through the program he has obtained a job in his old neighborhood, Sunset Park, still as drug-infested as when he began dealing as a 14-year-old.

'Finally Be an Adult'

"It was like I was frozen in my childhood back then," Angelo said. "The program resumed my life. I feel like I lived the rest of childhood in a year and sped forward to finally be an adult. Basically, they taught me we're not bad people," he said of the Samaritan Village program and his fellow addicts aiming for change.

Despite the program's modest enrollment, its surprising retention rate among the notoriously unreliable addict community is encouraging enough to attract praise from the office of Gov. Mario M. Cuomo and a decision to expand it to the other city prosecutors. A $700,000 state allocation of Federal anti-drug money will help finance 300 new residential treatment slots beyond the 200 in the Brooklyn program.

"The future of this approach is very dependent on the available treatment slots," Ms. Powers stressed. "There are only something like 15,000 full-scale residential slots available nationally — amazingly small — and maybe two-thirds of them are in New York and California. If the Clinton Administration is serious with its talk about changing the 70-30 approach of law-enforcement-to-treatment to something more of a 50-50 breakdown, then this program and others like it have a future."

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

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

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

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

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

PROBATION OFFICE

DATE: February 16, 1993

RE: Proposed Amendment #11

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

TO: U. S. Sentencing Commission
Public Information

* The synopsis of this proposed amendment indicates that a "snapshot" of the offender's involvement arguably provides a more reliable method of determining culpability. I strongly disagree with that theory and with the intent of this proposed amendment.

I contend that one adverse affect of this proposed amendment is to create an adaptation to the application and meaning of relevant conduct as defined in section 1B1.3. An exception to how 1B1.3 is applied is foreseen if this amendment is passed. This will create inconsistencies with the application of other guidelines, eg. 2B1.1 and 2F1.1 to name a few.

Drug distribution, almost by definition, is a continuous, ongoing crime. The overall philosophy of the guidelines appears to be to sanction, without double counting, all harms to the victim or victims of the criminal activity. The approach suggested by this amendment compromises that philosophy deeply.

Additionally, the proposal will create difficulty for the Court and probation officer in application and dispute resolution. Another element of factual determination is required and another issue for potential dispute is raised.

THOMAS P. JONES
ATTORNEY AT LAW
EAST CENTER STREET
P. O. DRAWER 0
BEATTYVILLE, KENTUCKY 41311
(606) 464-2648

February 22, 1993

U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002

To the U.S. Sentencing Commission:

I would like to express my support for the proposed amendments to the Sentencing Guidelines. I would especially like to voice my support for the following four amendments:

Proposal II, option 1: restructures 2D1.1 so that the offense level is based on the largest amount of a controlled substance in a single transaction.

Proposal 39: reduces the offense levels associated with higher drug quantities by two levels.

Proposal 50: bases the offense level in 2D1.1 on the amount of actual L.S.D. involved without including the weight of any carrier medium.

Proposal 56: pertains to 1B1.10, expanding the court's ability to apply changes in the Sentencing Guidelines retroactively.

These proposals would all help to insure fairer judgment in dealing with small-time drug offenders. It is only fair and reasonable to make any changes retroactive, providing convicted offenders the same reduced sentences being granted to new offenders. Thank you for your efforts at making the guidelines more equitable, so that the punishment will truly reflect the crime.

Sincerely,

Thomas P. Jones

Thomas P. Jones
Attorney at Law

TPJ/bm

McCORMICK & CHRISTOPH, P.C.
ATTORNEYS AT LAW
1406 PEARL STREET, SUITE 200
BOULDER, COLORADO 80302-5348
TELEPHONE (303) 443-2281
FAX (303) 443-2862

G. PAUL McCORMICK
JAMES R. CHRISTOPH

February 12, 1993

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

Attn: Public Information

Dear Sir or Madame:

I am responding to your request for feedback concerning the proposed amendments to the Federal Sentencing Guidelines. In particular, I am responding to Amendment No. 50 which proposes that the weight of the carrier in LSD cases be excluded from sentencing guideline consideration. I am strongly in favor of this proposed amendment. As a former prosecutor, public defender, and now private practitioner, I can assure you that nowhere is there a larger discrepancy between state and federal law than in LSD cases. Let me give you an example. I recently worked on a case where the defendant was involved in distributing 250 "hits" of LSD. Because the weight of the paper exceeded 10 grams, the defendant was facing approximately 15 years in prison. Under the same scenario in almost all state courts, if not granted probation, he would have been facing somewhere between two and five years in prison.

The other reason I support this amendment is that the current guidelines punish street-level users and sellers of LSD 100 times more severely than the manufacturers and producers of LSD. Usually when street-level persons possess LSD it is affixed to paper or cardboard or put in sugar cubes. Manufacturers, on the other hand, often possess pure liquid LSD. On a per-dosage basis, LSD affixed to blotter paper is 100 to 1,000 times heavier than the liquid concentrate. The manufacturer of LSD who possess 250 dosage units in the form of liquid LSD is only facing approximately 2 years under the guidelines. I would suggest that a sentencing scheme that punishes street-level possessors much more severely than drug manufacturers is backwards. Removing the weight of the carrier from the sentencing guidelines would remedy this gross disparity.

I enthusiastically encourage you to amend the guidelines as proposed in Amendment No. 50. Thank you for your consideration.

Sincerely,

G. Paul McCormick

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

Harold D. Vietor

Laurienne Moss
3921 Pemberly Ct.
Ann Arbor Mi. 4810_
Phone & Fax #
(313) 668-0716
(call first for fax)

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

Dear Commissioners,

I am writing to urge you to please consider the proposed amendments to the sentencing guidelines that would reduce sentences for first-time, non-violent offenders in drug cases. My husband, Robert Moss, is serving a 25-year sentence for conspiracy to import & distribute marijuana. As a first time, non-violent offender, he does not deserve to receive this harsh treatment by our courts. My family, which consists of two girls, ages 1 & 2 and a twelve year old stepson, myself, desperately need Robert to keep us going - as we have been emotionally and financially devastated by the federal courts decisions. Please give those like my husband

TEL: Mar 12,93 10:26 No.001 P.01

and their families a second chance at becoming productive members of this society which prides itself in giving fair & just treatment to its citizens who break the law.

In addition, I would like to remind you, as distinguished members of the sentencing commission, that the guidelines, which were intended to be used as a tool against drug use and abuse, has had no effect in this area. Abuse of drugs has remained the same or even risen in some cases, in spite of these stiff sentences. This leads me to believe that we should not use our courtrooms to rectify a social problem - rather it is a health problem. The money spent on prisons would be put to more effective use in education and prevention. This opinion is shared by many judges, and others

throughout this country. Government officials such as yourselves, need to get out of the business of destroying lives like ours by the thousands, and instead restore fair treatment to these offenders, which gives them a second chance in life.

Respectfully Yours,
Laurienne M. Moss

TEL: Mar 12.93 10:27 No.001 P.03

Mandatory Sentencing Dispute

Man with clean record gets long prison term for drug trafficking

By Ken Hoover
Chronicle Staff Writer

Christian Martensen, a 22-year-old San Francisco man with no previous convictions, has surrendered to begin serving a prison term that may end up lasting 17 years.

The case of Martensen, who was convicted of being part of a drug-trafficking conspiracy, is being spotlighted by critics of mandatory minimum sentences, who argue that it arbitrarily subjects marginal participants in a crime to time behind bars that should be reserved for hardened career criminals.

Martensen's story began in 1989 when he met a man at a Grateful Dead concert who said he wanted to buy some LSD. He did not supply it to him, Martensen says, because he did not deal in drugs.

He may serve 17 years for a drug deal in which he was to make $400

Over the next two years, Martensen says, he saw the man at various Grateful Dead concerts around the country, and he repeatedly asked Martensen for LSD. Martensen says that in 1991, because he was short of cash, he introduced the man, whom he thought to be a fellow "Deadhead," to two men who supplied the drug. Martensen was paid $400 for the introduction, but the man turned out to be an informant for federal drug agents. The meeting was secretly videotaped by agents, and Martensen was arrested.

Federal sentencing guidelines that went into effect in 1987 impose minimum sentences on drug dealers depending on the quantity of drugs involved.

The LSD in the case had been dropped onto blotter paper. The issue in the appeal was whether the hallucinogenic drug should be weighed with or without the blotter paper. Prosecutors contended it constituted a "mixture" of blotter paper and drug, which weighs enough to constitute a sizable amount of drugs justifying a harsher sentence.

The defense said that just the minute amount of drug should be weighed, which would have made Martensen eligible for a lighter sentence.

U.S. District Judge Vaughn Walker had accepted the defense argument that Martensen should receive the lighter sentence, and prosecutors appealed.

Just before he turned himself in last Saturday at the federal prison at Boron, the U.S. Court of Appeals in San Francisco ruled he would have to be sentenced as if he had dealt in a large quantity of drugs. Had the court ruled his case involved a small quantity, the sentence of five years imposed by Judge Walker would have stood.

"I'm upset by this one," said Martensen's attorney, John Runfola, noting his client's youth and lack of a criminal record.

Runfola said he would ask the full U.S. Court of Appeals, rather than the three-judge panel that decided the case, to reconsider the decision.

Martensen's story first came to light in an article in The Chronicle written by Dannie Martin, the paroled bank robber and award-winning author of more than 50 newspaper articles about prison life.

W. FREDERIC LARSON/THE CHRONICLE

Christian Martensen awaiting sentencing for selling LSD

Hard Time for Heavy Paper

Dear Commissioner Wilkens,

Enclosed for the commissions' review is a petition signed by nearly 1,000 concerned citizens. As taxpayers we highly commend your wisdom. We recommend our support for all amendments that create shorter more equitable sentences, especially for non-violent first time offenders like Christian Martensen. Article with update on the book also enclosed

We especially endorse Amendments
* 48, 49, 50 and 56. Thank you and the other commissioners for your time and support. We appreciate your work and know the passage of these vital amendments will be a gateway to Congress in restoring justice. I hope you and the rest of the commission finds this information helpful. Thank you

Respectfully

Shari Himel

WE, the undersigned concerned citizens and registered voters of the United States of America demand a fair solution to the LSD carrier weight issue. We want Congress and the United States Sentencing Commission to develop a coherent and realistic calculation in the drug quality table of the Federal sentencing guidelines concerning the carrier weight issue. Let the punishment fit the crime, don't destroy the futures of these unfortunate young people who are receiving these cruel and excessive sentences. Please enact legislation to reform this serious error in the Federal sentencing guidelines.

	NAME	ADDRESS	CITY	STATE	ZIP	SIGNATURE
1.	Mark Leyse	17 Harwood St.	San Fran.	CA.	94133	Mark Leyse
2.	Mike Bergstrom	2000 Ascot prky	Vallejo	Ca.	94591	Mike Bergstrom
3.	KARL GABRIELSON	1436 OHARE DR	BENICIA	CA	94510	[illegible]
4.	Claudia Delman	50 Baker	SF	CA	94117	[illegible]
5.	Erik Mathews	179 Hillcrest	G.P.F.	MI	48236	Erik Mathews
6.	Elizabeth G. O'Brien	10282 Aqueduct Dr	CYPress	CA	90630	
7.	Michael Sutherland	480 Arbol Verde St	Carpinteria	CA	93013	
8.	Brandi Tornbow	8843 Shady Meadow dr	Sandy	UT	84093	
9.	Glenn Bouchard	911 Vista Del Mar,	Aptos	CA	95003	Glenn Bouchard
10.	Erik Alsop	1271 Excelsior,	Oakland			[illegible]
11.	Chris McLaughlin	441 High St,	Santa Cruz,	CA	95060	[illegible]
12.	Quinn McLaughlin	4454 Rhoads Ave.	Santa Cruz,	CA	93111	
13.	Melissa Meyers	1020 Agate St	San Diego	CA	92109	[illegible]
14.	Brad Sargent	1204 California	Huntington Beach		92672	[illegible]
15.	ESSE GERSHFIELD	14 WESTMINSTER #B	VENICE	CA	90291	
16.	Joe Bishop	26446 oliver rd.	Carmel	CA	93923	Joe B. [illegible]

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Executive Director and Administrator
Charles and Pauline Sullivan

NATIONAL OFFICE:
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National Capital Station
Washington, DC 20013-2310
202-842-1650, ex. 320

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 Registar 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!

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-3205NI

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Northern District of Iowa.
Nancy Irene Martz,	*	
a/k/a Nancy Lebo,	*	
	*	
Appellant.	*	

Submitted: February 12, 1992

Filed: May 18, 1992

Before MAGILL, Circuit Judge, HEANEY, Senior Circuit Judge, and LARSON,* Senior District Judge.

MAGILL, Circuit Judge.

Nancy Irene Martz appeals her conviction and sentence for distributing LSD. Martz alleges the district court[1] erred in refusing to allow her to admit a California court document into evidence to impeach a key government witness. Martz also contests the district court's sentence, claiming the computation of the amount of LSD involved was erroneous. We affirm.

*THE HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

[1]The Honorable David R. Hansen was a United States District Judge for the Northern District of Iowa at the time judgment was entered. He was appointed to the United States Court of Appeals for the Eighth Circuit on November 18, 1991.

EXHIBIT A

I.

Postal inspectors executed a search warrant on June 26, 1990, and opened a first-class letter addressed to Paul Richard Smith in Charles City, Iowa. The letter, mailed from Oakland, California, contained 500 dosage units of LSD on blotter paper. Smith was arrested and agreed to cooperate in the ongoing investigation. Smith, acting with federal authorities in Iowa, twice wrote to Martz in Oakland requesting to purchase LSD. On both occasions, Smith received the requested LSD blotter sheets in return.

Martz was arrested and charged with three counts of distributing LSD, three counts of using the United States mails to distribute LSD, and one count of conspiracy to distribute LSD. A jury convicted Martz on all counts. The district court attributed 187.9 grams of LSD to Martz for an offense level of 36. The court found that Martz was the manager of a criminal enterprise involving more than five persons and increased Martz' offense level by three to 39. The judge also denied a two-level reduction for acceptance of responsibility. This put the total offense level at 39. With a criminal history in category I, Martz had a sentencing range of 262 to 327 months. The district court sentenced her to 288 months in prison and five years of supervised release.

A. Impeachment of Smith

During Smith's testimony, Martz' attorney cross-examined Smith about the plea agreement Smith had reached with federal prosecutors. Martz also sought to introduce evidence of two prior guilty pleas Smith had entered in California and Utah.[2] Martz

[2]The two documents included the certified record of an unrelated 1987 criminal case from California. In that case, Smith pleaded guilty to two drug possession misdemeanors while two felony drug charges were dismissed. The other document laid out Smith's guilty plea to a Utah felony which resulted in other related charges being dropped.

contended the documents would show Smith's knowledge of how cooperating with authorities could aid Smith in his own criminal case.

The district court allowed questioning about the prior pleas to the extent they demonstrated Smith's knowledge of the benefits of plea agreements and his concomitant incentive to aid prosecutors. Smith admitted in testimony that he had been charged with drug crimes in California, but he denied that he received a reduction in charges. Smith testified outside the jury's presence that he never entered a plea agreement in California, but merely pleaded guilty to two misdemeanors. The district court sustained the government's objection to the introduction of the California plea document. The court found that since the California plea required no cooperation or testimony from Smith, it gave Smith no incentive to cooperate with prosecutors and had no bearing on Smith's potential bias or prejudice. Therefore, the California document was excluded under Rule 608(b) of the Federal Rules of Evidence, which precludes the use of extrinsic evidence to prove specific instances of conduct to attack the witness' credibility. On appeal, Martz asserts the district court erred in refusing to allow introduction of the California document to impeach Smith.

Rule 608(b) gives the court discretion to allow questioning during cross-examination on specific bad acts not resulting in the conviction for a felony if those acts concern the witness' credibility. United States v. Hastings, 577 F.2d 38, 40-41 (8th Cir. 1978). The rule, however, forbids the use of extrinsic evidence to prove that the specific bad acts occurred. Fed. R. Evid. 608(b). The purpose of barring extrinsic evidence is to avoid holding mini-trials on peripherally related or irrelevant matters. Carter v. Hewitt, 617 F.2d 961, 971 (3d Cir. 1980) (citing 3A Wigmore on Evidence, § 979 at 826-27 (Chadbourn rev. ed. 1970)). The introduction of extrinsic evidence to attack credibility, to the extent it is ever admissible, is subject to the

discretion of the trial judge. United States v. Capozzi, 883 F.2d 608, 615 (8th Cir. 1989), cert. denied, 495 U.S. 918 (1990).

The district court allowed Martz to cross-examine Smith about prior guilty pleas he had made and whether he had come to realize the benefits of cutting deals with prosecutors in the past. But in conducting this questioning, Martz was required to "take his answer." Capozzi, 883 F.2d at 615; McCormick on Evidence § 42 at 92 (3d ed. 1984). While documents may be admissible on cross-examination to prove a material fact, United States v. Opager, 589 F.2d 799, 801-02 (5th Cir. 1979), or bias, United States v. James, 609 F.2d 36, 46 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980), they are not admissible under Rule 608(b) merely to show a witness' general character for truthfulness or untruthfulness. United States v. Whitehead, 618 F.2d 523, 529 (4th Cir. 1980); James, 609 F.2d at 46. The credibility determination pertinent to the Martz trial concerned whether Smith would lie in his testimony against Martz to receive favorable treatment from prosecutors. The issue was not whether Smith, in fact, received a reduced sentence in California for pleading guilty to two misdemeanors, or whether the charges were merely dropped by prosecutors on account of lack of evidence, crowded court dockets, or other unrelated reasons. Martz' attorney argued to the district court that "a sufficient record has been made at least to establish a question for the jury at least as to whether or not a plea bargain was entered into and whether or not the defendant received the benefit of the bargain." Tr. at 192. This argument represents exactly the type of mini-trial over a collateral matter that Rule 608(b) forbids.

Martz relies on Carter, 617 F.2d 961, for the proposition that documents admitted as evidence during cross-examination of the witness do not violate Rule 608(b). Carter's holding was much

narrower. In Carter,[3] the Third Circuit admitted the letter in question only after the witness admitted its authenticity. The court specifically held that extrinsic evidence could not be admitted after a witness denied a charge.

> [I]f refutation of the witness's denial were permitted through extrinsic evidence, these collateral matters would assume a prominence at trial out of proportion to their significance. In such cases, then, extrinsic evidence may not be used to refute the denial, even if this evidence might be obtained from the very witness sought to be impeached.

Carter, 617 F.2d at 970. Therefore, the district court did not abuse its discretion in refusing to admit the California plea document into evidence.

B. Sentence

Martz contests her sentence based on the district court's computation of the total weight of the LSD involved. Martz contends the district court should have compiled the total weight by using the Typical Weight Per Unit Table contained in application note 11 of U.S.S.G. § 2D1.1. Utilizing this table, Martz argues, would have resulted in an offense level of 28 rather than 36.

The district court attributed 33,800 dosage units of LSD to Martz and that figure is not contested on this appeal. In computing the total weight, the district court correctly included the weight of the drug-laced blotter paper. Chapman v. United States, 111 S. Ct. 1919, 1922 (1991); United States v. Bishop, 894

[3]In Carter, a prison inmate sued prison officials in a § 1983 action stemming from an alleged beating. On cross-examination of the plaintiff, defense attorneys introduced a letter written by the plaintiff they allege outlined a scheme to encourage inmates to file false brutality charges against prison officials. Carter, 617 F.2d at 964-65.

F.2d 981, 985 (8th Cir.), cert. denied, 111 S. Ct. 106 (1990). The court, however, noted that blotters that were tested contained varying weights, ranging from .00692 grams per dose to .0055 grams per dose. The actual weight of only 1800 of the dosage units was known. Applying the rule of lenity, the district court attributed the lightest known weight to all dosage units and arrived at a total of 185.9 grams (33,800 doses times .0055 grams). The court added to that figure two liquid grams of LSD that were not applied to blotter paper but were attributed to Martz.[4] The resulting total was 187.9 grams.

Martz argues that the district court should have applied the weight listed in the Typical Weight Per Unit Table contained in application note 11 of U.S.S.G. § 2D1.1. This table reveals a per-unit weight for LSD of .05 milligrams and would result in a total weight of 1.69 grams for the 33,800 doses. Adding in the two grams of liquid LSD and the 11 grams of LSD listed in the indictment would total 14.69 grams of LSD. This computation would have given Martz a base offense level of 28.

