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March 11, 1994

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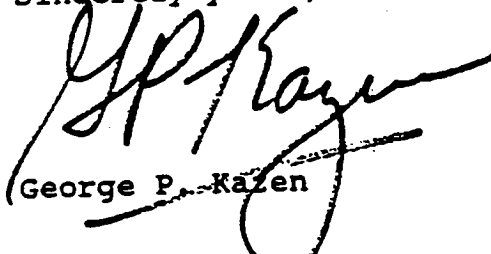
Dear Chairman Wilkins:

Enclosed you will find two separate position papers which I am submitting as chair, and on behalf, of the Subcommittee on Criminal Law and Sentencing, for the Judicial Conference Criminal Law Committee. The members of the Subcommittee are District Judges Maryanne Trump Barry, Stephen V. Wilson, Mark L. Wolf, and Richard J. Arcara. These papers are submitted in support of proposed amendment #14, and our proposed amendment to §1B1.10 (Issue for Comment #31). These papers are the Subcommittee's written response to the proposed amendments for this amendment cycle.

We appreciate the Commission's consideration of the views expressed in these position papers. In addition, we look forward to being able to comment on them orally when we meet with the Commission on March 25, 1994. We will also be prepared to comment on certain other proposed amendments at that time.

We thank the Commission for its careful consideration of the enclosed, and for the invitation to meet, on March 25th at 10 a.m.

Sincerely yours,


George P. Kazen

POSITION IN SUPPORT OF PROPOSED AMENDMENT #14

Submitted by

Judicial Conference Committee on Criminal Law
Subcommittee on Criminal Law and Sentencing Procedures

Introduction

An amendment concerning unusual combinations of characteristics as a basis for departure was first proposed in 1990, and was approved by the Committee and by the Judicial Conference. It was not adopted by the Commission in 1992, when most other Judicial Conference recommendations were adopted in some form. The Committee on Criminal Law continues to believe that there is a genuine need for this proposal.

The original Judicial Conference recommendation called for addition of an application note to Chapter 5, Part H, "Specific Offender Characteristics," to encourage departure in cases where characteristics, alone or in combination, are present to an unusual degree and are important to sentencing purposes in the individual case. (See The 1990 Recommendations of the Judicial Conference for Amendments to the Sentencing Guidelines) (emphasis added).

This year the Commission agreed to publish a proposed amendment on departures (#14), which combines the Judicial Conference recommendation of combination of circumstances with a recommendation by the Department of Justice endorsing the criteria for departures set out in U.S. v. Rivera, 994 F.2d 942 (1st Cir. 1993).

The Committee continues to urge an amendment to allow departures involving an unusual combination of circumstances. The Commission's combination of this concept with the Rivera analysis is a good one, because the Rivera criteria and analytical construct provide the additional control on this and other kinds of departure. As a result, we believe that amendment #14 in its present form (including the bracketed language regarding combination of circumstances) represents a statement of guided, reasonable departure which is not only helpful, but necessary, to more fairly and proportionally adjudicate some of the cases which come before the courts.

The Committee urges the Commission to adopt proposed amendment #14, including the bracketed language, during this amendment cycle. Our position is explained more fully, below. Some of this material was submitted to the Commission in the fall of 1993, in support of the publication of a combination of circumstances departure amendment. We have added additional information in support of our proposal in its current form (as proposed amendment #14).

By adopting Amendment #14, the Commission can resolve a conflict in the Circuits, strengthen a data source for guideline refinement, implement the Judicial Conference

recommendation, and send the needed signal that departures in truly unusual cases, properly guided by the Rivera criteria, are encouraged.

Need for an amendment to encourage appropriate departures.

The Commission has encouraged judges at Sentencing Institutes and in conversation to depart from the guidelines in appropriate cases. The impression remains among many judges, however, that departures are somehow dubious and should be made in only the most extreme cases. In part, this situation may be due to a lingering impression initially created by unfortunate talk of "compliance," or by language in the introductory section of the guidelines manual that is interpreted to discourage departures.

This impression may also result from the Commission's formal response to some of the departures that have been made. The Commission does not "plug every hole" created in the guidelines by downward departures, but the Commission has repeatedly amended the guidelines to make a factor identified in a departure no longer available. For example, in past years the Commission has passed amendments explicitly aimed at eliminating departures based on a defendant's "lack of guidance as a youth and similar circumstances indicative of a disadvantaged upbringing," military service, physique and vulnerability to sexual assault, or prior good works. The Commission has never added an adjustment in light of a mitigating factor identified by a departing court. Our proposal would help balance desired uniformity and needed individualization of sentences.