The district court's determination that extrapolating the lightest-known unit across the dosage units is a more reliable estimate than using the Typical Weight Per Unit Table was not erroneous. Application note 11 to U.S.S.G. § 2D1.1, itself, notes its inaccuracy and cautions that it should only be used when a more reliable estimate of weight is unavailable.

> 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 in the table below to estimate the total weight of the controlled substance. . . . Do not use this table

---

[4]The district court rejected the government's argument that blotter paper weight should be added to the two grams of liquid LSD merely because Martz' pattern was always to sell LSD on blotter paper.

if any more reliable estimate of the total weight is available from case-specific information.

The note provides further that the table does not include the weight of the carrying mechanism.

> For controlled substances marked with an asterisk [including LSD], 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.

U.S.S.G. § 2D1.1 & comment. (n.11). Since all of these doses were on blotter paper, the weight of the blotter paper and the LSD obviously provides a more reliable estimate than the naked drug itself.

In Bishop, 894 F.2d at 987, we upheld the estimate of a total amount of LSD based on the district court's extrapolating the lightest known weight over the total number of dosage units, including those that were unrecovered. Martz attempts to distinguish Bishop by arguing that the sample of blotter paper tested in her case did not constitute a representative sample. Unlike Bishop, the blotter paper in this case did not come from the same source at the same time. Nevertheless, the district court found that there was adequate case-specific information to estimate the total weight by extrapolating the lightest known weight over all the doses.

Random testing of drugs may be sufficient for sentencing purposes. United States v. Johnson, 944 F.2d 396, 404-05 (8th Cir.), cert. denied, 112 S. Ct. 646 (1991). In Johnson, this court refused to adopt the requirement that a representative sample of drugs from each independent source be tested. See also United States v. Follett, 905 F.2d 195, 196-97 (8th Cir. 1990) (estimate

of drug weight permissible in plea agreement although no LSD blotters were recovered and weighed), cert. denied, 111 S. Ct. 2796 (1991).

While there may arise situations where a sample is too small or too arbitrary to extrapolate fairly over a large number of dosage units that come from disparate sources, this is not such a case. First, all of the dosage units came from Martz. Martz' bare assertion that some of the blotter sheets may have been prepared by someone else is not enough to discredit the finding that the dosage units all were distributed by Martz, consisted of LSD-laced blotter paper, and were similar in appearance. Second, in order to reduce her offense level even one step to 34, Martz would have to show that the average weight of the dosage units weighed about half of the lightest known dosage unit (.0029 compared to .0055). See U.S.S.G. § 2D1.1(c). The evidence does not show that such a wide variance is possible since the known weights were clustered at .0055 to .00692. Moreover, a cursory review of LSD blotter weights from other cases reveals that .0055 rests at the bottom of the logical range. Compare United States v. Marshall, 908 F.2d 1312, 1316 (7th Cir. 1990) (en banc) (per-dose weights of .0057 grams and .00964 grams), aff'd sub nom. Chapman v. United States, 111 S. Ct. 1919 (1991); United States v. Bishop, 704 F. Supp. 910 (N.D. Iowa 1989) (per-dose weight of .0075 grams), aff'd, 894 F.2d 981 (8th Cir.), cert. denied, 111 S. Ct. 106 (1990); United States v. Andress, 943 F.2d 622 (6th Cir. 1991) (per-dose weight of .0065 grams), cert. denied, 112 S. Ct. 1192 (1992); United States v. Leazenby, 937 F.2d 496 (10th Cir. 1991) (per-dose weight of .0060 grams); United States v. Larsen, 904 F.2d 562 (10th Cir. 1990) (per-dose weight of .0061 grams), cert. denied, 111 S. Ct. 2800 (1991); United States v. Elrod, 898 F.2d 60 (6th Cir.) (per-dose weight of .0055 grams), cert. denied, 111 S. Ct. 104 (1990); United States v. Rose, 881 F.2d 386 (7th Cir. 1989) (per-dose weight of .0154 grams); United States v. DiMeo, 753 F. Supp. 23 (D. Me. 1990) (per-dose weight of .0069 grams), aff'd without opinion, 946 F.2d

880 (1st Cir. 1991). Therefore, we find that the district court did not err in determining that extrapolating the lightest known weight over all the dosage units was a more reliable estimate than using the bare drug weight found in the table.

II.

We find that the district court did not abuse its discretion in refusing to admit extrinsic evidence to impugn a witness' credibility. Further, we find that the district court properly calculated Martz' sentence. The decision below, therefore, is affirmed.

HEANEY, Senior Circuit Judge, dissenting.

In my view, Nancy Martz should have been permitted to introduce into evidence two documents which established that the government informant was lying when he testified that he had not entered into plea agreements in state courts in California and Utah. With respect to drug related offenses in those states, the exhibits were not offered to prove that Smith had prior drug convictions, but rather to attack his credibility. Smith's credibility was crucial -- his testimony was essential to Martz's conviction. The admission of these documents could have been accomplished quickly, and it would not have given rise to a mini-trial.

Although the Carter case well supports Martz's position, the majority distinguishes Carter on the grounds that the document in that case was admitted only after the witness admitted its authenticity. Here, however, the trial court did not ever question Smith as to the authenticity of the plea agreement. If faced with questioning about the previous plea agreements, Smith may well have backed off his previous statements, and his credibility would have been damaged.

I also believe that the majority errs in affirming the sentence. This court, over my dissent, recently held en banc that we must follow policy statements and commentary to bring about consistency in sentencing. United States v. Kelley, 956 F.2d 748, 756 (8th Cir. 1992) (en banc). One would think that we would be bound by that decision where the policy statement or commentary requires a shorter sentence as well as where it requires a longer sentence.

But, apparently this is not to be the case even though the application note here is clear and precise: "If the number of doses . . . but not the weight of the controlled substance is known, multiply the number of doses . . . by the typical weight per dose in the table below to estimate the total weight of the controlled substance." U.S.S.G. § 2D1.1 (Application Note 11). The weight of each dose was not known; thus, the table had to be used.

Unlike the majority, I do not believe extrapolation would be proper in this case. Unlike the situation in Bishop, the blotter paper here did not come from the same source at the same time. United States v. Bishop, 894 F.2d 981, 987 (8th Cir. 1990). Moreover, the amount of blotter paper weighed was a small fraction (approximately five percent) of the total amount attributed to Martz. Under these circumstances, the district court did not have enough "case-specific information" from which to make a "more reliable estimate of the total weight." U.S.S.G. § 2D1.1 (Application Note 11). Compare United States v. Shabazz, 933 F.2d 1029, 1034 (D.C. Cir. 1991) (use of table in Note 11 not required where defendant conceded estimated weight of dilaudid pills was accurate, and where estimated weight was supported by data from Physicians Desk Reference, the manufacturer, and the DEA).

The majority opinion buttresses the district court's findings by favorably comparing the district court's calculation of the

average weight per dose of the dosage unit (.0055 grams) to LSD blotter weights set forth in reported cases from other circuits. See ante at 8-9. Although the majority's review is interesting, I do not see how findings of fact from other cases can constitute "case-specific" evidence to support the district court's findings of fact in this case.

The majority also reports that a wide variance in blotter paper weights would not be possible in this case "because the known weights were clustered at .0055 to .00692." See ante at 8. With all due respect, I think this reasoning is circular: because only three samples were taken, there is no way to know whether there was a wide variance between blotter paper weights, yet the limited sample is used as proof that there was not a wide variance in weights. Moreover, there was a wide variance between even the three samples -- the heaviest sample was almost twenty-five percent heavier than the lightest sample.

While it would have taken a short time to accurately determine the weight per dose, the government did not make this effort. Thus, the court was obligated to follow the table.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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March 10, 1993

United States Sentencing Commission
ATTN: PUBLIC INFORMATION
One Columbus Circle North East
Suite 2-500 - South Lobby
Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments

To The Honorable United States Sentencing Commission:

I write to you, in as brief a form as possible, to express my comments on the proposed amendments in the sentencing guidelines. The fact that I am an assistant federal public defender for approximately 13 years makes me both a well informed and biased source, of which I am sure you are cognizant.

I applaud and encourage the thought and effort made to amend the loss tables and deal with the problem of more "than minimal planning" insofar as it has resulted in disparate treatments and a considerable amount of litigation. With respect to the additional issues for comment in this section, I definitely believe that the loss tables should have fewer and larger ranges in the lower ends. The loss tables at the higher ends are so large as to be beyond my experience and have no opinion as to whether they need adjustment.

Although more work would need to be done, I would encourage the Commission to modify the definition and approach to a more than minimal planning enhancement as opposed to building it into the loss table or, alternatively, building it into the loss table further from the bottom ranges, maintaining the lesser enhancement as long as possible and perhaps adding a third and additional level increase at the far end.

With respect to redefining more than minimal planning, I do have some suggestions:

1. Build in a two level decrease for spur of the moment or sudden temptation conduct;

2. Do not provide for multiple victim enhancement until the number of victims has reached an appreciably large level i.e. 15 or 20 and perhaps make this enhancement an additional one or two levels at an additionally large number such as 40 or 50;

3. Require, by example, truly more than the ordinary conduct to commit the offense before an enhancement is added. Few if any types of fraud or theft escape the current definition.

The proposal with respect to U.S.S.G. § 3B1.2 (role in the offense) is also an improvement. I would suggest option one is the most preferable of the options under Note 7 reading as follows: Option 1 is prefered because it affords the sentencing judge the most flexibility in determining whether or not to apply the two level adjustment for minor role and, unlike option 2, does not repeat the Application Note position contained in Note 8 concerning burden of pursuasion.

The firearms amendments are mostly technical and it would be useful for the Commission to have a period where it does not amend the firearms guideline. I do believe that an appropriate differentiation can be made between different weapons including weapons that fall within 26 U.S.C. § 5845 and its various subdivisions. Whether the differentiation should be made by different offense levels, by placement of the sentence within a the guideline range, or by a Commission-guided departure, depends on the weapon involved. It would seem that a fully automatic machine gun is different from a sawed-off shotgun which is different from a sawed-off rifle which is different from other weapons such as tear gas "pen guns," all of which are prohibited in Title 26.

I have no great critism of the proposed amendment § 3B1.3 abuse of position of special trust or use of special skill. However, perhaps the time has come to separate these two concepts into separate adjustment sections. It would seem to me be best to leave special trust as a Chapter 3 adjustment with appropriate illustrations in the application notes rather than adding it as a specific offense characteristic in a hit or miss fashion to various guidelines relating to fraud or embezzlement or in general to the embezzlement guideline. Certainly the proposed amendment is superior to the additional issue for comment, particularly as it relates to deleting the example regarding "ordinary bank tellers".

The proposal relating to 5K1.1 - issue 24 - will apply to very few cases if it is intended to exclude "crimes of violence" where that concept includes drug offenses. It also has limited usefulness because of the exclusion of anyone who is not a "first offender".

At least it should include all category I offenders and perhaps all category I and category II offenders. The injustice which it is intended to address is not related or necessarily related to whether the defendant is category I or category VI, but the proposal is at least some improvement over the current requirement for a government motion.

I should add with respect to § 5K that I have, as have other attorneys, experienced cases in which this proposed amendment could well have made a difference.

With respect to the proposal number 25 relating to § 6B1.2 the idea is commendable. Perhaps a stronger word than "encourages" should be utilized. I would suggest a policy statement that requires the government to make such the disclosures at either option point and provides as a ground for downward departure the intentional failure of the government to do so. Experiences has taught that toothless platitudes rarely modify prosecutorial behavior in an adversary system.

The Commission should act on issue for comment number 40 relating to the mandatory minimum and distinction between cocaine and cocaine base. Significant support exists not only from the interjection of the Commissions expertise, but also other sectors of the criminal justice system for the elimination of this distinction.

Proposed numbers 44, 45 and 46 are all poor ideas, poor policy, and should not result in favorable action. They would increase unwarranted disparities and would not further the purposes of sentencing indicated by Congress.

Proposal number 57 submitted by the Department of Justice should not be acted upon. It is an attempt to accomplish exactly the opposite of what it purports to do. The Department of Justice obviously intends to utilize its proposed amendment, if it becomes the guideline, as the Commission's position which ought to be followed by the Courts in prohibiting attacks on prior convictions. It is my understanding that the Commission wishes to take no position and allow the courts to develop their own procedures. If the Commission does intend to take a position on this procedural question, it should study the matter, invite additional comment, and it is hoped, ultimately recommended that the courts permit collateral attacks on prior convictions utilized to enhance sentences.

I had promised to make this letter brief. There are many other things I could or should say, but will not. I will say that the last two cycles of amendments have been encouraging insofar as they have addressed problems of harshness and not simply been "fixes" of guidelines which appear to be too low to some other components of the criminal justice system.

Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/tmw

Office of the
FEDERAL PUBLIC DEFENDER
MIDDLE DISTRICT OF FLORIDA

H. JAY STEVENS
Federal Public Defender

Reply to: JACKSONVILLE

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January 2, 1993

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comment on Dec. 31, 1992 Proposed Amendment 61

Dear Mr. Courlander:

Our office represents Mr. Terry Lynn Stinson in **Stinson v. United States**, Case No. 91-8685, in which certiorari was granted on November 11, 1991. The **Stinson** case involves the question whether it is a misapplication of the sentencing guidelines for a court to fail to follow the specific direction of current U.S.S.G. §4B1.2, application n.2, that possession of a firearm by a felon is not a "crime of violence." Proposed amendment 61 would reverse the directive which is the subject of **Stinson**.

The brief on the merits in **Stinson** is due January 6, 1993 and oral argument before the Supreme Court is set for March, 1993. The action taken by the Sentencing Commission in announcing this proposed amendment at this time obviously creates uncertainty as to the proper disposition of **Stinson**. We would request that the proposed amendment be withdrawn until the Supreme Court has ruled in **Stinson**.

Barring that, we would ask permission to present testimony at the scheduled hearing on March 22, 1993 in Washington. We will further written comment no later than March 15, 1993, as required by the announcement in the Federal Register.

Sincerely,

WILLIAM M. KENT
Assistant Federal Public Defender

WMK:wmk

701 Pennsylvania Avenue, N.W.
Washington D.C. 20004-2696
Telephone 202-508-5620

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."

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[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.

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.

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[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.

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March 10, 1993

Attn: Public Information
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Washington, D. C. 20002-8002

Dear Members:

We support proposed amendments to reduce drug sentences as endorsed by Families Against Mandatory Minimums. Please give their representatives every consideration. They know the problems we families face.

Our 39 year old son was convicted in a drug conspiracy case because a government-arranged "sting" group discussed locations at his homesite. He received a 10 year sentence! He is a non-violent first time offender. The real victim is his son, our totally blameless 3 1/2 year old grandson. We are helping our daughter-in-law raise this innocent child. We hope for relief on appeal. We have NOT received the justice in which we were raised to believe. PLEASE help our family and others like us help ourselves.

Thank you for your attention.

Sincerely yours,

Newell & Richard Lee

Newell M. and Richard M. Lee
413 East Park Avenue
Tallahassee, Florida 32301
(904) 222-1155

cc: Families Against Mandatory Minimums (202) 457-5790, Julie Stewart
Bill Clinton, United States President
Bob Graham, Florida Senator
Connie Mack, Florida Senator
Pete Peterson, Florida Representative
Clyde Taylor and Judge Griffin Bell, Attorneys

Re: George Martin Croy - 09645-017
Case No. 92-00300405 LAC
U. S. District Court for the Northern District of Florida, Pensacola Division

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March 8, 1993

Mr. Mike Courlander
United States Sentencing Commission
One Columbus Circle, NE
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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.

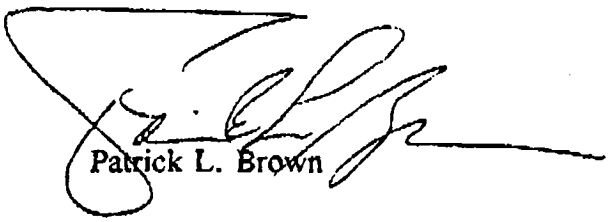
The proposal reducing the top guideline from 43 to 32 is another one which should be approved. The length of sentences in drug cases has simply gotten out of hand. As a society we can not continue to pay the costs of warehousing individuals for twenty and thirty years, especially when they are first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

between violent offenders and drug offenders and the relative disparity is 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
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TEL (315) 853-4370 FAX (315) 853-4371

March 4, 1993

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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
13 Arrowhead Way
Clinton, NY 13323

TEL (315) 853-4370 FAX (315) 853-4371

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 over-crowding 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

LAW OFFICES OF
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SUITE 300, MAIN PLACE
606 W. MAIN STREET
P. O. BOX 1126
KNOXVILLE, TENNESSEE 37901-1126

ROBERT W. RITCHIE
CHARLES W. B. FELS
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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,

Kenneth F. Irvine Jr.

KENNETH F. IRVINE, JR.

Laurienne Moss
3921 Pemberly Ct.
Ann Arbor Mi. 4810_
Phone & Fax #
(313) 668-0716
(call first for fax)

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

Dear Commissioners,

I am writing to urge you to please consider the proposed amendments to the sentencing guidelines that would reduce sentences for first-time, non-violent offenders in drug cases. My husband, Robert Moss, is serving a 25-year sentence for conspiracy to import & distribute marijuana. As a first time, non-violent offender, he does not deserve to receive this harsh treatment by our courts. My family, which consists of two girls, ages 1 & 2 and a twelve year old, and myself, desperately need Robert to keep us going - as we have been emotionally and financially devastated by the federal courts decisions. Please give those like my husband

TEL: Mar 12,'93 10:26 No.001 P.01

and their families a second chance at becoming productive members of this society which prides itself in giving fair & just treatment to its citizens who break the law.

In addition, I would like to remind you, as distinguished members of the sentencing commission, that the guidelines, which were intended to be used as a tool against drug use and abuse, has had no effect in this area. Abuse of drugs has remained the same or even risen in some cases, in spite of these stiff sentences. This leads me to believe that we should not use our courtrooms to rectify a social problem - rather it is a health problem. The money spent on prisons would be put to more effective use in education and prevention. This opinion is shared by many judges, and others

TEL: Mar 12,93 10:26 No.001 P.02

throughout this country. Government officials such as yourselves, need to get out of the business of destroying lives like ours by the thousands, and instead restore fair treatment to these offenders, which gives them a second chance in life.

Respectfully Yours,
Laurienne M. Moss

TEL: Mar 12,'93 10:27 No.001 P.03

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH, PENNSYLVANIA 15219

CHAMBERS OF
DONALD 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

Donald E. Ziegler

ef

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

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

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

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

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

PROBATION OFFICE

DATE: February 16, 1993

RE: 7. Issue for Comment.

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

TO: U. S. Sentencing Commission
Public Information

✳ The Commission should address the issue of whether 2B1.1, 2B1.2 and 2F1.1 fully capture the harmfulness and seriousness of the offense by commentary suggesting an upward departure if the Court thinks it is merited. If and when the Commission identifies, through its monitoring process, a trend of upward departures for this reason, it can address same through the adoption of a specific offense characteristic. This is consistent with the "heartland" approach adopted by the Commission, an approach that is valid, but has, in practice, diminished because of too many amendments during the first 5 years of implementation.

richard crane
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February 18, 1993

U.S. Sentencing Commission
1 Columbus Circle, N.E.
Suite 2500
Washington, D.C. 20002-8002

Re: Amendments 28(G), 37 and 38
Amendment 25

Gentlemen:

I am writing in support of proposed amendment 28 (G). Some of the problems with the loss definition under § 2B1.1 and § 2F1.1 have been resolved because of the 1992 amendment to the statutory index specifying that either of these guidelines could be appropriate for violation of 18 § 656.

But, the problem persists in other areas. For example, I had a client convicted this past year for conspiring to embezzle from an employee benefit plan. (18 § 371) The offense involved the use of a certificate of deposit from a union pension fund as collateral for a loan. The CD greatly exceeded the amount of the loan, so when the loan was defaulted on, only a portion of the CD was seized to cover the loss. Because the offense involved pension fund money, my client's sentenced was calculated under § 2B1.1 using the full value of the CD , rather than the actual loss. Your proposed amendment 28(G) would, hopefully, resolve this problem.

I also very much favor amendment No. 25 regarding disclosure of information relative to guideline calculations. I practice around the country and there are great differences from one U.S. Attorney's Office to another in providing this information.