A clearer signal needs to be sent that departures are not per se discouraged, but even encouraged in the appropriate circumstances, and that the factors identified by judges as important sentencing considerations will be added to the guideline rules.

Combinations of characteristics are the most difficult aspect of the sentencing decision to set into guidelines.

Judge Wilkins has written that when each individual factor has been adequately taken into account by the Sentencing Commission, or when the factors do not individually warrant a departure, "[v]iewing the factors cumulatively adds nothing significant to the calculus." *United States v. Goff*, 907 F.2d 1441 (4th Cir. 1990). The Committee respectfully submits that it is impossible for the Commission, or any guideline system, to adequately anticipate unusual combinations of circumstances and create rules that are right for every situation.

No workable guideline scheme can capture the many ways in which factors combine and interact in actual cases. Guidelines generally must, as the federal guidelines do, give the same weight to a relevant factor regardless of what other circumstances are present in a case. In this way the guidelines mimic the statistical regression analyses used in their development—a simple additive model in which each variable is assumed to have a constant impact on the outcome variable, regardless of the value of other variables. It is not possible to uncover every interaction or oddity that may exist in the data; these situations are

typically treated as "noise." But these interactions are the extraordinary cases where judges should be encouraged to examine the total picture and make their sentencing decisions accordingly.

Typical factors that alone do not warrant a departure can combine in unusual and relevant ways (e.g., a pregnant offender who exercised poor romantic judgment and became involved with a drug dealer but has now broken off the relationship and begun drug rehabilitation). It is sometimes only an unusual combination of circumstances that reveals how sentencing purposes can best be met in the individual case.

The split in the Circuits

Since the initial Judicial Conference recommendation, three Circuits have upheld departures based on the "totality of the circumstances" or on "combinations of factors" which—though not individually sufficient—together justify a departure, given the total context of the offense, criminal record, and other offender characteristics:

a)The Ninth Circuit wrote that "[A] wise person will not look on each particular factor abstractly and alone. Rather, it will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decision." *United States v. Cook*, 938 F.2d 149, 153 (9th Cir. 1991). *See also United States v. Anders*, 956 F.2d 907, 914 (9th Cir. 1992)(narrowing application to those factors authorized and not expressly prohibited by the guidelines);

b)The Tenth Circuit affirmed a downward departure based on the "unique combination of factors" that, standing alone, were each insufficient to justify a departure. *United States v. Bowser*, 941 F.2d 1019, 1024-25 (10th Cir. 1991). In an earlier case, the Tenth Circuit affirmed a downward departure based on "the aberrational character of [defendant's] conduct, combined with her responsibility to support two infants. *United States v. Pena*, 930 F.2d 1486, 1495 (10th Cir. 1991);

c)Recently, the Sixth Circuit adopted the Ninth Circuit approach and held that "[i]t is permissible to use a totality of the circumstances approach to departures, so long as the factors considered are not factors the guidelines have already taken into account or expressly deemed irrelevant." *United States v. McKelvey*, 7 F.3d 236 (6th Cir. 1993).

Other Circuits have rejected this approach:

a)The Fourth Circuit reversed a downward departure based on four factors which standing alone did not justify departure. *United States v. Goff*, 907 F.2d 1441 (4th Cir. 1990).

b)The First Circuit rejected a departure based on the "totality of the circumstances." *United States v. Pozzy*, 902 F.2d 133, 138 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 353 (1990). *But see, U.S. v Rivera*, 994 F.2d 942 (1st Cir. 1993)(district court has superior "feel" for "unusualness" of case).

Three other circuits have reversed departures based on combinations of characteristics, but it is unclear whether these Circuits believe departures based on the totality of circumstances are always inappropriate, or whether the particular facts of the cases made a departure inappropriate. The Third Circuit held that a "combination of typical factors does not present an unusual case." *United States v. Rosen*, 896 F.2d 789, 792 (3d Cir. 1990). *See also, United States v. Barone*, 913 F.2d 46, 50-52 (2d Cir. 1990); *United States v. Carey*, 895 F.2d 318, 322-25 (7th Cir. 1990).

By adopting the proposed policy statement, the Commission would resolve this split in the circuits.

Opening the floodgates?

Some Commissioners have expressed concern that if this type of departure were explicitly encouraged, it would "open the floodgates" to a large number of inappropriate departures and widespread sentencing disparity. Because three circuits have ruled that these departures are permitted, we have a natural experiment that can be used to test these concerns. Obviously, we cannot attribute any change in departure rates to only these rulings—other decisions, guideline amendments, or administrative changes can all affect departure rates. But if there is no sudden increase in the departure rate after a circuit approves this type of departure, then it is clear that the approval did not open any floodgates.

We examined monthly downward departure rates, excluding departures for substantial assistance, in the two circuits that have permitted these departures for over a year. The attached chart shows the departure rates in the 9th and 10th circuits before the relevant decisions (the decisions are indicated with vertical lines), as well as the rate after the decisions. For comparison, it also shows the departure rate in all other circuits combined. The chart shows that so far there is no significant increase in the number of departures in these two circuits.

We note also that the Commission's published list of reasons given by sentencing courts for downward departures does not include "totality of the circumstances" or "combinations of characteristics," which we take to mean that this reason for departure is rarely cited. It appears likely that if the proposed amendment is adopted, judges will use the new flexibility only in rare cases when unique circumstances call for a sentence outside the normal (presumptive) guideline range.

Preserving the Heartland

In addition, even if departures were to slightly increase under the proposed approach, the "heartland" of cases would easily be preserved, and the overwhelming majority of cases would continue to be sentenced within the guideline range, as they have been in the circuits already allowing such departures. The "heartland" concept reflects a "bell-curve" of normalcy. This would imply perhaps a 60-70 percent of "normalcy" within the bell. However, the Commission's national data (fiscal year 1992), indicates that there is an average departure rate of only 6% downward (other than substantial assistance departures), and 1.5% upward. Even if the current combined 7.5% departure rate were to double (although there is no reason to expect it would), there would still be 85% of the cases either sentenced within the range or subject to 5K motions.

Also, if this kind of departure were to be endorsed, it is reasonable to presume that at least some of the cases which are either: a) given technically unearned 5K motions (a subject of much discussion and criticism in the literature), or b) subject to "covert departures" (i.e. adjustments made in such a way that departure is effected, without being termed as such), might decrease and become reasoned, articulated departures guided by the Rivera criteria and, it should not be forgotten, controlled by the right to appeal.

Effect of Rivera Case

As we have noted, the criteria and analytical framework set out in Rivera, which the Department of Justice has proposed and which constitutes the major part of proposed amendment #14, would in itself function as the reasonable criteria which would work to guide these and other departures, and would work to prevent unwarranted or unrestrained use of the combination of circumstances departures.

Moreover, language in Rivera itself endorses the restrained but flexible case-by-case analysis we are proposing. Judge Breyer noted that the district court has the superior "feel" for the "unusualness" of the case. This is precisely why we are urging this kind of amendment.

Departure as Feedback to Guideline Refinement

For the departure mechanism to work as envisioned in the Sentencing Reform Act, departures must become a basis for continual refinement of the guideline rules. This refinement must include not only pruning of unwanted variation, but also incorporation of factors and circumstances that are identified by sentencing judges as relevant to just sentencing.

As the Commission states in a neglected passage in the introduction to the guidelines manual: "It is difficult to prescribe a single set of guidelines that encompass the vast range of human conduct potentially relevant to a sentencing decision...By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court

decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted."¹

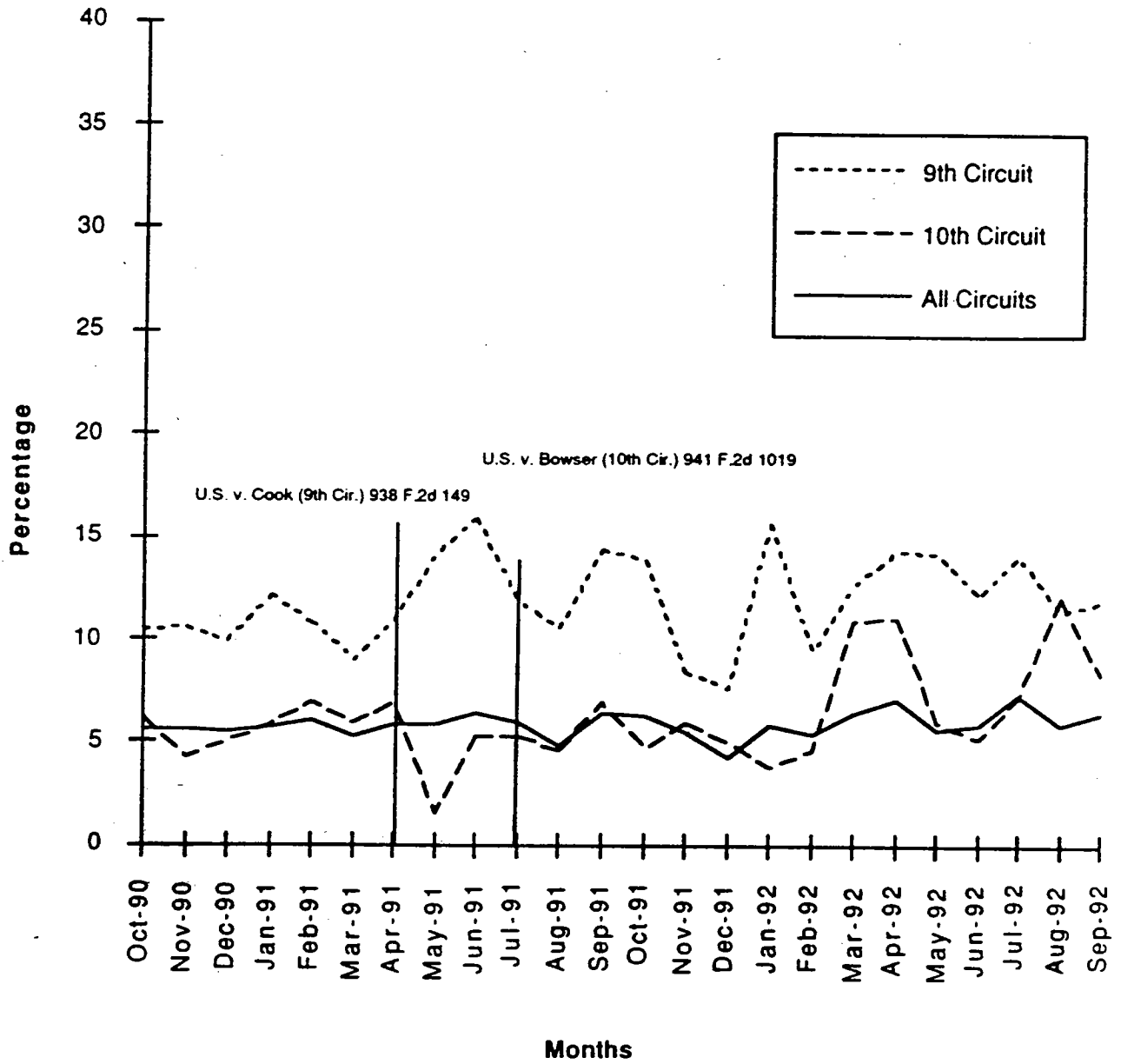
By adopting Amendment #14, the Commission would resolve a split in the circuits, it would incorporate for the first time a mitigating circumstance identified by the courts, it would provide a framework for useful feedback for further fine-tuning of the guidelines, and it would preserve the guideline sentence as the presumptive sentence in the vast majority of cases. The result would be increased fairness and flexibility to fit truly unusual case within a reasonable analytical framework for departures. In addition, all departures would be guided by the Rivera criteria, and subject to challenge on appeal.

Conclusion

For all these reasons, the Judicial Conference Committee on Criminal Law, through the Subcommittee on Criminal Law and Sentencing, urges the Commission to adopt proposed amendment #14.

United States Sentencing Commission, *Guidelines Manual* (Nov. 1993), at 6.

**Monthly Downward Departure Rates FY91-FY92
in Circuits Permitting Departures Based on
Combinations of Characteristics**



PROPOSED MODIFICATION OF §1B1.10 PROCEDURE
(Proposed Issue for Comment, #31)

Submitted by

Judicial Conference Committee on Criminal Law
Subcommittee on Criminal Law and Sentencing Procedures

Introduction

The Committee would like to express its appreciation to the Commission for agreeing to publish Proposed Issue for Comment #31 at the Committee's request. This paper presents the Committee's position in favor of changing the procedure for §1B1.10 sentence modifications to require the use of only the retroactive amendment to modify a sentence, rather than use of the entire current set of guidelines, a procedure which we believe greatly complicates the sentence modification process.