Additionally, I think that the amendment should include a requirement

recycled paper

that the government stipulate as often as possible in plea agreements to any facts which impact on guideline calculations. Again, as I practice in various states, some U.S. Attorney's offices are readily agreeable to incorporating stipulations or a separate statement of the offense, while other U.S. Attorney's offices have a "policy" of never stipulating to anything. This only increases the work for the probation officer and for the court, when these matters could easily be resolved during plea negotiations.

Sincerely,

Richard Crane

RC/cm

WHITE,
KOCH, KELLY
&
McCARTHY
A Professional Association

Attorneys and Counselors at Law

Sumner S. Koch
William Booker Kelly
John F. McCarthy, Jr.
Benjamin Phillips
John N. Patterson
David F. Cunningham
Albert V. Gonzales
Janet Clow
Kevin V. Reilly
Charles W. N. Thompson, Jr.
M. Karen Kilgore
Holly A. Hart
Sandra J. Brinck

Of Counsel
Kenneth Bateman

Special Counsel
Paul L. Bloom

Aaron J. Wolf
Jennifer Lea Wise
Jacquelyn Archuleta-Staehlin
Mark A. Basham

March 12, 1993

***VIA* TELEFAX 202-273-4529**

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

Dear United States Sentencing Commission:

The purpose of this letter is to express my support for Edwards Bill H.R. 957, Sentencing Uniformity Act of 1993. I have practiced criminal law for the past 17 years and was Chief Public Defender for the State of New Mexico from 1983 through 1985. I believe that mandatory minimum sentences have created injustice throughout the federal system and have clearly created a backlog of civil cases in the State of New Mexico.

I thank you for your consideration of Edwards Bill H.R. 957.

Sincerely,

JANET CLOW

JC/cam
cc: Steve Schiff (*via* Telefax)

433 Paseo de Peralta P.O. Box 787, Santa Fe, NM 87504-0787 (505) 982-4374 Fax Nos. (505) 982-0350; 984-8631

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March 10, 1993

United States Sentencing Commission
ATTN: PUBLIC INFORMATION
One Columbus Circle North East
Suite 2-500 - South Lobby
Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments

To The Honorable United States Sentencing Commission:

I write to you, in as brief a form as possible, to express my comments on the proposed amendments in the sentencing guidelines. The fact that I am an assistant federal public defender for approximately 13 years makes me both a well informed and biased source, of which I am sure you are cognizant.

I applaud and encourage the thought and effort made to amend the loss tables and deal with the problem of more "than minimal planning" insofar as it has resulted in disparate treatments and a considerable amount of litigation. With respect to the additional issues for comment in this section, I definitely believe that the loss tables should have fewer and larger ranges in the lower ends. The loss tables at the higher ends are so large as to be beyond my experience and have no opinion as to whether they need adjustment.

Although more work would need to be done, I would encourage the Commission to modify the definition and approach to a more than minimal planning enhancement as opposed to building it into the loss table or, alternatively, building it into the loss table further from the bottom ranges, maintaining the lesser enhancement as long as possible and perhaps adding a third and additional level increase at the far end.

With respect to redefining more than minimal planning, I do have some suggestions:

1. Build in a two level decrease for spur of the moment or sudden temptation conduct;

2. Do not provide for multiple victim enhancement until the number of victims has reached an appreciably large level i.e. 15 or 20 and perhaps make this enhancement an additional one or two levels at an additionally large number such as 40 or 50;

3. Require, by example, truly more than the ordinary conduct to commit the offense before an enhancement is added. Few if any types of fraud or theft escape the current definition.

The proposal with respect to U.S.S.G. § 3B1.2 (role in the offense) is also an improvement. I would suggest option one is the most preferable of the options under Note 7 reading as follows: Option 1 is prefered because it affords the sentencing judge the most flexibility in determining whether or not to apply the two level adjustment for minor role and, unlike option 2, does not repeat the Application Note position contained in Note 8 concerning burden of pursuasion.

The firearms amendments are mostly technical and it would be useful for the Commission to have a period where it does not amend the firearms guideline. I do believe that an appropriate differentiation can be made between different weapons including weapons that fall within 26 U.S.C. § 5845 and its various subdivisions. Whether the differentiation should be made by different offense levels, by placement of the sentence within a the guideline range, or by a Commission-guided departure, depends on the weapon involved. It would seem that a fully automatic machine gun is different from a sawed-off shotgun which is different from a sawed-off rifle which is different from other weapons such as tear gas "pen guns," all of which are prohibited in Title 26.

I have no great critism of the proposed amendment § 3B1.3 abuse of position of special trust or use of special skill. However, perhaps the time has come to separate these two concepts into separate adjustment sections. It would seem to me be best to leave special trust as a Chapter 3 adjustment with appropriate illustrations in the application notes rather than adding it as a specific offense characteristic in a hit or miss fashion to various guidelines relating to fraud or embezzlement or in general to the embezzlement guideline. Certainly the proposed amendment is superior to the additional issue for comment, particularly as it relates to deleting the example regarding "ordinary bank tellers".

The proposal relating to 5K1.1 - issue 24 - will apply to very few cases if it is intended to exclude "crimes of violence" where that concept includes drug offenses. It also has limited usefulness because of the exclusion of anyone who is not a "first offender".

At least it should include all category I offenders and perhaps all category I and category II offenders. The injustice which it is intended to address is not related or necessarily related to whether the defendant is category I or category VI, but the proposal is at least some improvement over the current requirement for a government motion.

I should add with respect to § 5K that I have, as have other attorneys, experienced cases in which this proposed amendment could well have made a difference.

With respect to the proposal number 25 relating to § 6B1.2 the idea is commendable. Perhaps a stronger word than "encourages" should be utilized. I would suggest a policy statement that requires the government to make such the disclosures at either option point and provides as a ground for downward departure the intentional failure of the government to do so. Experiences has taught that toothless platitudes rarely modify prosecutorial behavior in an adversary system.

The Commission should act on issue for comment number 40 relating to the mandatory minimum and distinction between cocaine and cocaine base. Significant support exists not only from the interjection of the Commissions expertise, but also other sectors of the criminal justice system for the elimination of this distinction.

Proposed numbers 44, 45 and 46 are all poor ideas, poor policy, and should not result in favorable action. They would increase unwarranted disparities and would not further the purposes of sentencing indicated by Congress.

Proposal number 57 submitted by the Department of Justice should not be acted upon. It is an attempt to accomplish exactly the opposite of what it purports to do. The Department of Justice obviously intends to utilize its proposed amendment, if it becomes the guideline, as the Commission's position which ought to be followed by the Courts in prohibiting attacks on prior convictions. It is my understanding that the Commission wishes to take no position and allow the courts to develop their own procedures. If the Commission does intend to take a position on this procedural question, it should study the matter, invite additional comment, and it is hoped, ultimately recommended that the courts permit collateral attacks on prior convictions utilized to enhance sentences.

I had promised to make this letter brief. There are many other things I could or should say, but will not. I will say that the last two cycles of amendments have been encouraging insofar as they have addressed problems of harshness and not simply been "fixes" of guidelines which appear to be too low to some other components of the criminal justice system.

Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/tmw

FIRST NATIONAL BANK
CAPITAL CITY GROUP

P.O. Box 900 • Tallahassee, Florida 32302-0900
(904) 224-1171

March 10, 1993

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

Dear Members:

We support proposed amendments to reduce drug sentences as endorsed by Families Against Mandatory Minimums. Please give their representatives every consideration. They know the problems we families face.

Our 39 year old son was convicted in a drug conspiracy case because a government-arranged "sting" group discussed locations at his homesite. He received a 10 year sentence! He is a non-violent first time offender. The real victim is his son, our totally blameless 3 1/2 year old grandson. We are helping our daughter-in-law raise this innocent child. We hope for relief on appeal. We have NOT received the justice in which we were raised to believe. PLEASE help our family and others like us help ourselves.

Thank you for your attention.

Sincerely yours,

Newell & Richard Lee

Newell M. and Richard M. Lee
413 East Park Avenue
Tallahassee, Florida 32301
(904) 222-1155

cc: Families Against Mandatory Minimums (202) 457-5790, Julie Stewart
Bill Clinton, United States President
Bob Graham, Florida Senator
Connie Mack, Florida Senator
Pete Peterson, Florida Representative
Clyde Taylor and Judge Griffin Bell, Attorneys

Re: George Martin Croy - 09645-017
Case No. 92-00300405 LAC
U. S. District Court for the Northern District of Florida, Pensacola Division

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(W.A.I.T. II) We Are Inmates Too (Wisconsin)

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Cong. Craig A. Washington (D-TX)

CITIZENS UNITED FOR REHABILITATION OF ERRANTS

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

Executive Director and Administrator
Charles and Pauline Sullivan

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CURE-NH
William J. Manseau, D.Min.
Chairperson
6 Daniel Webster Highway S.
Nashua, NH 03060
Phone: 603-888-3559

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

March 10, 1993

Attention: Public Information

To Whom It May Concern:

I wish to express my full support for proposed amendment #50 to the Federal Sentencing Guidelines for 1993 which reads as follows: "In determining the weight of LSD, use the actual weight of the LSD itself. The weight of any carrier medium, e.g. blotter paper, is not to be counted."

I urge you to specify that it be fully retroactive and that you submit it to the Congress on or before May 1, 1993. There are approximately 2,000 individuals incarcerated in the federal system to date, the majority of which are first-time, non-violent offenders, who have already been unjustly sentenced to outrageous amounts of time in LSD offenses for the sheer weight of carrier mediums.

Also, I wish to state my support for the Edwards Bill, The Sentencing Uniformity Act of 1993. Please work to repeal the mandatory minimum sentencing law and restore sentencing justice to all.

Thank you.

Sincerely,

William J. Manseau, D.Min.
Chairperson, CURE-NH

WJM/

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Executive Director and Administrator
Charles and Pauline Sullivan

NATIONAL OFFICE:
PO Box 2310
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Washington, DC 20013-2310
202-842-1650, ex. 320

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 Registar 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!

(614) 890-6164
OFFICE

(614) 258-0105
HOME

DAYTON ELECTRONIC SYSTEMS

Roger A. Logan
1605 Bryden Road
Columbus, OH 43205
March 8, 1993

To Whom It May Concern,

Legislation to abolish all federal mandatory minimum sentences was introduced early in the 103rd Congress, by Rep. Don Edwards. This bill will return justice to the sentencing process.

The news media makes you aware of the injustices in this country, but when you come in direct contact with injustices, your morale as a U.S. citizen is devastated. The bitterness of the 50's & 60's that I had has been rekindled. By being a black American, I must say that the backlash of the past 12 years has definitely set the black man behind on the issues accomplished in the 60's & 70's.

My son, Keith Logan, (a first-time offender) was sentenced to 14 years for conspiracy to distribute 8 kilos of cocaine. The undercover officer expressed to me that he knew that Kith was only responsible for conspiracy of one kilo and that if he would testify against someone else, he would have a reduced sentence.

My son confessed to being a part of the sell of one kilo of cocaine the evening the other young men were arrested and never went to trial. His sentence was based on a report submitted by a (young) probation officer and a (young) prosecutor. The reason I emphasize "young" is because the legislatures have taken away sentencing from judges and given it to young inexperienced "white" adults. The judge at her sentencing stated that she knew it was unfair and that black judges have stepped down because of the mandatory minimum sentencing law.

Mandatory minimum sentencing has not worked in the past, and is not working today. This has perpetuated the National debt. The goal should be to produce productive citizens.

Enclosed are statistics of the negative affects that mandatory minimum sentencing has had on America. I urge you to support Rep. Edward's Uniformity Sentencing Bill.

Please reply.

Sincerely,

Roger A. Logan

FAMM FACTS

PRISON OVERCROWDING

* In 1992, America had 1.2 million people behind bars. The United States imprisons more of its citizens per capita than any other country in the world. Per 100,000 people, the United States imprisons 455, with South Africa in second place with 311. In other words, one in every 300 Americans is in prison--not jail, probation, or parole--but in prison. *(The Sentencing Project, Americans Behind Bars: One Year Later, 1992)*

* From 1980 to January 1993, the federal prison population grew by 57,000 inmates--from 24,000 to 81,000. At the current rate of incarceration, by 1995 the federal prison population will reach 100,470, and by the year 2000 there will be 136,980 people in federal prisons. *(Bureau of Justice Statistics, Sourcebook 1991, p. 679)*

* Convictions for federal drug offenses increased 213 percent between 1980 and 1990. *(Bureau of Justice Statistics, National Update, January 1992, p.6)*

* Drug offenders currently make up 57 percent of the federal inmate population, up from 22 percent in 1980. By 1995, nearly 70 percent of federal inmates will be drug offenders. *(Testimony by former BOP director, J. Michael Quinlan, given on February 26, 1992 to House Appropriations Subcommittee)*

* In 1990, more than half of the federal inmates serving mandatory minimum sentences were first offenders. *(Bureau of Justice Statistics, Sourcebook 1991, p.542)*

* Average federal sentences in 1990 for the following offenses were:
Drugs offenses: 6.5 years. Sex offenses: 5.8 years. Manslaughter: 3.6 years. Assault: 3.2 years. *(Bureau of Justice Statistics, Sourcebook 1991, p.532)*

EXCESSIVE TAXPAYER COSTS

* The average cost of incarcerating a federal prisoner is $20,072 per year, or approximately $55 per day. *(Bureau of Prisons, State of the Bureau 1991, Summer 1992)*

* To house, feed, clothe, and guard the 81,000 federal inmates, taxpayers pay a hefty $4.5 million per day or $1.6 billion per year.

* At the state level, taxpayers cover incarceration costs as high as $6.8 million per day in California where over 100,000 people are behind bars at an average of $25,000 per inmate per year. *(The California Republic, July 1991, p.9)*

* States spend more of their budgets on justice programs (6.4%) than on housing and the environment (3.8%) and nearly as much as they spend on hospitals and health care (8.9%) *(Bureau of Justice Statistics, Justice Expenditures & Employment, 1990, Sept. 1992)*

* The federal drug program budget for FY 1993 was $12 billion. *(Office of National Drug Control Policy)*

* Federal spending for corrections increased 44 percent between 1989 and 1992, from $1.5 billion to 2.2 billion per year. *(U.S. Budget FY 93, Part 1, p.198)*

* The Bureau of Prisons' authorized budgets increased 1,350 percent between 1982 and FY 1993, from $97.9 million to $1.42 billion per year. *(National Drug Control Strategy Budget Summary, 1992, p.212)*

* It costs more to send a person to federal prison for four years than it does to send him to a private university (tuition, fees, room, board, books & supplies) for four years. *(Sources: Federal Bureau of Prisons, The College Board)*

* Figures are not yet available for the tax revenue loss from former tax-paying inmates, or the increased cost of social services needed by inmates' families that were previously supported by the inmate.

PRISON CYCLE

Statistics show that people who have been in prison are more likely to have children who will end up in prison. Long mandatory prison sentences are sowing the seeds for the next generation of inmates.

* More than half of the juveniles in state and local jails have an immediate family member who is a felon.

* More than one-third of the adults in state prisons and local jails have an immediate family member who is a felon.

* Relative to the general population, inmates are more than twice as likely to grow up in a single parent family. Seventy percent of juvenile offenders and 52 percent of adult offenders had one, or no, parent.

(Sources: Bureau of Justice Statistics, Survey of Youth in Custody 1987, Profile of Jail Inmates 1989, Survey of Inmates in State Correctional Facilities 1986.)

PUBLIC ATTITUDES

* toward crime: 61% prefer attacking social problems, 32% want more prisons & law enforcement.

* toward purpose of prison: 48% think it should rehabilitate, 38% think it should punish.

* toward spending more money & effort in fight against illegal drugs: 40% prefer teaching the young, 28% work with foreign governments, 19% arrest sellers, 4% help overcome addiction, 4% arrest users.

(Source: Bureau of Justice Statistics Sourcebook 1991, pp.202, 210, 243)

U.S. SENTENCING COMMISSION FINDINGS ON MANDATORY MINIMUMS

* Sentencing power has been transferred from the courts to the prosecutors. The Commission reports that, "Since the charging and plea negotiation processes are neither open to public review nor generally reviewable by the courts, the honesty and truth in sentencing intended by the guidelines system is compromised."

* Mandatory minimum sentences create disparities based on race. Blacks and hispanics are charged with and receive mandatory minimum sentences more often than whites. The Sentencing Commission reports that this racial disparity "reflects the very kind of disparity and discrimination that the Sentencing Reform Act...was designed to reduce."

Blacks, 68 percent of the time.
Hispanics, 57 percent of the time.
Whites, 54 percent of the time.

Sentences for crack cocaine are also 100 times greater than for powder cocaine. Generally, blacks use crack cocaine and whites use powder cocaine.

* Mandatory minimums are counterproductive--low level participants receive mandatory minimums more often than top level kingpins.

Street-level participants, 70 percent of the time.
Mid-level players, 62 percent of the time.
Top-level importers, 60 percent of the time.

* Mandatory minimums create "cliffs" in sentencing based on small differences in weight. Possession of 5.0 grams of cocaine requires a sentence of up to one year, but possession of 5.01 grams of cocaine requires a sentence of **atleast** five years.

COMPARATIVE OFFENSES

Keep in mind: Federal guidelines equate one marijuana plant to one kilo (2.2 pounds) of marijuana, regardless of the size of the plant at arrest. In LSD cases, the guidelines include the weight of the paper, or the sugarcube, or the orange juice in which the LSD is mixed, to determine the total drug weight on which sentencing is based.

Level 24: 4.3 years to 5.3 years

$80 million worth of larceny, embezzlement, other forms of theft. Kidnapping abduction, unlawful restraint.
176 pounds of marijuana, 800 mg. of LSD, 400 grams (less than 1 lb.) of cocaine powder.

Level 26: 5.3 years to 6.6 years

Robbery with life-threatening injury.
220 pounds of marijuana, 1 gram (half the weight of one dime) of LSD, 500 grams (a little over 1 lb.) of cocaine.

Level 28: 6.6 years to a 8.1 years

Conspiracy or solicitation of murder.
880 pounds of marijuana, 4 grams (almost the weight of 2 dimes) of LSD, 8.7 pounds of cocaine powder.

Level 30: 8.1 years to 10.1 years

Kidnapping, abduction, unlawful restraint with ranson demand.
1540 pounds of marijuana, 7 grams (a little over 3 dimes weight) of LSD, 8.7 pounds of cocaine powder.

Level 38: 19.6 years to 24.4 years

Selling or buying of children for use in the production of pornography.
66,000 pounds of marijuana, 300 grams (approx. 3/4 lb.) of LSD, 330 pounds of cocaine powder.

(Source: U.S. Sentencing Commission Guidelines Manual, November 1, 1992)

SOME ORGANIZATIONS THAT OPPOSE MANDATORY MINIMUM SENTENCES

- **The United States Sentencing Commission.** The Commission found mandatory minimums to be racially discriminative, inefficient, counterproductive, and to have had no effect on the rate of crime in America.
- **The Federal Courts Study Committee**
- **The American Bar Association**
- Each of the 11 **Judicial Conferences of Federal Judges**
- **The National Association of Criminal Defense Lawyers**
- **The American Civil Liberties Union**

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

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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 over-crowding 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

Henry N. Blansfield, M.D.
1 Cedarcrest Drive
Danbury, CT 06811
(203) 744-6222
Fax (203) 744-6336

February 26, 1993

United States Sentencing Commission
1 Columbus Circle, N.E., suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public information

As a physician currently engaged in providing services to psychoactive drug users in our society and concerned with reducing harm to them, I strongly support amendments to sentencing guidelines that would drastically lessen their length. I am opposed to mandatory lengths of incarceration based upon the type of illicit drug involved in felonious drug selling and its weight. There must be a return to consideration of an arrested individual's prior record and willingness to accept rehabilitation and treatment if a compulsive drug user. Most of all, leniency would seem indicated if the nature of the crime, namely selling, has not directly harmed another. Reforms in the length of sentences need to be retroactive to allow redress for those already imprisoned by previous unfair and inhumane mandatory rules of sentencing.

Working as a clinician in the drug/alcohol field for twenty years has led me to believe that chemical dependence is a disease resulting from alterations in neuron receptor - transmitter mechanisms. Paradoxically society criminalizes the use of certain agents acting on the central nervous system while permitting the legal acquisition and consumption of others that have been repeatedly shown to have morbid deleterious heath effects, i.e. alcohol and tobacco. This, in itself, is the epitome of hypocrisy.

There is increasing awareness of the adverse impact of present drug laws on society, particularly the urban minority young male population. Racism and the drug war have been addressed by Clarence Lusane in his book "Pipe Dream Blues". A study of the impact of current drug policy, from a crime and corrections standpoint, has been carried out by the Monroe County Bar Association (Rochester, New York and environs) and detailed in a report called "Justice in Jeopardy". This report can be obtained from :

James C. Gocker, Esq.
130 East Main St.
Rochester, NY 14604
(716) 232- 4448

I enclose a copy of a New York Times article dealing with alternative sentencing, a policy whose time has come. Such approaches need to be strongly considered not only because they are dictated by the evidence pointing to the failure of present drug policy involving crime and corrections to succeed in alleviating or reducing the problem, but also because alternatives may be much less costly. The crime and corrections industry will, of course, lobby strongly against any change in the 70% dollar allocation they are now receiving.

Sincerely yours,

Henry N. Blansfield, M.D.

NY Times 1/20/93

Dealing With Drug Dealers: Rehabilitation, Not Jail

Hynes Tries Alternative Approach Intended to Stop a Problem by Curing an Addiction

By FRANCIS X. CLINES

In 15 years of selling cocaine and heroin in the doorways and abandoned buildings of Brooklyn's pervasive Borough Park narcotics mart, Guillermo Rios developed an entrepreneurial sense of a good deal, even as he indulged his own deep addiction.

Mr. Rios, who once managed seven tidy street outlets, had to hurriedly put his deal-maker's sense to good use 20 months ago when he was caught, fix in hand, selling drugs to undercover detectives. At the arraignment, District Attorney Charles J. Hynes of Brooklyn offered him a deal he never expected:

Either complete an experimental long-term rehabilitation program and be treated like an addict with all the struggle of self-reform, or face mandatory prison time as just another common criminal with all the attendant lost freedom and wasted life.

Limited Experiment

It was a deal that Mr. Rios and more than 200 other addicted drug dealers in Brooklyn have taken gladly but warily over the last two years in an unusual program that is attracting attention from other law-enforcement officials who are intent not so much on declaring a truce in the war on drugs as in attempting a little creative triage.

The Brooklyn program is a limited experiment, but it is showing enough progress at retaining phlegmatic addicts in long-term treatment in lieu of prison that the state has decided to extend it to the other city prosecutors' offices this

Continued on Page B2

Joyce Dopkeen/The New York Times

"What I am learning is to finally begin valuing my life," said Guillermo Rios, left, who chose an experimental rehabilitation program after being caught selling drugs. He talked with Ed Hill of Daytop Village in Swan Lake, N.Y.

Dealers' Deal: Rehabilitation, Not Jail

Continued From Page B1

year. Mr. Rios, who is finishing his first year in rigorous rehabilitation, said, "I had already been in jail and that just made me a little crazier."

He remains free, as ever, to walk away from the deal. But if he does, a special pursuit team will try to track him down and put him back on the narcotics court treadmill toward the overwhelming likelihood of serving long years in prison, with no second chance at mercy from Mr. Hynes.

The program is intended to deal with the legions of drug dealers who basically underwrite their own addiction with the money they make selling. Second offenders like Mr. Rios face very tough laws providing mandatory prison time and no easy plea bargains. Prison reformers say such second-felony laws are unrealistically harsh, but Mr. Hynes is exploiting the harshness, in effect, in his new carrot-and-stick program.

Half the states have comparable drug crackdown laws mandating prison time for repeat offenders and these have been instrumental in the mushrooming of prison populations and expenses across the nation through a high turnover in drug arrests. This growth has not necessarily focused on the more violent criminals who are at the heart of the public's alarm and the politicians' enactment of harsh remedies.

Up to 2 Years

With prisons becoming glutted, some criminal-justice officials are looking for cheaper, more productive alternatives. Few new programs besides Mr. Hynes's Drug Treatment Alternative to Prison offer such a powerful combination of seduction and penalty to try to change addicts who have been carefully screened and not merely to detain them behind bars until they come out to deal again.

Under the program, arrested dealers who spend up to two years completing private drug-rehabilitation programs like Daytop Village and Samaritan Village are rewarded by having the drug charges for which they were arrested dropped; the arrested dealer is free to pursue a new drug-free life with one less felony blot.

But those who yield to the temptation to walk out on the rehabilitation program's rough self-examination, job training and other responsibilities immediately face the full force of New York State's predicate felony law, which mandates prison time for second-time drug offenders, with little leeway afforded sentencing judges.

For public officials, the cost of treatment versus incarceration of nonviolent drug offenders is increasingly important. The Brooklyn program costs about $17,000 a year for each dealer in treatment, less than half the cost of imprisonment, about $40,000. But the real choice in public policy is not that simple, and alternative approaches to prison can prove risky for responsible officials.

'A Terrifying Experience'

An assistant district attorney, Susan A. Powers, recalled the initial anxiety that the program, rooted in Mr. Hynes's unusual use of his case-disposal powers, might prove to be a gamble that failed, with addicts scandalously fleeing in droves. "It was a terrifying experience," she said. "But the results so far have been rather amazing." Ms. Powers pointed out that 70 percent of the addicts admitted to the program have stayed, versus a rate of about 13 percent nationally in voluntary drug-treatment programs.

"Retention is the key to success, studies show, even if you're forced to enter a program," she said. "They can change you if they can keep you,"

> 'This is the hardest thing an addict's going to do,' a director says.

providing the programs are as long term and experience proven as Daytop and Samaritan.

"This is actually a lot harder for them than jail," said Ed Hill, director of the privately run Daytop Village center in Swan Lake, in the Catskills, where Mr. Rios, ever a manager, has risen in 11 months to be the chief administrator for running the woodshop and its staff.

"This is the hardest thing an addict's going to do because it represents true and total change," Mr. Hill said. "No more the swaggering tough guy with the .45 pistol in his belt or the 9-millimeter in his boot. We're talking complete overhaul."

He stressed that society was right to want its streets cleaned of the plague of addict-dealers like Mr. Rios but that the real issue, finally faced fully by this program, was whether to try to change them or to merely guarantee a deeper problem with prison-toughened criminals.

Mr. Rios, a trim, watchful man with more than half his 29 years of life already invested in drugs, said pragmatism was as effective as idealism in Mr. Hynes's program. He conceded that he had jumped at the program mainly to avoid prison and had thought he could ease through and feign dedication when needed, as with other more casual programs that he had gone through inside prison and out.

Mr. Hill, a Daytop graduate from Brooklyn's street-drug pathology of two decades ago, smiled, noting that avid peer-pressure is only one tool intended to root out routine fakery. Mr. Rios said he eventually found change and growth in himself necessary to stay in the program.

"Here, instead of doing 7 to 15 in prison, I'm not even doing time," he said gratefully. "I'm learning a lot about myself, what a threat I am to me and to others. What I am learning is to finally begin valuing my life."

Of the 30 percent in dropouts from the program, Mr. Hynes's pursuit squad, put together especially for this program, has arrested 95 percent to resume the court process. Of 64 returned to court, 51 received felony prison terms and 11 cases were pending as of the latest tally in November. Only two received misdemeanor treatment — a tribute to the original selection of firm second-felony drug cases by the District Attorney to guarantee the harsh stick needed to complement the program's inviting carrot.

Long-range effects are yet to be measured since only the first 14 graduates have returned to their communities. "I had my hand on the doorknob several times, ready to walk," said Angelo K., a 30-year-old graduate who completed the program's residential and re-entry programs, learning to be a diesel mechanic in the process. Through the program he has obtained a job in his old neighborhood, Sunset Park, still as drug-infested as when he began dealing as a 14-year-old.

'Finally Be an Adult'

"It was like I was frozen in my childhood back then," Angelo said. "The program resumed my life. I feel like I lived the rest of childhood in a year and sped forward to finally be an adult. Basically, they taught me we're not bad people," he said of the Samaritan Village program and his fellow addicts aiming for change.

Despite the program's modest enrollment, its surprising retention rate among the notoriously unreliable addict community is encouraging enough to attract praise from the office of Gov. Mario M. Cuomo and a decision to expand it to the other city prosecutors. A $700,000 state allocation of Federal anti-drug money will help finance 300 new residential treatment slots beyond the 200 in the Brooklyn program.

"The future of this approach is very dependent on the available treatment slots," Ms. Powers stressed. "There are only something like 15,000 full-scale residential slots available nationally — amazingly small — and maybe two-thirds of them are in New York and California. If the Clinton Administration is serious with its talk about changing the 70-30 approach of law-enforcement-to-treatment to something more of a 50-50 breakdown, then this program and others like it have a future."

Teresa E. Storch
P.O. Box 449
Albuquerque, NM 87103

March 15, 1993

United States Sentencing Commission
Attn.: Public Information
One Columbia Circle, N.E.
Suite 2-500. South Lobby
Washington, DC 20002-8002

Dear Sentencing Commission,

I am writing with the following comments to the proposed amendments to the Sentencing Guidelines. I will refer to the guideline section for which the amendment is being proposed, and I will be following in the order in which the amendments are discussed in the Federal Register, Vol. 57, No. 252.

1. Support the amendment to Sec. 1B1.3 (not using acquitted counts for relevant conduct).

2. No comment on the amendment to Sec. 1B1.11 (use of version of guidelines).

3. Support the policy statement amendment to Sec. 1B1.12 (Juvenile Delinquency Act).

4. No comment on amendment to Sec 2A4.2 (demanding ransom).

5. No comment on amendments to fraud, theft, tax guidelines.

6. Support amendment to Sec. 2D1.1(a)(3), establishing a mitigation ceiling; a mitigation ceiling of level 32 is still too high, however.

7. Support amendment to Sec. 3B1.2, Option 1 (upper limit of drug quantity table at 36).

8. Support amendment to Sec. 2D1.1 concerning "mixture or substance" not including waste.

9. Support amendment to Sec. 2D1.1 (a)(3), Option 1 (offense level limited by amount involved...at any one time).

10. Support future amendment to Sec. 2D1.1 which would take into account "sentencing entrapment" issue in reverse sting operation, and would suggest that amount be based on market rate ant what defendant could reasonably purchase at market rate.

11. No comment to amendment to Sec. 2K1.3 (using Career Offender definition of prior convictions instead of Criminal History definitions).

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12. No comment to amendment to Sec. 2K2.1 (definition of firearms).

13. Oppose amendment to Sec. 2K2.1 (knowledge that firearms stolen).

14. No comment to amendments listed at paras. 17 and 18 of Fed. Reg.

15. Levels 6 and 8 for violations of 18 USC 922 and 930 appropriate.

16. Amendment to Sec. 2S1.1 (a)(1) concerning "if defendant committed the underlying offense" and "level for that offense can be determined" is vague. Otherwise, no comment.

17. No comment on amendments to the tax section.

18. No comment to amendment to Sec. 2X1.1.

19. Support amendment to Sec. 3B1.3.

20. Support an amendment to the guidelines which would allow a judge to depart for substantial assistance without government motion for non-violent first offenders.

21. Support amendment to Sec. 6B1.2 (requiring government to disclose information to guideline application).

22. No comment on car-theft guideline.

23. Support consolidation guidelines as outlined at Para. 27 of Fed. Reg.

24. Support the additional language to Introductory Commentary at Ch. 5, Part H, as proposed by the Judicial Conference.

25. Support the Bar Association amendment to 5K1.1, over the Commission's amendment commented on above at Para. 20; should not be limited to first offenders. Support Option A in providing an additional ground for departure rather that B.

26. Supports expanding Zones A and B in general (Para. 33, Fed. Reg.).

27. Supports restricting sentencing court's consideration of conduct that includes the elements of the offense to which Defendant pleads guilty (Para. 34 Fed. Reg.).

28. Support proposed amendments as outlined by Practitioner's Advisory Group, Paras. 35, 36, 37, 38, 39, 40, Fed. Reg.

29. No comment on amendment proposed by IRS and US Postal Service (Paras. 41-46, Fed. Reg.).

30. Support proposed amendments as outlined by Federal Defenders (Paras. 47-56, Fed. Reg.).

31. Oppose amendments proposed by the Department of Justice (Paras. 57, and 60-66, Fed. Reg.).

32. No comment on amendments proposed by the Department of Justice, Paras. 58 and 59, Fed. Reg.

Sincerely,

Teresa E. Storch

Post-it ® brand fax transmittal memo 7671 | # of pages ▸ 1

To PUBLIC OPINIONS	From V. CONROY
Co. U.S. SENTENCING COMM.	Co.
Dept.	Phone # 314-781-8160
Fax # 202-273-4529	Fax #

March 12, 1992

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

Dear Commissioners:

This letter concerns the series of proposed amendments to the sentencing guidelines. I am writing to advocate the passage of proposed Amendment 50, which will eliminate the weight of the carrier in LSD cases, allowing the actual weight of the drug, not the carrier weight, in determining the offenders sentence.

I believe Amendment 50 will correct the current inequity in the sentencing of LSD offenders. I believe that LSD offenders are being and have been sentenced far in excess of what justice requires due to the inclusion of the carrier medium.

✳ I also advocate passage of proposed amendment 56, which would allow for the correction of the previous guidelines, which were enacted with good intent, but in practice have proven to be at at odds with Congress's mandate to the Sentencing Commission to promote uniformity of sentencing.

Thank you for your consideration regarding this matter.

Sincerely,

Virginia L. Conroy
2187 Clifton
St. Louis, MO 63139

FEDERAL PUBLIC DEFENDER
ROOM 174, U.S. COURTHOUSE
MINNEAPOLIS, MN 55401

DANIEL M. SCOTT
FEDERAL PUBLIC DEFENDER
SCOTT F. TILSEN
KATHERIAN D. ROE
ANDREW H. MOHRING
ANDREA K. GEORGE
ROBERT D. RICHMAN

PHONE: (612) 348-1755
(FTS) 777-1755
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March 10, 1993

United States Sentencing Commission
ATTN: PUBLIC INFORMATION
One Columbus Circle North East
Suite 2-500 - South Lobby
Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments

To The Honorable United States Sentencing Commission:

I write to you, in as brief a form as possible, to express my comments on the proposed amendments in the sentencing guidelines. The fact that I am an assistant federal public defender for approximately 13 years makes me both a well informed and biased source, of which I am sure you are cognizant.

I applaud and encourage the thought and effort made to amend the loss tables and deal with the problem of more "than minimal planning" insofar as it has resulted in disparate treatments and a considerable amount of litigation. With respect to the additional issues for comment in this section, I definitely believe that the loss tables should have fewer and larger ranges in the lower ends. The loss tables at the higher ends are so large as to be beyond my experience and have no opinion as to whether they need adjustment.

Although more work would need to be done, I would encourage the Commission to modify the definition and approach to a more than minimal planning enhancement as opposed to building it into the loss table or, alternatively, building it into the loss table further from the bottom ranges, maintaining the lesser enhancement as long as possible and perhaps adding a third and additional level increase at the far end.

With respect to redefining more than minimal planning, I do have some suggestions:

1. Build in a two level decrease for spur of the moment or sudden temptation conduct;

2. Do not provide for multiple victim enhancement until the number of victims has reached an appreciably large level i.e. 15 or 20 and perhaps make this enhancement an additional one or two levels at an additionally large number such as 40 or 50;

3. Require, by example, truly more than the ordinary conduct to commit the offense before an enhancement is added. Few if any types of fraud or theft escape the current definition.

The proposal with respect to U.S.S.G. § 3B1.2 (role in the offense) is also an improvement. I would suggest option one is the most preferable of the options under Note 7 reading as follows: Option 1 is prefered because it affords the sentencing judge the most flexibility in determining whether or not to apply the two level adjustment for minor role and, unlike option 2, does not repeat the Application Note position contained in Note 8 concerning burden of pursuasion.

The firearms amendments are mostly technical and it would be useful for the Commission to have a period where it does not amend the firearms guideline. I do believe that an appropriate differentiation can be made between different weapons including weapons that fall within 26 U.S.C. § 5845 and its various subdivisions. Whether the differentiation should be made by different offense levels, by placement of the sentence within a the guideline range, or by a Commission-guided departure, depends on the weapon involved. It would seem that a fully automatic machine gun is different from a sawed-off shotgun which is different from a sawed-off rifle which is different from other weapons such as tear gas "pen guns," all of which are prohibited in Title 26.

I have no great critism of the proposed amendment § 3B1.3 abuse of position of special trust or use of special skill. However, perhaps the time has come to separate these two concepts into separate adjustment sections. It would seem to me be best to leave special trust as a Chapter 3 adjustment with appropriate illustrations in the application notes rather than adding it as a specific offense characteristic in a hit or miss fashion to various guidelines relating to fraud or embezzlement or in general to the embezzlement guideline. Certainly the proposed amendment is superior to the additional issue for comment, particularly as it relates to deleting the example regarding "ordinary bank tellers".

The proposal relating to 5K1.1 - issue 24 - will apply to very few cases if it is intended to exclude "crimes of violence" where that concept includes drug offenses. It also has limited usefulness because of the exclusion of anyone who is not a "first offender".

At least it should include all category I offenders and perhaps all category I and category II offenders. The injustice which it is intended to address is not related or necessarily related to whether the defendant is category I or category VI, but the proposal is at least some improvement over the current requirement for a government motion.

I should add with respect to § 5K that I have, as have other attorneys, experienced cases in which this proposed amendment could well have made a difference.

With respect to the proposal number 25 relating to § 6B1.2 the idea is commendable. Perhaps a stronger word than "encourages" should be utilized. I would suggest a policy statement that requires the government to make such the disclosures at either option point and provides as a ground for downward departure the intentional failure of the government to do so. Experiences has taught that toothless platitudes rarely modify prosecutorial behavior in an adversary system.

The Commission should act on issue for comment number 40 relating to the mandatory minimum and distinction between cocaine and cocaine base. Significant support exists not only from the interjection of the Commissions expertise, but also other sectors of the criminal justice system for the elimination of this distinction.

Proposed numbers 44, 45 and 46 are all poor ideas, poor policy, and should not result in favorable action. They would increase unwarranted disparities and would not further the purposes of sentencing indicated by Congress.

Proposal number 57 submitted by the Department of Justice should not be acted upon. It is an attempt to accomplish exactly the opposite of what it purports to do. The Department of Justice obviously intends to utilize its proposed amendment, if it becomes the guideline, as the Commission's position which ought to be followed by the Courts in prohibiting attacks on prior convictions. It is my understanding that the Commission wishes to take no position and allow the courts to develop their own procedures. If the Commission does intend to take a position on this procedural question, it should study the matter, invite additional comment, and it is hoped, ultimately recommended that the courts permit collateral attacks on prior convictions utilized to enhance sentences.

I had promised to make this letter brief. There are many other things I could or should say, but will not. I will say that the last two cycles of amendments have been encouraging insofar as they have addressed problems of harshness and not simply been "fixes" of guidelines which appear to be too low to some other components of the criminal justice system.

Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/tmw

United States District Court
Central District of California
751 West Santa Ana Boulevard
Santa Ana, California 92701

Chambers of
Alicemarie H. Stotler
United States District Judge

714 / 836-2055
FTS / 799-2055

March 03, 1993

Judge Billy W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
One Columbus Circle, N.E., Ste. 2-500
Washington, D.C. 20002-8002

Re: 1993 Proposed Amendments

Dear Chairman Wilkins:

I wish you and the Commission and the Judicial Working Group a productive March 8th conference.

I submit herewith comments on the proposed amendments for the 1993 cycle. As always, silence is ambiguous and may signify one or more of the following: approval; no opinion; deference to others more knowledgeable; no experience; no clue. One almost overriding consideration governs my responses: everyone complains when changes occur and therefore only absolutely necessary changes should be made. Those, we recognize by the vague notion of "consensus," untoward appellate attention, and by the insights contained in comments by Sentencing Commission "consumers."

On separate pages, then, numbered to match with the number of the proposed amendment, I comment where (1) I cannot restrain myself; (2) where I feel certain that reasonable minds will differ and I want my vote recorded; (3) where I feel qualified to take issue with the need for any change at all; and, (4) where I disagree for reasons stated.

If any member of the Commission/staff reviewing these remarks wishes further explanation, please call.

Sincerely,

Alicemarie H. Stotler
United States District Judge

Amendment 3

1. Omit proposed § 1B1.12

Unless the function of Policy Statements has been expanded to alert attorneys to a law that they should already know if they handling a juvenile case in federal court or to alert probation officers to the non-applicability of guideline sentencing to juveniles, this addition is an accurate but superfluous statement of prevailing law. § 1B1.12 is unnecessary inasmuch as the Supreme Court decision states the rule.