Problems involved with the application of current §1B1.10 discussed herein are just now becoming evident, now that there are several years of amendments in place, and some retroactive amendments are receiving widespread application, such as the LSD amendment effective November 1, 1993.

Most of the complications and disparate applications becoming apparent are a result of the use of the entire set of current guidelines (which we refer to as the "new-book" approach¹) in determining the modified sentencing range pursuant to §1B1.10, rather than only the amendment specifically made retroactive in §1B1.10.

In effect, this procedure makes all amendments enacted subsequent to the defendant's sentencing retroactive to these particular defendants. It also requires recomputation of all other guidelines involved in the original sentencing calculation whose application may have changed because of subsequent case law. This de novo guideline computation based on the entire current guideline manual generates numerous new issues of fact to be determined, many of which may require evidentiary sentencing hearings at which the defendant should be present. Any issue beyond the narrow use of the retroactive amendment to the old guideline computation arguably requires a hearing.

In addition, because all changes (even if substantively unrelated to the actual retroactive amendment) are applied to only those defendants involved in the sentence modification process, and denied to all other defendants sentenced at the same time as

¹ This is done in order to distinguish this procedure from what is often referred to as the "one-book" rule for sentencings, pursuant to § 1B1.11, which would remain unchanged and actually reinforced by our proposal.

those defendants, the new-book procedure results in unwarranted disparity in guideline application among certain defendants.

In order to avoid otherwise unnecessary new factual issues, litigation, sentencing hearings, and unfair disparity in application, we urge the Commission to amend §1B1.10 and its Commentary to allow the simple application of only the specified retroactive amendment to the original sentencing computation. We are proposing that §1B1.10(b) be amended to read "...had the amended guideline listed in subsection (d) been in effect.." (rather than "...had the guidelines, as amended, been in effect..."). In addition, Note 1 would be amended accordingly.² This procedure would allow the original sentence to remain otherwise unchanged, derived from the same set of guidelines under which other defendants were sentenced at the same time as the defendant whose sentence is later "modified".

The "New-Book" Procedure

The Commission directed that the entire current set of guidelines, as amended, be used in computing the range for a modified sentence,³ pursuant to §1B1.10. The Policy Statement states:

In determining whether a reduction in sentence is warranted for a defendant...the court should consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect at that time. Note 1, §1B1.10(b) (emphasis added).

Application Note 1 makes it explicit:

... the amended guideline range referred to in subsections (b) and (c) of this section is to be determined by applying all amendments to the guidelines (i.e., as if the defendant was being sentenced under the guidelines currently in effect). §1B1.10, comment., n. 1 (emphasis added).

² Note 1 would provide that the amended form of the retroactive guideline would be substituted for the extant guideline, and the modified range would be computed, with all other aspects of the original sentence calculation remaining unchanged. See Exhibit A which suggests the form of such an amendment, as well as possible explanatory commentary.

³ References to a "modified sentence" or range herein are not intended to infer that such a modification is automatically imposed. An actual sentence reduction based on the modified range is not mandatory, but discretionary with the court. "...the court...may reduce the term of imprisonment, after considering the factors set forth in section 3553(a)..." (18 USC § 3553(a)); "...a reduction in...imprisonment may be considered..." (§ 1B1.10(a) USSG). (emphases added). See also, U.S. v. Connell, 960 F.2d 191, 197 (1st Cir. 1992); U.S. v. Wales, 977 F.2d 1323, 1327-8 (9th Cir. 1992). This proposal would not, and should not, affect the discretionary nature of § 1B1.10.

The modified sentence calculation would involve a consideration of all post-sentencing changes to the guidelines or case law, any new guidelines, and a de novo consideration of any unchanged guidelines - anything which would affect the length of imprisonment,⁴ including all amendments to Chapters One, Two, Three, Four, and possibly Five. The Criminal History would be calculated based on the defendant's criminal history as it was at the time of sentencing,⁵ but using the current Criminal History guidelines.

In fact, by using the entire amended set of guidelines in computing a modified sentence pursuant to §1B1.10, the entire current manual is made retroactive, en masse, to any defendant whose sentence involved an amendment listed in §1B1.10. The result is that the defendant is sentenced differently than other defendants who were sentenced with the same manual.