(I suppose it is ironic that in a recent juvenile homicide on my docket, neither counsel nor the probation officer appeared to know of U.S. v. R.L.C..)

2. Retain the Second Paragraph of § 5H1.1

We know that "Age" is discussed in Chapter 5 and I favor **retention** of § 5H1.1's second paragraph.

It is still accurate; R.L.C. merely put a cap on the sentence. Either the case citation, or one sentence, or both, could be inserted:

> However, the sentence may not exceed the maximum of the guideline range applicable to an otherwise similarly situated adult. See United States v. R.L.C., 112 S.Ct.1329 (1992).

3. Fix the Index

No entry appears in the Index for "minors" or for "juveniles." The amendment could be downgraded as suggested above and enlarging the Index would be the simplest place to help practitioners and probation officers note this minor addition.

Amendment 56

As suggested on page 5 concerning "healing" amendments, retroactive applications will hopefully be kept minimal.

It seems that § 3582(c) contemplated primarily Offense Level changes as grounds to modify sentences. This Amendment would be the first, as best as I can tell, to inject Chapter 3 Adjustments into Chapter One's list in § 1B1.10(d)'s retroactive amendments.

It certainly is a policy call, of course, but my fairly recent research on this issue indicated that no Circuit was concluding that the amendment to § 3E1.1 was to be applied retroactively. There will be a great number of motions forthcoming, be assured.

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

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

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

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

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

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

*****MEMORANDUM*****

DATE: 2-23-93

RE: **26. Issue for Comment.**

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

TO: U. S. Sentencing Commission
Public Information

✳ The appropriate guideline for carjacking is the robbery guideline found at 2B3.1. It has all the elements needed to calculate the offense level. Carjacking is a violent offense commited against a person and should comprise its own count group for each crime.

THOMAS P. JONES
ATTORNEY AT LAW
EAST CENTER STREET
P. O. DRAWER 0
BEATTYVILLE, KENTUCKY 41311
(606) 464-2648

February 22, 1993

U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002

To the U.S. Sentencing Commission:

I would like to express my support for the proposed amendments to the Sentencing Guidelines. I would especially like to voice my support for the following four amendments:

Proposal II, option 1: restructures 2D1.1 so that the offense level is based on the largest amount of a controlled substance in a single transaction.

Proposal 39: reduces the offense levels associated with higher drug quantities by two levels.

Proposal 50: bases the offense level in 2D1.1 on the amount of actual L.S.D. involved without including the weight of any carrier medium.

Proposal 56: pertains to 1B1.10, expanding the court's ability to apply changes in the Sentencing Guidelines retroactively.

These proposals would all help to insure fairer judgment in dealing with small-time drug offenders. It is only fair and reasonable to make any changes retroactive, providing convicted offenders the same reduced sentences being granted to new offenders. Thank you for your efforts at making the guidelines more equitable, so that the punishment will truly reflect the crime.

Sincerely,

Thomas P. Jones

Thomas P. Jones
Attorney at Law

TPJ/bm

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

DEPARTMENT OF THE TREASURY
WASHINGTON

March 19, 1993

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1 Columbus Circle, N.E.
Suite 2500
South Lobby
Washington, D.C. 20002-8002

Dear Judge Wilkins:

The United States Sentencing Commission has proposed changes to the sentencing guidelines concerning sentences for money laundering crimes and violations of currency reporting laws. The changes proposed by the Commission would reduce the base offense level for these crimes and violations, and increase this offense level only based upon particularized characteristics of the offense or the state of mind of the offender. The Commission has advanced these suggested changes in response to some perceived excessive sentences with respect to "minor" money laundering offenses, and violations of regulatory reporting requirements.

The efforts of the Commission to change the sentencing guidelines to ensure that the sentence imposed is commensurate with the seriousness of the offense are laudatory. However, Treasury believes that the proposed changes to the sentencing guidelines for money laundering and currency reporting violations are contrary to both the Commission's past efforts and the intentions of Congress in enacting the money laundering and currency reporting laws. Therefore, Treasury opposes the Commission's proposed changes to the sentencing guidelines.

The two major money laundering statutes, 18 U.S.C. 1956 and 1957, provide for 20 and 10 year terms of imprisonment, respectively. It is apparent that Congress recognized money laundering as an offense separate from the underlying predicate crime that is deserving of independent and lengthy punishments.

The proposed changes to the sentencing guidelines for money laundering offenses would lower the base offense level and result in shorter sentences. At a time when the available information and statistics suggest that the volume of currency being laundered has grown tremendously and the methods and schemes of laundering money have proliferated and become increasingly more complicated, to lower the sentences for money launderers would be counter productive to all other law enforcement efforts.

The Department of Justice has submitted comments that include alternatives to the changes proposed by the Commission. While the alternatives suggested by the Justice Department proposal, and the analysis and reasoning offered in support thereof, acknowledge the Commission's concern for lower sentences in certain types of cases, the Justice proposal recognizes the serious nature of the money laundering offense and maintains a base offense level commensurate with the seriousness of the offense. Treasury believes that the Justice Department proposal accommodates the current need for the majority of money laundering offenses.

With respect to the currency reporting violations, 26 U.S.C. 7203 (26 U.S.C. 6050I), 31 U.S.C. 5313, 5314, 5316 and 5324, the Commission proposes to combine current sentencing guidelines 2S1.3 and 2S1.4 and create a base offense level of 8 or 6 with an adjustment for the value of funds involved. Merging 2S1.3 and 2S1.4 would treat the failure to file a monetary instrument report(31 U.S.C. 5316), the same as the failure to file other financial transaction reports. Representatives from Justice and Treasury discussed this alternative prior to its submission to the Commission and concur that the base offense levels proposed by the Commission are too low. Accordingly, the Justice Department has proposed an alternative, enclosed herewith, which combines current sentencing guidelines 2S1.3 and 2S1.4 with a base offense level of 13, 9, or 5.

The Commission considered currency reporting violations to be regulatory violations that need not be sentenced as severely as other money laundering offenses. For the reasons advanced by the Justice Department in its proposed alternative on currency reporting violations and for the additional reasons advanced below, Treasury does not agree that the base offense level for these violations should be reduced from 13 to 8.

The Bank Secrecy Act and its legislative history demonstrate that Congress believed certain reporting violations are criminal in nature and should be punished as such. This Congressional intent is reflected in 31 U.S.C. 5322, the criminal offense section, where enhanced violations are punishable by a term of imprisonment of up to ten years.

The principal anti-money laundering law enforcement effort currently is directed at detecting currency upon its entry into the financial system, the placement stage. The placement stage is acknowledged to be the most vulnerable phase of the money laundering operation. Presently, virtually every regulatory reporting requirement is aimed at recording funds at the placement stage of the money laundering scheme.

The enforcement of financial transaction reporting requirements has created a simple, wide-ranging process which identifies large

transactions in currency and monetary instruments. Congress recognized the value in this process and enacted a separate provision, penalizing the structuring of transactions to avoid the reporting requirements. Sentences must be severe enough to ensure the compliance necessary to support the overall anti-money laundering law enforcement effort; a base offense level of 8 or 6 is insufficient for this purpose.

The United States has participated in the meetings and discussions of the Financial Action Task Force (FATF). Through its membership, the United States has encouraged other nations who participate in the FATF to adopt currency reporting requirements as an important part of an overall anti-money laundering program. Indeed, some of the FATF member nations have begun considering currency reporting requirements.

At the same time that the value of currency reporting is being advanced by the United States in the international forum, the Commission proposes to reduce the sentencing guideline offense levels for failing to comply with those reporting requirements. The Commission's proposal to reduce the base offense level for failing to comply with the currency reporting guidelines is not the appropriate signal to send to the other FATF members and the international law enforcement community, who are eager to join in the fight against money laundering.

The Commission's proposed changes would only increase the level of the offense based upon the value of the funds involved in the reporting offense. The Commission should be mindful, however, that the value of the funds involved in a money laundering offense may not be an accurate measure of the harm caused.

For the reasons advanced above and for the reasons advanced by the Department of Justice, the Department of the Treasury endorses and supports the Department of Justice's proposals concerning the sentencing guidelines for money laundering offenses and for currency reporting violations.

Treasury appreciates the opportunity to share its views with the Sentencing Commission.

Sincerely,

John P. Simpson
Deputy Assistant Secretary
(Regulatory, Tariff and Trade Enforcement)

Enclosure

Proposed Guideline (changes appear in bold)

§2S1.3 Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements

(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 containing materially false statements; or

(2) 9, for a wilful failure to file; or

(3) 5, otherwise.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that the funds were criminally derived property, increase by 4 levels. If the resulting offense level is less than level 13, increase to level 13.

(2) If the base offense level is from (a)(1) **or (a)(2)** above and the value of the funds exceeded $100,000, increase the offense level as specified in §2S1.1(b)(2).

(c) Special Instruction for Fines -- Organizations
[unchanged]

Commentary

Statutory Provisions: 26 U.S.C. § 7206 (if a willful violation of 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, **5316**, 5322, 5324. For additional statutory provision(s), see Appendix A (Statutory Index).

Background:
[add as indicated:] A base offense level of 13 is provided for those offenses where the defendant either structured the transaction to evade reporting requirements or knowingly filed, or caused another to file, a report containing materially false statements. **A base level of 9 is provided for willful failure to file and for the mere denial of reportable assets, in response to routine questioning at a border crossing.** A lower alternative of 5 is provided in all other cases.

[§2S1.4 IS DELETED]

PORTER, WRIGHT,
MORRIS & ARTHUR
Attorneys & Counselors at Law

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Columbus, Ohio 43215-3406
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Daniel A. Brown
614-227-2171

March 17, 1993

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8003

Dear Mr. Courlander:

I am a federal criminal defense practitioner in Columbus, Ohio. I am writing in response to the United States Sentencing Commission's request for public comment upon the proposed amendments to the Sentencing Guidelines published in the December 31, 1992 edition of the Federal Register (Vol. 57, No. 252, Part IV). The purpose of this letter is to comment on proposed amendment numbers 20 and 58, which govern money laundering offenses and violations for failing to file certain currency and monetary instrument reports.

I strongly recommend adoption of amendment number 20, which would amend U.S.S.G. §§2S1.1 and 2S1.2 governing money laundering offenses. This amendment would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds.

This constitutes a much needed reform. As the report of the Commission staff on money laundering demonstrates, there are cases around the country in which the government has been able to obtain a significantly higher guideline sentencing range than the underlying offense would yield simply by adding a violation of 18 U.S.C. §§1956 or 1957 to the indictment. As the proposed amendment seems to recognize, these statutes are quite broad and can apply even in relatively simple fraud and other cases. Such cases often involve monetary transactions that are normally not thought of as sophisticated "money laundering," but which nonetheless are proscribed by §§1956

and 1957. United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), is a perfect example. In that case, a state public official was convicted for money laundering under 18 U.S.C. 1956 based upon the deposit into his personal checking account of a single $3,000 check representing a bribe.

There also are instances when the government can substantially influence plea bargaining negotiations by merely threatening to include in the indictment a count charging a violation of §1956 or 1957. The proposed amendment goes a long way towards addressing this problem and ultimately will help to achieve the Commission's stated goal of "eliminating unfair treatment that might flow from count manipulation." U.S.S.G., Chapter 1, Part A, Paragraph 3.

While I strongly recommend adoption of amendment number 20, I strongly urge the Commission to reconsider amendment number 58, which would amend §2S1.3 governing violations of the currency transaction and IRS Form 8300 reporting requirements. Although I support the Commission's efforts to harmonize its treatment of violations under §2S1.3 with violations under §2S1.4, I think that a base level of 9 is too high for all of these offenses, particularly if the currency is not the proceeds of, or being used to further, criminal activity. To be consistent with the base offense level for structuring transactions to evade these same reporting requirements and the Commission's overall goal in harmonizing its treatment of similar offenses, I strongly urge the Commission to seriously consider a base offense level of 6 for both §2S1.3 and §2S1.4 for failures to file Currency Transaction Reports, IRS Forms 8300 and Currency and Monetary Instrument Reports. As with structuring, the offense level could be increased by the number of offense levels in the fraud table (§2F1.1) if the defendant knew or believed that the funds were intended to be used to promote criminal activity.

I support the Commission's effort to make the sentencing guidelines uniform and fair.

Very truly yours,

Daniel A. Brown

PORTER • WRIGHT • MORRIS & ARTHUR

LAW OFFICES
OF
J. W. COYLE III, INC.
A PROFESSIONAL CORPORATION
ROBINSON RENAISSANCE
119 NORTH ROBINSON, SUITE 320
OKLAHOMA CITY, OKLAHOMA 73102

J. W. COYLE III
GLOYD L. McCOY

TELEPHONE
(405) 232-1988
TELECOPIER
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March 15, 1993

VIA FAX (202) 273-4529

United States Sentencing Commission
1 Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002
ATTN: Public Information

To: Honorable Sentencing Commission:

I am an active criminal defense lawyer and am writing to comment on two of the most serious areas of abuse that I have personally witnessed in my law practice.

AMENDMENT NO. 20 - (pg. 25) - Money Laundering (Chapter Two, Part S) - Consolidate Sections 2S1.1 and 2S1.2 in Sections 2S1.4 and 2S1.4; Ties offense level closer to seriousness of offenses.

In the area of white collar crime this area of the guidelines is the one most frequently abused by prosecutors. In plea bargaining negotiations, we are frequently told "if you don't plead to the mail fraud, then we will charge him with money laundering". It is very unfair when someone can get 6 to 10 months for a mail fraud scheme, and then 40-something months for depositing the check that was the object of the mail fraud. In the first place it does not make good sense, and in the second place it is a very unfair advantage for the Government. Further, it does not in any way mete out fair punishment.

It is very simply an arrow that should be removed from the Government's quiver.

AMENDMENT NO. 40 - (pg. 63) - 100 to 1 Ratio of Crack vs. Powder Cocaine; There is in fact little scientific support for the 100 to 1 Ratio, and unquestionably black persons are impacted by this very unfair requirement. I proved in the case of United States v. Hutchinson, in the United States District Court for the Western District of Oklahoma, Case No. CR-92-31-T, that of all

J. W. COYLE III, INC.

crack cases since the guidelines (November 1, 1987) in the Western District, 94.39% of the defendants were black.

The enormous disparity in sentences, and the unduly harsh requirements of the guidelines have resulted in the life imprisonment of many persons who deserve a substantially shorter sentence. This should be done immediately, and retroactively.

Thank you for the opportunity to comment on the guidelines.

Respectfully yours,

J. W. Coyle, III

JWC/sm
L-JW.SC

BAKER & MOSCOWITZ
ATTORNEYS AT LAW
3130 SOUTHEAST FINANCIAL CENTER
200 SOUTH BISCAYNE BOULEVARD
MIAMI, FLORIDA 33131-5306

JANE W. MOSCOWITZ

TELEPHONE
(305) 379-6700
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(305) 379-2215

March 15, 1993

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8003

Dear Mr. Courlander:

I am a federal criminal defense practitioner in Miami, Florida. I am writing in response to the United States Sentencing Commission's request for public comment upon the proposed amendments to the Sentencing Guidelines published in the December 31, 1992 edition of the Federal Register (Vol. 57, No. 252, Part IV). The purpose of this letter is to comment on amendment numbers 20 and 58, which govern money laundering offenses and violations for failing to file certain currency and monetary instrument reports.

I strongly recommend adoption of amendment number 20, which would amend U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses. This amendment would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds.

This constitutes a much needed reform. As the report of the Commission staff on money laundering demonstrates, there are cases around the country in which the government has been able to obtain a significantly higher guideline sentencing range than the underlying offense would yield simply by adding a violation of 18 U.S.C. §§ 1956 or 1957 to the indictment. As the proposed amendment seems to recognize, these statutes are quite broad and can apply even in relatively simple fraud and other cases. Such cases often involve monetary transactions that are normally not thought of as sophisticated "money laundering," but which nonetheless are proscribed by §§ 1956 and 1957. United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), is a perfect example. In

that case, a state public official was convicted for money laundering under 18 U.S.C. 1956 based upon the deposit into his personal checking account of a single $3,000 check representing a bribe.

There also are instances when the government can substantially influence plea bargaining negotiations by merely threatening to include in the indictment a count charging a violation of § 1956 and 1957. The proposed amendment goes a long way towards addressing this problem and ultimately will help to achieve the commission's stated goal of "eliminating unfair treatment that might flow from count manipulation." U.S.S.G., Chapter 1, Part A, Paragraph 3.

While I strongly recommend adoption of amendment number 20, I strongly urge the Commission to reconsider amendment number 58, which would amend § 2S1.3 governing violations of the currency transaction and IRS Form 8300 reporting requirements. Although I support the Commission's efforts to harmonize its treatment of violations under § 2S1.3 with violations under § 2S1.4, I think that a base level of 9 is too high for all of these offenses, particularly if the currency is not the proceeds of, or being used to further, criminal activity. To be consistent with the base offense level for structuring transactions to evade these same reporting requirements and the Commission's overall goal in harmonizing its treatment of similar offenses, I strongly urge the Commission to seriously consider a base offense level of 6 for both § 2S1.3 and § 2S1.4 for failures to file Currency Transaction Reports, IRS Forms 8300 and Currency and Monetary Instrument Reports. As with structuring, the offense level could be increased by the number of offense levels in the fraud table (§ 2F1.1) if the defendant knew or believed that the funds were intended to be used to promote criminal activity.

I support the Commission's effort to make the sentencing guidelines uniform and fair.

Yours very truly,

Jane W. Moscowitz

JWM:cnt

LAW OFFICES OF
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March 15, 1993

Via Facsimile
(202) 273-4529

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500 South Lobby
Washington, D.C. 20002-8003

Dear Mr. Courlander:

I strongly recommend adoption of amendment number 20, which would amend U.S. Sentencing Guidelines §§ 2S1.1 and 2S1.2 governing money laundering offenses. My experience with the Sentencing Reform Act convinces me that it is critical to bring the sanctions for money laundering into proportion with the underlying offense. Because the language of the money laundering laws is so broad, federal prosecutors use it as a threat in a significant proportion of underlying cases, with inequitable results. Defendants are then simply not in a position to contest the underlying offense because of the enormous threat of the money laundering sanctions.

I also strongly urge the Commission to adopt the modification of the Guidelines which would preclude a court from considering conduct on which a defendant was acquitted at the sentencing phase.

Very truly yours,

Katrina C. Pflaumer

KCP:nz

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March 11, 1993

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

Re: Public comment on sentencing guideline proposals

Dear Chairman Wilkins:

It is my understanding that one of the proposals up for consideration to amend the sentencing guidelines involves the money laundering section, §2S1.1. I am writing because the present money laundering guideline requires sentences, in some cases, that are totally out of line with the underlying crime itself. I am an attorney that represents someone who faces this problem.

My client is alleged to have participated as an assistant in a company that allowed escort services to use their merchant number to process credit card charges. The company also assisted in processing the charges for the escort services and paid them the face value of the charge less a percentage for their service. The Government's position is that this is money laundering because following certain sections in the racketeering chapter of the United States Code, the specified criminal conduct leads to the travel act violation, 18 U.S.C. §1952, promoting prostitution by interstate conduct.

This is a unique case. All previous prosecutions concerning this type of activity, using merchant numbers to process credit card charges for escort services, have been prosecuted under the travel act as a travel act violation under 18 U.S.C. §1952.

Travel act violations under §2E1.2 would have a base offense level of 6 or the 14 under §2G1.1, transportation for the purpose of prostitution, if applicable under §2E1.2(2). The relevant guideline for that, without any adjustment for acceptance of responsibility, would either be 0-6 under offense level 6 or 15 to 21 months under offense level 14.

However, since defendant is charged under 18 U.S.C. §1956(a)(1)(A), the base offense level is 23. Moreover, since the amount of funds that have passed through the company on the way to the credit card companies is substantial, approximately 5 or 6 additional points would be added on.[1]

Thus, the base offense level for my client would be 28 or 29. This offense level would require my client to be sentenced to either 78-97 months or 87-108 months.

It is my understanding that the proposed amendment to the sentencing guidelines would cause the offense level of money laundering to relate to the underlying offense. This is reasonable and rational. Money laundering of proceeds from gambling should be treated differently than money laundering of proceeds from drug dealing. The same thing is true with money laundering of prostitution proceeds.

It goes without explanation that escort services are rarely, if ever, prosecuted for promoting prostitution. On the rare cases that they are, such as the Mayflower Madam case, the charges are misdemeanors, punishable with a maximum of one year in jail. To punish someone for assisting a misdemeanor offense as they would punish someone assisting a large scale drug operation, makes no sense and is repugnant to our sense of fairness and justice.

I implore you and the sentencing commission to adopt the proposal that will relate the offense level for money laundering to the offense level of the underlying criminal activity.

Thank you for your consideration of this matter.

Sincerely yours,

Sam A. Schmidt

SAS/jr

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1. It is important to note that there is no claim of loss to any party.

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AMY G. RUDNICK
OF COUNSEL
DIRECT DIAL NUMBER
(202) 835-7554

March 11, 1993

BY TELECOPY AND REGULAR MAIL

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8003

Dear Mr. Courlander:

I am a federal criminal defense practitioner in Washington, D.C. and Co-chair of the American Bar Association, Criminal Justice Section, White Collar Crime Committee, Money Laundering Subcommittee. I am writing in my individual capacity to respond to the United States Sentencing Commission's request for public comment on the proposed amendments to the Sentencing Guidelines published in the December 31, 1992 edition of the Federal Register (Vol. 57, No. 252, Part IV). The purpose of this letter is to comment on proposed amendment numbers 20 and 58, which govern money laundering offenses and violations for failing to file certain currency and monetary instrument reports.

I strongly recommend adoption of amendment number 20, which would amend U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses. This amendment would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds.

This constitutes a much needed reform. As the report of the Commission staff on money laundering demonstrates, there are cases around the country in which the government has been able to obtain a significantly higher guideline sentencing range than the underlying offense would yield simply by adding a violation of 18 U.S.C. §§ 1956 or 1957 to the indictment. As the proposed amendment seems to recognize, these statutes are quite

broad and can apply even in relatively simple fraud and other cases. Such cases often involve monetary transactions that are normally not thought of as sophisticated "money laundering," but which nonetheless are proscribed by §§ 1956 and 1957. United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991), is a perfect example. In that case, a state public official was convicted for money laundering under 18 U.S.C. § 1956 based upon the deposit into his personal checking account of a single $3,000 check representing a bribe.

There also are instances when the government can substantially influence plea bargaining negotiations by merely threatening to include in the indictment a count charging a violation of § 1956 or § 1957. The proposed amendment goes a long way towards addressing this problem and ultimately will help to achieve the commission's stated goal of "eliminating unfair treatment that might flow from count manipulation." U.S.S.G., Chapter 1, Part A, Paragraph 3.

While I strongly recommend adoption of amendment number 20, I strongly urge the Commission to reconsider amendment number 58, which would amend U.S.S.G. § 2S1.3 governing violations of the currency transaction and IRS Form 8300 reporting requirements. Although I support the Commission's efforts to harmonize its treatment of violations under § 2S1.3 with violations under § 2S1.4, I think that a base level of 9 is too high for all of these offenses, particularly if the currency is not the proceeds of, or being used to further, criminal activity. To be consistent with the base offense level for structuring transactions to evade these same reporting requirements and the Commission's overall goal in harmonizing its treatment of similar offenses, I strongly urge the Commission to seriously consider a base offense level of 6 for both § 2S1.3 and § 2S1.4 for failures to file Currency Transaction Reports, IRS Forms 8300 and Currency and Monetary Instrument Reports. As with structuring, the offense level could be increased by the number of offense levels in the fraud table (§ 2F1.1) if the defendant knew or believed that the funds were intended to be used to promote criminal activity.

I support the Commission's effort to make the sentencing guidelines uniform and fair.

Very truly yours,

Amy G. Rudnick

440908

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February 18, 1993

U.S. Sentencing Commission
1 Columbus Circle, N.E.
Suite 2500
Washington, D.C. 20002-8002

Re: Amendments 28(G), 37 and 38
Amendment 25

Gentlemen:

I am writing in support of proposed amendment 28 (G). Some of the problems with the loss definition under § 2B1.1 and § 2F1.1 have been resolved because of the 1992 amendment to the statutory index specifying that either of these guidelines could be appropriate for violation of 18 § 656.

But, the problem persists in other areas. For example, I had a client convicted this past year for conspiring to embezzle from an employee benefit plan. (18 § 371) The offense involved the use of a certificate of deposit from a union pension fund as collateral for a loan. The CD greatly exceeded the amount of the loan, so when the loan was defaulted on, only a portion of the CD was seized to cover the loss. Because the offense involved pension fund money, my client's sentenced was calculated under § 2B1.1 using the full value of the CD , rather than the actual loss. Your proposed amendment 28(G) would, hopefully, resolve this problem.

I also very much favor amendment No. 25 regarding disclosure of information relative to guideline calculations. I practice around the country and there are great differences from one U.S. Attorney's Office to another in providing this information.

Additionally, I think that the amendment should include a requirement

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that the government stipulate as often as possible in plea agreements to any facts which impact on guideline calculations. Again, as I practice in various states, some U.S. Attorney's offices are readily agreeable to incorporating stipulations or a separate statement of the offense, while other U.S. Attorney's offices have a "policy" of never stipulating to anything. This only increases the work for the probation officer and for the court, when these matters could easily be resolved during plea negotiations.

Sincerely,

Richard Crane

RC/cm

UNITED STATES POSTAL SERVICE
ROOM 3100
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WASHINGTON DC 20260-2100

CHIEF POSTAL INSPECTOR
INSPECTION SERVICE

March 15, 1993

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

Attention: Public Information

Gentlemen:

The U.S. Postal Service respectfully submits its comments on the 1993 proposed guideline amendments. As an overview, we disagree with the proposed guidelines on money laundering (Amendment 20) and the guideline commentary on public trust (Amendment 23), and request the adoption of the proposed amendments submitted by the Postal Service relating to the theft of mail (Amendment 44), and the public trust enhancement for offenses committed by postal employees (Amendment 46). In addition, we strongly urge the Commission to consider the future formulation of a "multiple victim" adjustment guideline (Amendment 45). Our comments are explained more fully in the following:

Proposed Amendment 20, § 2S1.1, § 2S1.2. We disagree with the proposed revisions to the money laundering guideline based on the statutory purpose of 18 U.S.C. §§ 1956, 1957. The legislative intent of these statutes is to create a separate crime offense to deter criminals from attempting to profit from their illegal activities and to impose a higher penalty for this type of criminal misconduct. To accomplish this, the statutes prescribe criminal penalties separate from and higher than those of the underlying criminal offense which gave rise to the monies, property or proceeds involved in the money laundering. This legislative intent would in effect be vitiated by the revision to the guideline. Because the underlying offense and the money laundering are two separate crimes, we believe the guidelines should likewise maintain this

OFFICIAL OLYMPIC SPONSOR

was not in a trust position), and obviate the need of detailed analysis by the court of the specific duties and responsibilities of the defendant as qualifying the particular position occupied as one of "public trust."

Proposed Amendment 44, § 2B1.1(b)(4). The current guidelines applicable to mail theft are based on the dollar value of the loss. Although the guideline increases the offense level if mail is involved, we do not feel this adequately addresses the seriousness of the offense and its impact on the victims and on the essential governmental function of mail delivery. The proposed amendments take these factors into consideration by initially increasing the offense level to a level 6, and then adding the appropriate level increase corresponding to the total dollar loss associated with the theft. In order to conform with similar guideline language, the amendment should be reworded to read:

> "If undelivered United States Mail was taken, increase by two levels. If the offense is less than level 6, increase to level 6."

In addition to this amendment to the mail theft guideline, we have proposed § 2B1.1(b)(8) to address theft schemes involving large volumes of mail. Frequently, these volume thefts are conducted as a gang-related crime to steal the mail and then fraudulently negotiate or use those items contained within. In most instances, a substantial volume of stolen mail is necessary to obtain a minimal number of checks, credit cards, negotiable instruments or other items of value. The dollar loss of these types of thefts does not accurately reflect the scope of the crime in terms of the number of victims affected and the operations of the government's postal system. Our proposed amendment would address the more serious nature of these schemes to steal large volumes of mail by increasing the offense level to a 14.

Technical corrections to the proposed amendment are needed to clarify the application of the guideline for its purpose. The amendment would read as follows:

> 8. If the offense involved a scheme to steal multiple pieces of undelivered United States Mail and the offense level determined above is less than level 14, increase to level 14.

Proposed Amendment 45, (§ 3A1.4). The Postal Service remains committed to the principle of victims' rights and supports more guidelines which emphasize victim impact in the sentencing process. We believe the sentencing level should reflect the total harm caused by the defendant's criminal misconduct. Our proposed guideline accomplishes this by including a victim-related adjustment based on the number of victims. For example, in volume mail theft crimes, and in consumer fraud crimes, substantial numbers of victims are directly harmed. We believe that the number of victims impacted by the defendant's relevant conduct should warrant an increase in the offense level. Furthermore, we feel such a guideline should be applied to any offense which results in multiple victims for these reasons.

As proposed, our amendment would give a two-level increase for a crime which results in two or more victims; those crimes affecting more than 100 victims would be subject to an additional two-level increase for each 250 victims, up to a maximum eight-level increase.

Because our proposed amendment is a Chapter 3 adjustment, it would impact on other offenses beyond those which are postal related, which requires a more comprehensive analysis of multiple victim crimes. Accordingly, we urge the Commission to include the study and formulation of a multiple victim guideline as a priority issue for 1994.

Your consideration of these issues is appreciated. If additional information is needed, please contact me at (202) 268-4267.

Sincerely,

K. J. Hunter

K. J. Hunter

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Food and Drug Division
Rockville, MD 20857

March 12, 1993

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Mr. Courlander:

On behalf of the Food and Drug Administration ("FDA"), I wish to submit the following comments on proposed amendments to the sentencing guidelines for United States courts, published in 57 Fed. Reg. 62832 (1992).

Proposed Amendment Five:

(a) The FDA opposes proposed amendment five, which would eliminate from Sections 2B1.1 (theft) and 2F1.1 (fraud and deceit) "more than minimal planning" as a specific offense characteristic providing for a two-level increase in sentence. The amendment would also eliminate from Section 2F1.1 "a scheme to defraud more than one victim" as a specific offense characteristic requiring a two-level increase in sentence. Instead, the amendment would modify the loss tables in Sections 2B1.1 and 2F1.1 to incorporate gradually an increase for "more than minimal planning" with a two-level increase for losses in excess of $40,000.

The "more than minimal planning" and "scheme to defraud more than one victim" specific offense characteristics have special significance in offenses involving the public health and safety, which often consist of coordinated or carefully planned schemes to defraud that result in substantial non-monetary harm to consumers and to health patients. Indeed, fraud offenses frequently include planned efforts to conceal the wrongful conduct from regulatory agencies and from the public. Therefore, the FDA believes that these characteristics should remain as specific offense characteristics rather than being considered only in terms of economic loss under Sections 2B1.1 and 2F1.1.

(b) Under the heading "Additional Issues for Comment," the Notice also invites comment on various alternatives to proposed amendment five. The FDA opposes eliminating the "more than minimal planning" and "scheme to defraud" specific offense characteristics from Section 2F1.1, or any of the proposals to

otherwise alter the definition of "more than minimal planning" in Section 1B1.1. However, the agency strongly supports increasing the base offense level of Section 2F1.1, and other guidelines that contain an enhancement for "more than minimal planning," in recognition of the pervasiveness and seriousness of fraudulent criminal conduct. The agency also supports setting forth more examples of the application of "more than minimal planning" in fraud and theft cases, specifically including examples of fraud involving the manufacture, distribution, or use of food, drug, device, or cosmetic products.

The FDA believes that the current base offense level six in Section 2F1.1 is disproportionately low in comparison to other guideline offenses. In addition, the agency believes that the guidelines do not sufficiently reflect the serious, non-monetary harm that frequently results from fraud-related offenses within the purview of the Federal Food, Drug, and Cosmetic Act. Accordingly, while the FDA supports the proposal to restructure the loss tables for fraud offenses to provide higher offense levels for losses at the lower end of the loss table, the agency believes that the guidelines' offense levels should be substantially increased for health-related fraud offenses that do not result in substantial economic harm. One way to partially address this concern would be to adopt the proposals set forth in proposed amendment six and issue for comment (no. seven), as set forth below.

Proposed Amendment Six:

The FDA strongly supports proposed amendment six, which would amend Application Note 10 of Section 2F1.1 to (a) provide guidance for an upward departure in cases in which the fraud caused substantial non-monetary harm and to (b) include an example of a fraudulent blood bank operation. Other "guidance" examples of health-related fraud offenses warranting an upward departure would exist in the case of a pharmaceutical manufacturer that conducted or reported fraudulent or false testing to determine the identity, strength, quality, or purity of a drug, or of a person or persons that created, sold or dispensed a counterfeit drug. In each example, the quality or safety of the drug may be seriously deficient based on the improper or inadequate manufacturing operations or processes. Such offenses might result in substantial harm to innocent health victims that is not adequately addressed by considering economic loss alone.

Issue For Comment (No. Seven):

For the reasons set forth in the preceding two paragraphs, the FDA strongly supports amending Sections 2B1.1, 2B1.2, and 2F1.1 to identify specific offense characteristics for circumstances in which the "loss" does not fully capture the harmfulness and seriousness of the conduct, thereby warranting an increased offense level. In particular, the agency suggests establishing respective specific offense characteristics to provide for (a) a two-level increase (or level 13) for circumstances in which some or all of the harm caused by the offense was non-monetary, (b) a four-level increase (or level 24) when the defendant knowingly or recklessly endangered the health or safety of one or more persons, (c) a four-level increase (or level 24) when the offense involved the knowing or reckless risk of serious bodily injury or death to one or more persons, and (d) a six-level increase (or level 26) when the offense results in death. Alternatively, the FDA supports amending the commentary to these sections to include the above examples as circumstances in which an upward departure may be warranted.

Issue For Comment (No. 65):

The FDA supports amending Section 2F1.1 to include the risk of loss as a factor in determining the guideline range for fraud and related offenses when the amount of the risk is greater than the actual or intended loss. The risk of loss should increase the guideline range to the same extent as actual or intended loss, irrespective of whether or not the risk was reasonably foreseeable. Currently, Section 2F1.1 provides that the intended loss shall be used if it is greater than the actual loss. Presumably, this is to hold defendants accountable for the loss intended by their wrongful acts. The agency believes that defendants should likewise be held fully accountable for the risk of loss associated with their intentional wrongful acts.

Additional FDA Comments:

The FDA recommends that the Statutory Index (Appendix A), which specifies the guideline section or sections ordinarily applicable to the statute of conviction, be amended. With respect to the Federal Food, Drug, and Cosmetic Act, the current appendix lists Sections 2F1.1 and 2N2.1 as being applicable to offenses under 21 U.S.C. §333(a)(2), but only Section 2N2.1 as being applicable to 21 U.S.C. §§331, 333(a)(1), and 333(b). The agency believes that Section 2F1.1 is also applicable to offenses under 21 U.S.C. §§331, 333(a)(1), and 333(b) (as amended August 26, 1992), and that this information should be included as a Consolidation and Simplification of Chapter Two Offense Guidelines amendment.

Thank you for this opportunity to comment on the proposed amendments to the sentencing guidelines. If the Sentencing Commission has any questions concerning these comments, please feel free to contact me (301-443-4370) or James S. Cohen, Associate Chief Counsel for Enforcement (301-443-7272).

Sincerely,

Margaret Jane Porter
Chief Counsel
Food and Drug Administration

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March 10, 1993

United States Sentencing Commission
ATTN: PUBLIC INFORMATION
One Columbus Circle North East
Suite 2-500 - South Lobby
Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments

To The Honorable United States Sentencing Commission:

I write to you, in as brief a form as possible, to express my comments on the proposed amendments in the sentencing guidelines. The fact that I am an assistant federal public defender for approximately 13 years makes me both a well informed and biased source, of which I am sure you are cognizant.

I applaud and encourage the thought and effort made to amend the loss tables and deal with the problem of more "than minimal planning" insofar as it has resulted in disparate treatments and a considerable amount of litigation. With respect to the additional issues for comment in this section, I definitely believe that the loss tables should have fewer and larger ranges in the lower ends. The loss tables at the higher ends are so large as to be beyond my experience and have no opinion as to whether they need adjustment.

Although more work would need to be done, I would encourage the Commission to modify the definition and approach to a more than minimal planning enhancement as opposed to building it into the loss table or, alternatively, building it into the loss table further from the bottom ranges, maintaining the lesser enhancement as long as possible and perhaps adding a third and additional level increase at the far end.

With respect to redefining more than minimal planning, I do have some suggestions:

1. Build in a two level decrease for spur of the moment or sudden temptation conduct;

2. Do not provide for multiple victim enhancement until the number of victims has reached an appreciably large level i.e. 15 or 20 and perhaps make this enhancement an additional one or two levels at an additionally large number such as 40 or 50;

3. Require, by example, truly more than the ordinary conduct to commit the offense before an enhancement is added. Few if any types of fraud or theft escape the current definition.

The proposal with respect to U.S.S.G. § 3B1.2 (role in the offense) is also an improvement. I would suggest option one is the most preferable of the options under Note 7 reading as follows: Option 1 is prefered because it affords the sentencing judge the most flexibility in determining whether or not to apply the two level adjustment for minor role and, unlike option 2, does not repeat the Application Note position contained in Note 8 concerning burden of pursuasion.

The firearms amendments are mostly technical and it would be useful for the Commission to have a period where it does not amend the firearms guideline. I do believe that an appropriate differentiation can be made between different weapons including weapons that fall within 26 U.S.C. § 5845 and its various subdivisions. Whether the differentiation should be made by different offense levels, by placement of the sentence within a the guideline range, or by a Commission-guided departure, depends on the weapon involved. It would seem that a fully automatic machine gun is different from a sawed-off shotgun which is different from a sawed-off rifle which is different from other weapons such as tear gas "pen guns," all of which are prohibited in Title 26.

I have no great critism of the proposed amendment § 3B1.3 abuse of position of special trust or use of special skill. However, perhaps the time has come to separate these two concepts into separate adjustment sections. It would seem to me be best to leave special trust as a Chapter 3 adjustment with appropriate illustrations in the application notes rather than adding it as a specific offense characteristic in a hit or miss fashion to various guidelines relating to fraud or embezzlement or in general to the embezzlement guideline. Certainly the proposed amendment is superior to the additional issue for comment, particularly as it relates to deleting the example regarding "ordinary bank tellers".

The proposal relating to 5K1.1 - issue 24 - will apply to very few cases if it is intended to exclude "crimes of violence" where that concept includes drug offenses. It also has limited usefulness because of the exclusion of anyone who is not a "first offender".

At least it should include all category I offenders and perhaps all category I and category II offenders. The injustice which it is intended to address is not related or necessarily related to whether the defendant is category I or category VI, but the proposal is at least some improvement over the current requirement for a government motion.

I should add with respect to § 5K that I have, as have other attorneys, experienced cases in which this proposed amendment could well have made a difference.

With respect to the proposal number 25 relating to § 6B1.2 the idea is commendable. Perhaps a stronger word than "encourages" should be utilized. I would suggest a policy statement that requires the government to make such the disclosures at either option point and provides as a ground for downward departure the intentional failure of the government to do so. Experiences has taught that toothless platitudes rarely modify prosecutorial behavior in an adversary system.

The Commission should act on issue for comment number 40 relating to the mandatory minimum and distinction between cocaine and cocaine base. Significant support exists not only from the interjection of the Commissions expertise, but also other sectors of the criminal justice system for the elimination of this distinction.

Proposed numbers 44, 45 and 46 are all poor ideas, poor policy, and should not result in favorable action. They would increase unwarranted disparities and would not further the purposes of sentencing indicated by Congress.

Proposal number 57 submitted by the Department of Justice should not be acted upon. It is an attempt to accomplish exactly the opposite of what it purports to do. The Department of Justice obviously intends to utilize its proposed amendment, if it becomes the guideline, as the Commission's position which ought to be followed by the Courts in prohibiting attacks on prior convictions. It is my understanding that the Commission wishes to take no position and allow the courts to develop their own procedures. If the Commission does intend to take a position on this procedural question, it should study the matter, invite additional comment, and it is hoped, ultimately recommended that the courts permit collateral attacks on prior convictions utilized to enhance sentences.

I had promised to make this letter brief. There are many other things I could or should say, but will not. I will say that the last two cycles of amendments have been encouraging insofar as they have addressed problems of harshness and not simply been "fixes" of guidelines which appear to be too low to some other components of the criminal justice system.

Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/tmw

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

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

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

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

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

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

Date: February 16, 1993

To: United States Sentencing Commission
Public Information

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

Re: More than minimal planning

The Commission should remove this as a specific offense characteristic from guidelines in which it is presently incorporated. There is vast disparity in the application of this factor and it is often a bone of contention for the Court to resolve at sentencing.

The intent of the Commission to take this factor into consideration by building it in to loss table when the loss increases means the factor will be adequately considered.

I also think the Commission should adopt an amendment that creates a specific offense characteristic that provides that if the offense, <u>including all relevant conduct</u>, involved a single opportunistic act, a 2 level decrease may be given. It is important the guideline or commentary emphasize all relevant conduct is to be considered in making this determination, otherwise controversy over it and the act underlying the offense of conviction will be rampant.

Making these changes will reduce the amount of time taken by all parties in the dispute resolution process; will more fairly penalize those at higher offense levels, and; will allow a reduction for the true situational offender, thus allowing the straight probation option more often for such defendants.

UNITED STATES POSTAL SERVICE
ROOM 3100
475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-2100

CHIEF POSTAL INSPECTOR
INSPECTION SERVICE

March 15, 1993

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

Attention: Public Information

Gentlemen:

The U.S. Postal Service respectfully submits its comments on the 1993 proposed guideline amendments. As an overview, we disagree with the proposed guidelines on money laundering (Amendment 20) and the guideline commentary on public trust (Amendment 23), and request the adoption of the proposed amendments submitted by the Postal Service relating to the theft of mail (Amendment 44), and the public trust enhancement for offenses committed by postal employees (Amendment 46). In addition, we strongly urge the Commission to consider the future formulation of a "multiple victim" adjustment guideline (Amendment 45). Our comments are explained more fully in the following:

Proposed Amendment 20, § 2S1.1, § 2S1.2. We disagree with the proposed revisions to the money laundering guideline based on the statutory purpose of 18 U.S.C. §§ 1956, 1957. The legislative intent of these statutes is to create a separate crime offense to deter criminals from attempting to profit from their illegal activities and to impose a higher penalty for this type of criminal misconduct. To accomplish this, the statutes prescribe criminal penalties separate from and higher than those of the underlying criminal offense which gave rise to the monies, property or proceeds involved in the money laundering. This legislative intent would in effect be vitiated by the revision to the guideline. Because the underlying offense and the money laundering are two separate crimes, we believe the guidelines should likewise maintain this

OFFICIAL OLYMPIC SPONSOR

Technical corrections to the proposed amendment are needed to clarify the application of the guideline for its purpose. The amendment would read as follows:

> 8. If the offense involved a scheme to steal multiple pieces of undelivered United States Mail and the offense level determined above is less than level 14, increase to level 14.

✳ **Proposed Amendment 45, (§ 3A1.4).** The Postal Service remains committed to the principle of victims' rights and supports more guidelines which emphasize victim impact in the sentencing process. We believe the sentencing level should reflect the total harm caused by the defendant's criminal misconduct. Our proposed guideline accomplishes this by including a victim-related adjustment based on the number of victims. For example, in volume mail theft crimes, and in consumer fraud crimes, substantial numbers of victims are directly harmed. We believe that the number of victims impacted by the defendant's relevant conduct should warrant an increase in the offense level. Furthermore, we feel such a guideline should be applied to any offense which results in multiple victims for these reasons.

As proposed, our amendment would give a two-level increase for a crime which results in two or more victims; those crimes affecting more than 100 victims would be subject to an additional two-level increase for each 250 victims, up to a maximum eight-level increase.

Because our proposed amendment is a Chapter 3 adjustment, it would impact on other offenses beyond those which are postal related, which requires a more comprehensive analysis of multiple victim crimes. Accordingly, we urge the Commission to include the study and formulation of a multiple victim guideline as a priority issue for 1994.

Your consideration of these issues is appreciated. If additional information is needed, please contact me at (202) 268-4267.

Sincerely,

K. J. Hunter

K. J. Hunter

701 Pennsylvania Avenue, N.W.
Washington D.C. 20004-2696
Telephone 202-508-5620

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."

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[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.

V. Amendment No. 45, Multiple Victims

The United States Postal Service requests that the Commission create in Chapter Three, Part A, a new victim-related general adjustment to take into account increased harm caused when there is more than one victim.[8] The proposed amendment is as follows:

> If the offense affected more than one victim, increase the offense level by 2 levels. If the offense affected 100 victims or more, increase the offense by 2 levels for every 250 victims.
>
> | No. of victims | Increase in offense level |
> |---|---|
> | 2 - 99 | 2 |
> | 100-349 | 4 |
> | 350-649 | 6 |
> | more than 650 | 8 |

The Postal Service specifically recommended that this departure be included as a victim-related adjustment applicable to all offenses involving multiple victims rather than limited to specific types of offenses.[9]

First of all, courts need to look to the statute and regulations that define the offense for which a defendant is being sentenced to determine whether "number of victims" is a relevant factor in sentencing. If the statute or regulations identify factors for the court to consider in setting the level of fine or imprisonment for an offense, and do not list "number of victims" as a relevant factor, it may not be appropriate for the court to consider. Furthermore, even if number of victims is a relevant factor, in many cases it will have been addressed by the prosecutor bringing multiple counts against the defendant. For the court to enhance the defendant's sentence based on "number of victims" in such cases would be to penalize the defendant twice for the same conduct.

---

[8] Amendment No. 45, Notice at 62,853.

[9] Letter to the Honorable William W. Wilkins, Jr. from Chief Postal Inspector K.J. Hunter, dated November 27, 1992.

In addition, EEI is concerned that the proposed amendment would prove too vague and, thus, difficult for sentencing courts to apply. Specifically, the proposed amendment does not define under what circumstances an "affected" party would be deemed a victim or the degree to which a party would have to be "affected" in order to be deemed a victim. In this regard, EEI is particularly concerned about the impact of the proposed amendment on persons convicted of offenses involving the environment. In such cases, more than one individual may be affected by an offense, but this may not correlate to degree of actual harm experienced by any of those individuals, and the effects may be an indirect consequence of the conduct for which the defendant is being sentenced.

Moreover, unlike other adjustments in Chapter 3, Part A -- vulnerable victims, official victims, and restraint of victims -- the proposed amendment deals not with knowing conduct aimed at particular victims but with possible unforeseen impacts on unintended victims. While such an adjustment may be desirable when applied to specific offenses, particularly offenses intended to affect multiple victims, its application across a wide variety of offenses without such constraints would inject an unacceptable degree of uncertainty into the sentencing process.

Therefore, EEI recommends that the Commission reject the proposed amendment as being too broad and ill-defined. At a minimum, the Postal Service should be required to identify the types of offenses directly of concern to it in proposing the amendment, and the amendment should be limited to those types of violations. Also, even as to those types of violations, the Commission needs to provide guidance about who qualifies as a victim. Furthermore, courts should be instructed to consider whether "number of victims" is relevant under the statute and regulations being enforced and given the facts of the case, including the number of counts brought by the prosecutor and the defendant's state of mind in committing the offense.

Thank you for considering our views on these matters.

Very truly yours,

Peter B. Kelsey

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March 10, 1993

United States Sentencing Commission
ATTN: PUBLIC INFORMATION
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Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments

To The Honorable United States Sentencing Commission:

I write to you, in as brief a form as possible, to express my comments on the proposed amendments in the sentencing guidelines. The fact that I am an assistant federal public defender for approximately 13 years makes me both a well informed and biased source, of which I am sure you are cognizant.

I applaud and encourage the thought and effort made to amend the loss tables and deal with the problem of more "than minimal planning" insofar as it has resulted in disparate treatments and a considerable amount of litigation. With respect to the additional issues for comment in this section, I definitely believe that the loss tables should have fewer and larger ranges in the lower ends. The loss tables at the higher ends are so large as to be beyond my experience and have no opinion as to whether they need adjustment.

Although more work would need to be done, I would encourage the Commission to modify the definition and approach to a more than minimal planning enhancement as opposed to building it into the loss table or, alternatively, building it into the loss table further from the bottom ranges, maintaining the lesser enhancement as long as possible and perhaps adding a third and additional level increase at the far end.

With respect to redefining more than minimal planning, I do have some suggestions:

1. Build in a two level decrease for spur of the moment or sudden temptation conduct;

2. Do not provide for multiple victim enhancement until the number of victims has reached an appreciably large level i.e. 15 or 20 and perhaps make this enhancement an additional one or two levels at an additionally large number such as 40 or 50;

3. Require, by example, truly more than the ordinary conduct to commit the offense before an enhancement is added. Few if any types of fraud or theft escape the current definition.

The proposal with respect to U.S.S.G. § 3B1.2 (role in the offense) is also an improvement. I would suggest option one is the most preferable of the options under Note 7 reading as follows: Option 1 is prefered because it affords the sentencing judge the most flexibility in determining whether or not to apply the two level adjustment for minor role and, unlike option 2, does not repeat the Application Note position contained in Note 8 concerning burden of pursuasion.

The firearms amendments are mostly technical and it would be useful for the Commission to have a period where it does not amend the firearms guideline. I do believe that an appropriate differentiation can be made between different weapons including weapons that fall within 26 U.S.C. § 5845 and its various subdivisions. Whether the differentiation should be made by different offense levels, by placement of the sentence within a the guideline range, or by a Commission-guided departure, depends on the weapon involved. It would seem that a fully automatic machine gun is different from a sawed-off shotgun which is different from a sawed-off rifle which is different from other weapons such as tear gas "pen guns," all of which are prohibited in Title 26.

I have no great critism of the proposed amendment § 3B1.3 abuse of position of special trust or use of special skill. However, perhaps the time has come to separate these two concepts into separate adjustment sections. It would seem to me be best to leave special trust as a Chapter 3 adjustment with appropriate illustrations in the application notes rather than adding it as a specific offense characteristic in a hit or miss fashion to various guidelines relating to fraud or embezzlement or in general to the embezzlement guideline. Certainly the proposed amendment is superior to the additional issue for comment, particularly as it relates to deleting the example regarding "ordinary bank tellers".

The proposal relating to 5K1.1 - issue 24 - will apply to very few cases if it is intended to exclude "crimes of violence" where that concept includes drug offenses. It also has limited usefulness because of the exclusion of anyone who is not a "first offender".

At least it should include all category I offenders and perhaps all category I and category II offenders. The injustice which it is intended to address is not related or necessarily related to whether the defendant is category I or category VI, but the proposal is at least some improvement over the current requirement for a government motion.

I should add with respect to § 5K that I have, as have other attorneys, experienced cases in which this proposed amendment could well have made a difference.

With respect to the proposal number 25 relating to § 6B1.2 the idea is commendable. Perhaps a stronger word than "encourages" should be utilized. I would suggest a policy statement that requires the government to make such the disclosures at either option point and provides as a ground for downward departure the intentional failure of the government to do so. Experiences has taught that toothless platitudes rarely modify prosecutorial behavior in an adversary system.

The Commission should act on issue for comment number 40 relating to the mandatory minimum and distinction between cocaine and cocaine base. Significant support exists not only from the interjection of the Commissions expertise, but also other sectors of the criminal justice system for the elimination of this distinction.

Proposed numbers 44, 45 and 46 are all poor ideas, poor policy, and should not result in favorable action. They would increase unwarranted disparities and would not further the purposes of sentencing indicated by Congress.

Proposal number 57 submitted by the Department of Justice should not be acted upon. It is an attempt to accomplish exactly the opposite of what it purports to do. The Department of Justice obviously intends to utilize its proposed amendment, if it becomes the guideline, as the Commission's position which ought to be followed by the Courts in prohibiting attacks on prior convictions. It is my understanding that the Commission wishes to take no position and allow the courts to develop their own procedures. If the Commission does intend to take a position on this procedural question, it should study the matter, invite additional comment, and it is hoped, ultimately recommended that the courts permit collateral attacks on prior convictions utilized to enhance sentences.

I had promised to make this letter brief. There are many other things I could or should say, but will not. I will say that the last two cycles of amendments have been encouraging insofar as they have addressed problems of harshness and not simply been "fixes" of guidelines which appear to be too low to some other components of the criminal justice system.

Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/tmw

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March 12, 1993

Honorable William Wilkins, Jr.
Federal Sentencing Commission
One Columbus Circle, N.E.
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Washington, DC 20002-8002

In Re: Proposed Amendments By The Practitioners Advisory Group

Dear Judge Wilkins:

The Board of Directors of the Pennsylvania Association of Criminal Defense Lawyers wishes to express our approval of the proposed amendments to the Federal Sentencing Guidelines as submitted by the Practitioners Advisory Group. As practitioners, we experience first-hand the impact of the Guidelines not only on our clients but on the entire judicial system.

In stating our support, we draw particular attention to the following:

Proposed Amendment 35. Treatment of acquitted conduct under §1B1.3 Relevant Conduct. PACDL prefers Option 1 yet recognizes that the majority of conduct deemed relevant conduct for sentencing purposes is generally not included in acquitted counts but is most often "uncharged conduct". Further, we believe that any conduct used for sentencing should meet the beyond a reasonable doubt standard and should be submitted to the trier of fact during trial.

✳ Proposed Amendment 36. Rule 11 procedure. PACDL supports the recommendation in this comments. It should also be noted that the Federal Court section of the Allegheny County Bar Association is recommending that the local rules for the Western District of Pennsylvania be amended to require a pretrial conference including the Government prosecutor, the defendant and the probation officer in order to disclose the facts and circumstances of the offense and the offender characteristics applicable to the Sentencing Guideline range.

Proposed Amendment 39. Reduction of offense level for drug quantity. PACDL supports the overall scheme of this proposed amendment and believes that a maximum offense level of 36 achieves the purpose of the Sentencing Guidelines system.

The proposed amendments by the Practitioners Advisory Group are a definite improvement upon the Federal Sentencing Guidelines as they presently exist. The input of attorneys who work with the Guidelines on "the front line" must always be given high priority. PACDL supports the efforts of the Advisory Group.

Very sincerely,

Caroline M. Roberto

Caroline M. Roberto
Board Member and Chair of the
Sentencing Committee

CMR:abs

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 Amendment 1, included in the Guideline amendments proposed for public comment by the Commission on December 31, 1992. The amendment would prohibit conduct of which the defendant has been acquitted from being considered as relevant conduct; an application note suggests that such "acquitted conduct" may, in an exceptional case, provide a basis for an upward departure.

I strongly urge the adoption of this amendment. It would eliminate one of the most indefensible features of the current guideline system, a feature that has yielded bizarre results and brought the guideline system into disrepute.

For purposes of determining conduct that counts as "relevant conduct," the Guidelines currently make no distinction between uncharged conduct and conduct for which the defendant has been charged, tried, and acquitted. Both categories of conduct are not only included as "relevant conduct," but they both are priced at the same level of severity.

An extraordinary example of the effect of the current practice is contained in a case recently decided by the Court of Appeals for the Second Circuit, United States v. Concepcion, ___ F.2d ___ (2d Cir. Dec. 28, 1992). One defendant, Nelson Frias, was charged with two weapons offenses and a narcotics conspiracy offense. A jury convicted him of the weapons offenses and acquitted him of the drug conspiracy offense. His guideline range based solely on the conduct of which he was convicted was 12 to 18 months. Because the acquitted conduct was considered relevant conduct, his guideline range was increased to a range of from 210 to 262 months, exactly the same range that would have applied if he had been convicted of the narcotics conspiracy. He was sentenced to 20 years, the maximum statutory sentence available for the two weapons offenses. His sentence is thirteen times higher than the sentence he would have received had he been sentenced in the guideline range applicable to the conduct of which he was convicted.

The Second Circuit felt compelled, by the Guidelines and existing case law, to rule the guideline calculation lawful. However, the Court also ruled that the circumstances permitted consideration of

a downward departure from the enhanced guideline range that resulted from the inclusion of acquitted conduct as relevant conduct.

Use of acquitted conduct to achieve the same guideline range that would result if a defendant were convicted is a serious flaw in a guideline system that endeavors to promote confidence in a rational system of sentencing. The Second Circuit's permission for a departure downward from the guideline range enhanced by the acquitted conduct is not an adequate substitute for the proposal in amendment 1 to eliminate acquitted conduct from relevant conduct while permitting, in exceptional cases, an upward departure from the guideline calculated without regard to the acquitted conduct.

Acquitted conduct was recognized as relevant to sentencing in the pre-Guidelines era on the theory that the jury's acquittal indicated only that the conduct had not been proven beyond a reasonable doubt, whereas the sentencing judge was entitled to find the conduct established by a preponderance of the evidence, the standard generally applicable to aggravating circumstances weighed at sentencing. But courts that had permitted such use of acquitted conduct did so only to permit a sentencing judge to "consider" acquitted conduct. See United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972). They did not contemplate that, under a guidelines regime, an acquittal would subject a defendant to the same severity of punishment as a conviction. It is the current inclusion of acquitted conduct as relevant conduct, priced at the same severity as convicted conduct, that achieves the Kafkaesque result illustrated by the case of Nelson Frias.

Amendment 1 should be adopted and explicitly made available retroactively, see U.S.S.G. § 1B1.10. If the Commission is unwilling at this time to eliminate acquitted conduct from consideration as relevant conduct, as proposed in amendment 1, then the Commission should consider, as an alternate, permitting the sentencing judge to count the acquitted conduct at some reduced level of severity, perhaps between one-third and two-thirds (in the judge's discretion) of the level appropriate for convicted or uncharged conduct.

Amendment 1 probably will apply to only a small number of defendants. But its elimination will greatly enhance public confidence in the Commission.

Sincerely,

Jon O. Newman
United States Circuit Judge

University of Colorado at Boulder

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March 12, 1993

Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
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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").

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[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.

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:

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

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March 12, 1993

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In Re: Proposed Amendments By The Practitioners Advisory Group

Dear Judge Wilkins:

The Board of Directors of the Pennsylvania Association of Criminal Defense Lawyers wishes to express our approval of the proposed amendments to the Federal Sentencing Guidelines as submitted by the Practitioners Advisory Group. As practitioners, we experience first-hand the impact of the Guidelines not only on our clients but on the entire judicial system.

In stating our support, we draw particular attention to the following:

* Proposed Amendment 35. Treatment of acquitted conduct under §1B1.3 Relevant Conduct. PACDL prefers Option 1 yet recognizes that the majority of conduct deemed relevant conduct for sentencing purposes is generally not included in acquitted counts but is most often "uncharged conduct". Further, we believe that any conduct used for sentencing should meet the beyond a reasonable doubt standard and should be submitted to the trier of fact during trial.

Proposed Amendment 36. Rule 11 procedure. PACDL supports the recommendation in this comments. It should also be noted that the Federal Court section of the Allegheny County Bar Association is recommending that the local rules for the Western District of Pennsylvania be amended to require a pretrial conference including the Government prosecutor, the defendant and the probation officer in order to disclose the facts and circumstances of the offense and the offender characteristics applicable to the Sentencing Guideline range.

Proposed Amendment 39. Reduction of offense level for drug quantity. PACDL supports the overall scheme of this proposed amendment and believes that a maximum offense level of 36 achieves the purpose of the Sentencing Guidelines system.

The proposed amendments by the Practitioners Advisory Group are a definite improvement upon the Federal Sentencing Guidelines as they presently exist. The input of attorneys who work with the Guidelines on "the front line" must always be given high priority. PACDL supports the efforts of the Advisory Group.

Very sincerely,

Caroline M. Roberto

Caroline M. Roberto
Board Member and Chair of the
Sentencing Committee

CMR:abs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH, PENNSYLVANIA 15219

CHAMBERS OF
DONALD 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

Donald E. Ziegler

ef

United States District Court
Central District of California
751 West Santa Ana Boulevard
Santa Ana, California 92701

Chambers of
Alicemarie H. Stotler
United States District Judge

714 / 836-2055
FTS / 799-2055

March 03, 1993

Judge Billy W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
One Columbus Circle, N.E., Ste. 2-500
Washington, D.C. 20002-8002

Re: 1993 Proposed Amendments

Dear Chairman Wilkins:

I wish you and the Commission and the Judicial Working Group a productive March 8th conference.

I submit herewith comments on the proposed amendments for the 1993 cycle. As always, silence is ambiguous and may signify one or more of the following: approval; no opinion; deference to others more knowledgeable; no experience; no clue. One almost overriding consideration governs my responses: everyone complains when changes occur and therefore only absolutely necessary changes should be made. Those, we recognize by the vague notion of "consensus," untoward appellate attention, and by the insights contained in comments by Sentencing Commission "consumers."