Consideration of Other Amendments or New Guidelines

Most of the complications and disparities which result from using the entire current set of guidelines in the sentence modification process result from the application of guidelines which are either new or which have been amended since the sentencing (but not made retroactive to others defendants). This procedure generates numerous new issues of fact, potential litigation, and results in disparate applications.

Windfall Reductions, Complications, and Disparities

Often a defendant receives a windfall benefit from consideration of otherwise non-retroactive amendments during the modification process. For example, the most obvious issue already encountered in several LSD sentence modifications is that the LSD defendant would receive consideration for the possible application of the third level for acceptance of responsibility in the "current set of guidelines,"⁶ even though numerous other defendants have been routinely and repeatedly denied retroactive consideration for this same amendment in numerous post-conviction motions.

The Commission has repeatedly harmonized splits in the circuits with commentary or guideline amendments which, upon a de novo recalculation of a sentence for modification, could result in a windfall benefit to a defendant (unrelated to the retroactive amendment

⁴ "Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the guidelines listed in subsection (d) below, a reduction in the defendant's term of imprisonment may be considered under 18 USC § 3582(c)(2)." U.S.S.G. § 1B1.10(a).

⁵ "In considering whether a reduction in sentence is warranted..., the court should consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect at that time." § 1B1.10 (emphasis added).

⁶ Amendment #459 effective November, 1992.

triggering the modification), to which other defendants sentenced at the time do not have access.

Similarly, one amendment that the Commission did not make retroactive to other defendants is the eight-page "clarification" to relevant conduct⁷, which substantially changed (and narrowed) the computation of relevant conduct in most districts. In the case of an LSD defendant involved in a conspiracy, this may well result in wholesale reconsideration and recalculation of the drug activities of the LSD defendant - a recalculation which other defendants sentenced at the same time as the LSD defendant are denied.

There are some circumstances under which another amendment might undercut, or reduce, the amount of the reduction intended by the application of a specific retroactive amendment, which would similarly result in disparity in application between that defendant and others sentenced at the same time, not involved in the modification process.⁸

De Novo Consideration of Unchanged Guidelines

Under the current rule, complications can also arise from the reconsideration of the guidelines which have remained unchanged since sentencing. A new computation of all the guidelines invites the possibility that either subsequent facts, or a new understanding of the facts at sentencing, could result in a different computation of even those guidelines which have not changed since sentencing, generating more complications, new sentencing hearings, and potential litigation. Two examples of these kinds of issues have recently arisen in the field:

- a) If a defendant originally received the adjustment for acceptance of responsibility, has subsequently filed a §2255 motion in which he denied responsibility

⁷ Amendment #439, effective November 1, 1992.

⁸ The argument that the entire new book should be applied because any one amendment depends on the interaction of all others to form a coherent whole does not alone justify the new book process for modifications. Few amendments are integrally tied to other amendments, and where this is so, such a connection could be considered in the retroactive decision, where the Commission might decide to make them both retroactive or to specifically cross-reference the two when making the one retroactive. While the integration of the whole book is absolutely logical and necessary for sentencing, the modification process is not a whole sentencing and should be treated differently (see discussion, below). The integrity of the whole book used at sentencing (which remains the actual sentencing) and need for uniformity with other defendants sentenced at the same time as the defendant are best addressed with a procedure which uses only the retroactive amendment.

for the offense, and now is before the court for a sentence modification, should the acceptance adjustment be regranted?⁹

b) If the probation office has since learned that what was thought to be a "pending" other offense at sentencing was actually a conviction at that time, a de novo computation of criminal history would result in a higher criminal history category.

It is virtually certain that where a court follows the current procedure, it will recompute all guidelines, including those which have not changed. Even though it would be less likely to happen, it could be that a court might understand that it was to recompute the original guidelines, even if told to add only the retroactive amendment. Therefore, we ask that in addition to amending §1B1.10 to direct courts to use only the retroactive amendment, it should be specified that the retroactive amendment should be applied to the facts as they were at sentencing, based on the sentencing court's understanding of those facts at that time, to avoid these issues. In other words, the sentencing court's determination of all but the retroactively amended guideline should remain unchanged. We have attached, as Exhibit A, some suggested versions of how such an amendment might read.

Changes in Case Law

Using the entire new manual not only invites but probably requires consideration of current case law to interpret new or changed guidelines as well as those which have remained unchanged. Examples of potential problems are easy to imagine.

Case law has had a significant effect in defining many areas such as role, acceptance, and relevant conduct. Perhaps the most striking of these changes is the computation of relevant conduct. All circuits have gradually defined and essentially narrowed the computation of relevant conduct, a trend no doubt driven at least partly by the amendments to §1B1.3. Many defendants sentenced previously would receive a significantly different sentence if resentenced today using current calculations.

While this may be a welcome result for a particular defendant, the disparities of application are significant, and the complications are enormous. For example, several circuits have recently decided to use an arguably narrower measure of drugs to compute mandatory minimums in drug conspiracies¹⁰. A recomputation of all guidelines at sentence

⁹ Perhaps applying current guidelines as if they had been in effect at the time of sentencing (as provided in 1B1.10) would direct that the acceptance adjustment should remain unchanged (although this is awkward at best, given a de novo guideline computation requirement).

¹⁰ See, e.g., U.S. v. Jones, 965 F.2d 1507 (8th Cir. 1992), cert den., 113 S.Ct. 346 (1993).

modification for an LSD defendant would result in a significantly lower drug computation for a defendant involved in a conspiracy, a windfall benefit (in addition to, and unrelated to, the reason for the modification, such as the recalculation of LSD weight).

It is difficult to justify this windfall benefit, granted gratuitously by virtue of the new-book process, when such a recalculation is denied to all other defendants sentenced at the same time as the ones receiving a modification for a particular amendment. Consideration of current case law may arguably be appropriate or even necessary where it is directly involved with the calculation of a retroactive amendment, but less clear when involved with changes unrelated to the actual retroactive amendment.¹¹

Procedural Problems

The use of the current set of guidelines generates new factual issues that complicate the sentence modification proceedings and raise procedural issues, which potentially generate litigation.

New Factual Issues and More Evidentiary Hearings

New factual issues arise whenever it is necessary to determine either guidelines or amendments which did not exist at the sentencing, or changes in application determined by case law. Nearly all examples mentioned above involve potential new issues to be determined, including for the additional acceptance adjustment, not in existence prior to November, 1992, and the sweeping clarifications to relevant conduct that have had immense impact on the calculations of drug amounts for defendants in drug conspiracies.

It is obvious that any procedure which introduces new facts to be determined is more likely to necessitate hearings than a procedure which does not do so, or does so to the least extent possible. Under the current procedure, hearings might well be needed to determine, for example, the new third level for acceptance of responsibility, or new interpretations of relevant conduct. These hearings complicate the sentence modifications and potentially generate more litigation, and represent what is an unnecessary burden on the system - particularly if a retroactive amendment in the future is even more widely applied than any now currently listed in §1B1.10.

¹¹ An example might be evolved interpretation of role or firearm adjustments, in the modification of LSD weight-calculation. Application of only the retroactive guideline avoids most of these issues.

If a sentence were modified by the simple application of only the retroactive amendment listed in §1B1.10, new issues of fact are kept to a minimum, as is the need for evidentiary or protracted sentencing hearings.¹²

Presence of Defendant

Rule 43(a), Federal Rules of Criminal Procedure, provides that the defendant "shall be present at...the imposition of sentence, except as otherwise provided by this rule." However, the defendant's presence is excused "at a reduction of sentence under Rule 35," to avoid (Rule 43(c)(4)).¹³ This exception to the rule was made to avoid bringing

"the defendant to court from an institution in which he is confined, possibly at a distant point, if the court determines to reduce the sentence previously imposed. It seems in the interest of both the Government and the defendant not to require such presence, because of the delay and expense that are involved."¹⁴

The rationale for exempting defendants' presence at a sentence reduction applies equally to a sentence modification, especially if the modification proceeding involves few if any contested facts. However, use of the entire new manual is substantially more likely to require the defendant's presence by invoking new factual issues, and becoming more like a sentencing and less like a Rule 35 reduction of sentence.¹⁵

¹² The only issues arising so far in the LSD amendment modifications where only the amendment is applied is the legal issue of the mandatory minimum computation (whether Chapman requires use of the actual weight to determine the statutory penalty).

¹³ The Notes of the Advisory Committee to Rule 43 explain the rationale of excusing the defendant's presence at Rule 35 sentence reductions:

"4. The purpose [of Rule 43(c)(4)] is to resolve a doubt that at times has arisen as to whether it is necessary to bring the defendant to court from an institution in which he is confined, possibly at a distant point, if the court determines to reduce the sentence previously imposed. It seems in the interest of both the Government and the defendant not to require such presence, because of the delay and expense that are involved."