On separate pages, then, numbered to match with the number of the proposed amendment, I comment where (1) I cannot restrain myself; (2) where I feel certain that reasonable minds will differ and I want my vote recorded; (3) where I feel qualified to take issue with the need for any change at all; and, (4) where I disagree for reasons stated.

If any member of the Commission/staff reviewing these remarks wishes further explanation, please call.

Sincerely,

Alicemarie H. Stotler

Alicemarie H. Stotler
United States District Judge

Amendment 1

§ 1B1.3 (c) should definitely be adopted.

Application Note 11 contains an unnecessary and undesirable second sentence. Absent direction about what constitutes an "exceptional case" for purposes of §1B1.3(c), this sentence about "basis for an upward departure" injects another uncertainty where, finally, something in these Guidelines can be declared certain.

LAW OFFICES OF

RITCHIE, FELS & DILLARD, P.C.

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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,

Kenneth F. Irvine Jr.

KENNETH F. IRVINE, JR.

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

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

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

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

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

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

DATE: February 16, 1993

RE: Proposed Amendment #11

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

TO: U. S. Sentencing Commission
Public Information

✳ The synopsis of this proposed amendment indicates that a "snapshot" of the offender's involvement arguably provides a more reliable method of determining culpability. I strongly disagree with that theory and with the intent of this proposed amendment.

I contend that one adverse affect of this proposed amendment is to create an adaptation to the application and meaning of relevant conduct as defined in section 1B1.3. An exception to how 1B1.3 is applied is foreseen if this amendment is passed. This will create inconsistencies with the application of other guidelines, eg. 2B1.1 and 2F1.1 to name a few.

Drug distribution, almost by definition, is a continuous, ongoing crime. The overall philosophy of the guidelines appears to be to sanction, without double counting, all harms to the victim or victims of the criminal activity. The approach suggested by this amendment compromises that philosophy deeply.

Additionally, the proposal will create difficulty for the Court and probation officer in application and dispute resolution. Another element of factual determination is required and another issue for potential dispute is raised.

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CURE-SORT (Sex Offenders Restored Through Treatment)
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Executive Director and Administrator
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NATIONAL OFFICE:
PO Box 2310
National Capital Station
Washington, DC 20013-2310
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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 Registar 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!

FEDERAL PUBLIC DEFENDER
ROOM 174, U.S. COURTHOUSE
MINNEAPOLIS, MN 55401

DANIEL M. SCOTT
FEDERAL PUBLIC DEFENDER
SCOTT F. TILSEN
KATHERIAN D. ROE
ANDREW H. MOHRING
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PHONE: (612) 348-1755
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March 10, 1993

United States Sentencing Commission
ATTN: PUBLIC INFORMATION
One Columbus Circle North East
Suite 2-500 - South Lobby
Washington, D.C. 20002-8002

Re: Comment on Proposed Amendments

To The Honorable United States Sentencing Commission:

I write to you, in as brief a form as possible, to express my comments on the proposed amendments in the sentencing guidelines. The fact that I am an assistant federal public defender for approximately 13 years makes me both a well informed and biased source, of which I am sure you are cognizant.

I applaud and encourage the thought and effort made to amend the loss tables and deal with the problem of more "than minimal planning" insofar as it has resulted in disparate treatments and a considerable amount of litigation. With respect to the additional issues for comment in this section, I definitely believe that the loss tables should have fewer and larger ranges in the lower ends. The loss tables at the higher ends are so large as to be beyond my experience and have no opinion as to whether they need adjustment.

Although more work would need to be done, I would encourage the Commission to modify the definition and approach to a more than minimal planning enhancement as opposed to building it into the loss table or, alternatively, building it into the loss table further from the bottom ranges, maintaining the lesser enhancement as long as possible and perhaps adding a third and additional level increase at the far end.

With respect to redefining more than minimal planning, I do have some suggestions:

1. Build in a two level decrease for spur of the moment or sudden temptation conduct;

2. Do not provide for multiple victim enhancement until the number of victims has reached an appreciably large level i.e. 15 or 20 and perhaps make this enhancement an additional one or two levels at an additionally large number such as 40 or 50;

3. Require, by example, truly more than the ordinary conduct to commit the offense before an enhancement is added. Few if any types of fraud or theft escape the current definition.

* The proposal with respect to U.S.S.G. § 3B1.2 (role in the offense) is also an improvement. I would suggest option one is the most preferable of the options under Note 7 reading as follows: Option 1 is prefered because it affords the sentencing judge the most flexibility in determining whether or not to apply the two level adjustment for minor role and, unlike option 2, does not repeat the Application Note position contained in Note 8 concerning burden of pursuasion.

The firearms amendments are mostly technical and it would be useful for the Commission to have a period where it does not amend the firearms guideline. I do believe that an appropriate differentiation can be made between different weapons including weapons that fall within 26 U.S.C. § 5845 and its various subdivisions. Whether the differentiation should be made by different offense levels, by placement of the sentence within a the guideline range, or by a Commission-guided departure, depends on the weapon involved. It would seem that a fully automatic machine gun is different from a sawed-off shotgun which is different from a sawed-off rifle which is different from other weapons such as tear gas "pen guns," all of which are prohibited in Title 26.

I have no great critism of the proposed amendment § 3B1.3 abuse of position of special trust or use of special skill. However, perhaps the time has come to separate these two concepts into separate adjustment sections. It would seem to me be best to leave special trust as a Chapter 3 adjustment with appropriate illustrations in the application notes rather than adding it as a specific offense characteristic in a hit or miss fashion to various guidelines relating to fraud or embezzlement or in general to the embezzlement guideline. Certainly the proposed amendment is superior to the additional issue for comment, particularly as it relates to deleting the example regarding "ordinary bank tellers".

The proposal relating to 5K1.1 - issue 24 - will apply to very few cases if it is intended to exclude "crimes of violence" where that concept includes drug offenses. It also has limited usefulness because of the exclusion of anyone who is not a "first offender".

At least it should include all category I offenders and perhaps all category I and category II offenders. The injustice which it is intended to address is not related or necessarily related to whether the defendant is category I or category VI, but the proposal is at least some improvement over the current requirement for a government motion.

I should add with respect to § 5K that I have, as have other attorneys, experienced cases in which this proposed amendment could well have made a difference.

With respect to the proposal number 25 relating to § 6B1.2 the idea is commendable. Perhaps a stronger word than "encourages" should be utilized. I would suggest a policy statement that requires the government to make such the disclosures at either option point and provides as a ground for downward departure the intentional failure of the government to do so. Experiences has taught that toothless platitudes rarely modify prosecutorial behavior in an adversary system.

The Commission should act on issue for comment number 40 relating to the mandatory minimum and distinction between cocaine and cocaine base. Significant support exists not only from the interjection of the Commissions expertise, but also other sectors of the criminal justice system for the elimination of this distinction.

Proposed numbers 44, 45 and 46 are all poor ideas, poor policy, and should not result in favorable action. They would increase unwarranted disparities and would not further the purposes of sentencing indicated by Congress.

Proposal number 57 submitted by the Department of Justice should not be acted upon. It is an attempt to accomplish exactly the opposite of what it purports to do. The Department of Justice obviously intends to utilize its proposed amendment, if it becomes the guideline, as the Commission's position which ought to be followed by the Courts in prohibiting attacks on prior convictions. It is my understanding that the Commission wishes to take no position and allow the courts to develop their own procedures. If the Commission does intend to take a position on this procedural question, it should study the matter, invite additional comment, and it is hoped, ultimately recommended that the courts permit collateral attacks on prior convictions utilized to enhance sentences.

I had promised to make this letter brief. There are many other things I could or should say, but will not. I will say that the last two cycles of amendments have been encouraging insofar as they have addressed problems of harshness and not simply been "fixes" of guidelines which appear to be too low to some other components of the criminal justice system.

Sincerely,

SCOTT F. TILSEN
Assistant Federal Defender

SFT/tmw

United States District Court
Central District of California
751 West Santa Ana Boulevard
Santa Ana, California 92701

Chambers of
Alicemarie H. Stotler
United States District Judge

714 / 836-2055
FTS / 799-2055

March 03, 1993

Judge Billy W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
One Columbus Circle, N.E., Ste. 2-500
Washington, D.C. 20002-8002

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Alicemarie H. Stotler

Alicemarie H. Stotler
United States District Judge

Amendments 8, 9, 11, 39, 48, and 60

The mere existence of all these options suggests that changes concerning greater latitude for minimal criminal participation (and therefore less harsh sentences) and, possibly, a distinction among offenders involved with "less dangerous" types of controlled substance are widely thought to be desirable.

Hearing the discussion of the members of the Working Group is essential to be able to cast a well-informed vote on any of these. At least one, however, seems unnecessary, and that is **Amendment 60**. One can only infer that "ghost" co-defendants have been invoked so as to justify comparative role status in some single-defendant cases.

Amendments 9 and 39 are more extensive in their reach than **Amendment 8**, but they are more complicated. If the Working Group concludes that emphasis on the role of firearms is required, then **Amendment 9** is on target.

Adoption of **Amendment 8** and possibly **Amendment 48** would show movement in the apparently desirable direction. We could work with cases under the refined definitions of "mitigated role" defendants and those whose offenses do not concern heroin and cocaine, and see if the goal for more "individualized" sentences might be achieved.

Finally, I find **Amendment 11** arbitrary. I think it was meant to be, but I prefer *status quo*.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH, PENNSYLVANIA 15219

CHAMBERS OF
DONALD 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

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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

Donald E. Ziegler

ef

United States District Court
Central District of California
751 West Santa Ana Boulevard
Santa Ana, California 92701

Chambers of
Alicemarie H. Stotler
United States District Judge

714 / 836-2055
FTS / 799-2055

March 03, 1993

Judge Billy W. Wilkins, Jr.
Chairman
U. S. Sentencing Commission
One Columbus Circle, N.E., Ste. 2-500
Washington, D.C. 20002-8002

Re: 1993 Proposed Amendments

Dear Chairman Wilkins:

I wish you and the Commission and the Judicial Working Group a productive March 8th conference.

I submit herewith comments on the proposed amendments for the 1993 cycle. As always, silence is ambiguous and may signify one or more of the following: approval; no opinion; deference to others more knowledgeable; no experience; no clue. One almost overriding consideration governs my responses: everyone complains when changes occur and therefore only absolutely necessary changes should be made. Those, we recognize by the vague notion of "consensus," untoward appellate attention, and by the insights contained in comments by Sentencing Commission "consumers."

On separate pages, then, numbered to match with the number of the proposed amendment, I comment where (1) I cannot restrain myself; (2) where I feel certain that reasonable minds will differ and I want my vote recorded; (3) where I feel qualified to take issue with the need for any change at all; and, (4) where I disagree for reasons stated.

If any member of the Commission/staff reviewing these remarks wishes further explanation, please call.

Sincerely,

Alicemarie H. Stotler
United States District Judge

Amendments 29 and 30

Amendment 29 presents this direct question to the Sentencing Commission: do you want to be more popular with the federal judiciary? Then, adopt the proposed third paragraph for § 5H1.1. Do you wish, instead, to declare a national policy for sentencing offenders and punishing offenses on an objective basis? Then turn down this amendment.

Unpopular though it is, I decline to endorse the JCUS Committee's suggestion. Every judge's sense of justice is different and will predictably vary given even the same case. Every judge notes these "5H" factors anyway but may or may not let them sway her/him. When the factors mount up to that judge's threshhold, then that judge is already departing anyway. While I tend to agree with Judge Becker that perhaps judges erroneously feel that they are restrained from departing when they might wish, this amendment does not provide a "remedy."

Amendment 30 should likewise be rejected.

LAW OFFICES OF

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KNOXVILLE, TENNESSEE 37901-1126

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615-637-0661

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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,

Kenneth F. Irvine Jr.

KENNETH F. IRVINE, JR.

701 Pennsylvania Avenue, N.W.
Washington D.C. 20004-2696
Telephone 202-508-5620

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."

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[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

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[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 Governmment 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

cooperation departure. Third, the Commission's current insistance 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,

Jon O. Newman
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH, PENNSYLVANIA 15219

CHAMBERS OF
DONALD 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.

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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

Donald E. Ziegler

ef

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ATTORNEYS AT LAW

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...rick L. Brown
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*Also Admitted in Kentucky

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Fax (513) 381-1776

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.

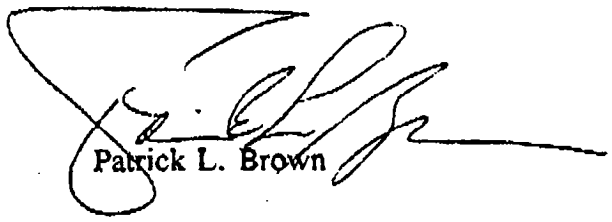
The proposal reducing the top guideline from 43 to 32 is another one which should be approved. The length of sentences in drug cases has simply gotten out of hand. As a society we can not continue to pay the costs of warehousing individuals for twenty and thirty years, especially when they are first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

between violent offenders and drug offenders and the relative disparity is 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 over-crowding 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

LAW OFFICES OF

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

TELEPHONE
615-637-0661

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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,

Kenneth F. Irvine Jr.

KENNETH F. IRVINE, JR.

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

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

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

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

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

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
PROBATION OFFICE

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 easier.

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

TELEPHONE
615-637-0661

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615 524-4623

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,

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,

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

LAW OFFICES

HOCHMAN, SALKIN AND DEROY

A PROFESSIONAL CORPORATION

9150 WILSHIRE BOULEVARD

SUITE 300

BEVERLY HILLS, CALIFORNIA 90212-3414

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DIRECT DIAL NO.

March 9, 1993

Mr. Michael Corlander
Public Information Specialist
United States Sentencing Commission
1 Columbus Circle, NE, Suite 2-500 South Lobby
Washington, DC 20002-8002

RE: Comment to Proposed Sentencing Guideline Amendments/ Tax Provisions

Dear Mr. Corlander:

This letter is written in response to the Commission's solicitation for public comment regarding proposed amendments to the United States Sentencing Guidelines.

Our practice primarily consists of criminal and civil tax litigation. We would like to comment on the proposal to redefine tax loss and specifically the provision which would provide for a "rebuttable presumption" that the tax loss will be equal to the specified percentage (i.e., 28% or 34%) of unreported gross income or improperly claimed deductions.

We believe the proposal is a good change and should be favorably considered by the Commission. Under the existing guidelines, tax loss is generally determined merely by applying the specified percentage (e.g., 28%) against the omitted items of gross income. Legitimate deductions which were not claimed on the return may not be taken into account. Accordingly, under the guidelines, there may be situations where there is little or no criminal tax deficiency, but a very large "tax loss."

For example, assume a taxpayer omitted income of $200,000 from his or her return with the intent to evade the tax on such income. Also assume that the taxpayer had other deductions of $100,000 which were not claimed on the return. Under the existing guidelines, the tax loss is 28% of the $200,000, or $56,000. The actual deficiency, assuming a 28% bracket, would be approximately one-half that amount, or $28,000.

Since the underlying premise of the guidelines is to sentence based upon tax loss, it seems appropriate to attempt to determine, within practical limitations, what the tax loss is. An individual who has evaded $56,000 of tax should be sentenced differently than an individual who evaded $28,000 of tax.

We believe the "rebuttable presumption" approach contained in the proposal strikes the proper balance. Once the Government has demonstrated the omission of gross income, the tax defendant has the obligation to come forward with evidence showing a reduction in the tax deficiency. While it is true that allowing consideration of offsetting deductions complicates the determination of tax loss, it is a complication which is nevertheless required to be addressed by the Internal Revenue Service for civil tax purposes and should be addressed in determining the appropriate sentence under the guidelines.

We would appreciate your placing this comment in the public record of the Commission's proceedings.

Sincerely yours,

Bruce I. Hochman

BRUCE I. HOCHMAN

STEVEN TOSCHER

ST/jmr

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

PROBATION OFFICE

DATE: February 16, 1993

RE: Amendment #21. Additional Issue for Comment.

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

TO: U. S. Sentencing Commission
Public Information

* The Commission invites comment on whether the tax table should be amended to offset the potential impact of other amendments that increased the potential for sentences of probation for low level tax offenders.

I do not think tax offenders should be treated differently than other property offenders and the Court should have available the same sentencing options for these similar offenders.

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CHIEF POSTAL INSPECTOR
INSPECTION SERVICE

March 15, 1993

United States Sentencing Commission
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Suite 2-500, South Lobby
Washington, DC 20002-8002

Attention: Public Information

Gentlemen:

The U.S. Postal Service respectfully submits its comments on the 1993 proposed guideline amendments. As an overview, we disagree with the proposed guidelines on money laundering (Amendment 20) and the guideline commentary on public trust (Amendment 23), and request the adoption of the proposed amendments submitted by the Postal Service relating to the theft of mail (Amendment 44), and the public trust enhancement for offenses committed by postal employees (Amendment 46). In addition, we strongly urge the Commission to consider the future formulation of a "multiple victim" adjustment guideline (Amendment 45). Our comments are explained more fully in the following:

Proposed Amendment 20, § 2S1.1, § 2S1.2. We disagree with the proposed revisions to the money laundering guideline based on the statutory purpose of 18 U.S.C. §§ 1956, 1957. The legislative intent of these statutes is to create a separate crime offense to deter criminals from attempting to profit from their illegal activities and to impose a higher penalty for this type of criminal misconduct. To accomplish this, the statutes prescribe criminal penalties separate from and higher than those of the underlying criminal offense which gave rise to the monies, property or proceeds involved in the money laundering. This legislative intent would in effect be vitiated by the revision to the guideline. Because the underlying offense and the money laundering are two separate crimes, we believe the guidelines should likewise maintain this

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was not in a trust position), and obviate the need of detailed analysis by the court of the specific duties and responsibilities of the defendant as qualifying the particular position occupied as one of "public trust."

Proposed Amendment 44, § 2B1.1(b)(4). The current guidelines applicable to mail theft are based on the dollar value of the loss. Although the guideline increases the offense level if mail is involved, we do not feel this adequately addresses the seriousness of the offense and its impact on the victims and on the essential governmental function of mail delivery. The proposed amendments take these factors into consideration by initially increasing the offense level to a level 6, and then adding the appropriate level increase corresponding to the total dollar loss associated with the theft. In order to conform with similar guideline language, the amendment should be reworded to read:

> "If undelivered United States Mail was taken, increase by two levels. If the offense is less than level 6, increase to level 6."

In addition to this amendment to the mail theft guideline, we have proposed § 2B1.1(b)(8) to address theft schemes involving large volumes of mail. Frequently, these volume thefts are conducted as a gang-related crime to steal the mail and then fraudulently negotiate or use those items contained within. In most instances, a substantial volume of stolen mail is necessary to obtain a minimal number of checks, credit cards, negotiable instruments or other items of value. The dollar loss of these types of thefts does not accurately reflect the scope of the crime in terms of the number of victims affected and the operations of the government's postal system. Our proposed amendment would address the more serious nature of these schemes to steal large volumes of mail by increasing the offense level to a 14.

Technical corrections to the proposed amendment are needed to clarify the application of the guideline for its purpose. The amendment would read as follows:

> 8. If the offense involved a scheme to steal multiple pieces of undelivered United States Mail and the offense level determined above is less than level 14, increase to level 14.

Proposed Amendment 45, (§ 3A1.4). The Postal Service remains committed to the principle of victims' rights and supports more guidelines which emphasize victim impact in the sentencing process. We believe the sentencing level should reflect the total harm caused by the defendant's criminal misconduct. Our proposed guideline accomplishes this by including a victim-related adjustment based on the number of victims. For example, in volume mail theft crimes, and in consumer fraud crimes, substantial numbers of victims are directly harmed. We believe that the number of victims impacted by the defendant's relevant conduct should warrant an increase in the offense level. Furthermore, we feel such a guideline should be applied to any offense which results in multiple victims for these reasons.

As proposed, our amendment would give a two-level increase for a crime which results in two or more victims; those crimes affecting more than 100 victims would be subject to an additional two-level increase for each 250 victims, up to a maximum eight-level increase.

Because our proposed amendment is a Chapter 3 adjustment, it would impact on other offenses beyond those which are postal related, which requires a more comprehensive analysis of multiple victim crimes. Accordingly, we urge the Commission to include the study and formulation of a multiple victim guideline as a priority issue for 1994.

Your consideration of these issues is appreciated. If additional information is needed, please contact me at (202) 268-4267.

Sincerely,

K. J. Hunter

K. J. Hunter