In addition, presumably many defendants who have more time to serve prefer not enduring the uncomfortable long travel and housing at detention facilities to attend a hearing.

¹⁴ Advisory Committee Notes to Rule 43(c)(4), Federal Criminal Code and Rules, 1993 Edition.

¹⁵ Of course a Rule 35 reduction was totally different, but it was often uncontested and did not involve new factual determinations, and typically involved a one-factor analysis (whether the defendant's progress in custody merited sentence reduction). New Rule 35 is

Where a court accepts a defendant's waiver of his or her presence at a §1B1.10 modification of sentence under current procedure, the defendant might later challenge the procedure in a §2255 motion, especially if any new facts are determined to the defendant's detriment in the defendant's absence, or where the defendant shows he or she might have raised issues regarding changes to the entire current manual which were not raised.

Reported Experience with §1B1.10

Most courts which have modified sentences pursuant to §1B1.10 to date apparently have not employed the entire current set of guidelines, but have applied only the retroactive amendment, usually without a hearing, and issued an amended Judgment and Commitment modifying the sentence. See, U.S. v. Woolston, 840 F.Supp. 1 (D.Me. 1993)(applying the LSD guideline); U.S. v. Crosby, 762 F.Supp 658 (E.D. Pa. 1991); U.S. v. Kahn, 789 F.Supp. 373 (M.D. Ala. 1992).

The lack of compliance with the new-book may be due to a misunderstanding of the current procedure,¹⁶ or perhaps resistance to the complication which it entails.¹⁷ At any rate, it is not difficult to imagine that some of these cases which have not followed the new-book procedure might see future litigation over the lack of a hearing and the defendant's presence, because of the many possible issues which were not raised involving current guidelines (such as the extra acceptance level).

The lack of the application of the new book largely explains why the problems noted herein have not already become apparent. Also, many of these problems have remained latent in the LSD cases because the mandatory minimum issue overrides any guideline

similarly one-factor (e.g. how much reduction in sentence the defendant's substantial assistance merited). Any factual determinations were and are narrow.

¹⁶ The Bureau of Prisons' Memorandum of Operations sent to all institutions notifying defendants of the LSD amendment included a sample "Motion to Reduce Term of Imprisonment" which refers to applying only the amended guideline to a previous sentence. See Exhibit B. This may have contributed to the mixed procedures in applying the LSD amendment, so far.

¹⁷ Even though § 1B1.10 itself is a Policy Statement, which allows some discretion in application by the courts (see, e.g., U.S. v. Park, 951 F.2d 634, 636 (5th Cir. 1992)), this particular Policy Statement carries extra authority by specific reference in the statute, 18 USC § 3582(c)(2). Furthermore, if a court undertakes to perform a § 1B1.10 modification, disregard of the Application Note directing the procedure to be used would likely be reversible error, in view of the strength the Supreme Court has given to the Commission's commentary. U.S. v. Stinson, 113 S.Ct. 1913 (1993).

application issues.¹⁸ These problems are most likely to generate litigation in the future, when more courts understand and comply with the new-book requirement, as more amendments accumulate, and some retroactive amendments receive broad application.¹⁹

Clarifying Amendments

Some confusion might arise regarding how the use of clarifying amendments fits into either the current practice or our proposal.

All Amendments Are Not Clarifying

It would not be accurate or logical to argue that the entire current set of guidelines should be applied upon modification because all amendments to the guidelines are essentially clarifying.

First, some amendments are clearly substantive and not clarifying. These include the third level for acceptance of responsibility, some increases in the firearm guidelines, the "authorization" to make acceptance of responsibility available to career offenders, and any change made to accommodate changes in statutory penalties.

Second, the Commission has made a distinction between "clarifying" and "substantive" amendments by specifically providing in some amendments that the purpose is to "clarify", and by distinguishing the use of clarifying amendments from substantive amendments in §1B1.11.²⁰ Third, there is a clear distinction between truly retroactive amendments listed in §1B1.10 and all other amendments, including "clarifying" ones.

¹⁸ Where there was no mandatory minimum, the new calculations are so low that the defendants are released for time-served; where the actual weight triggered a mandatory minimum, it is so much higher than any guideline computations that the defendant's only remedy is to appeal the mandatory minimum issue.

¹⁹ One other, relatively minor, possible confusion with using the whole-book rather than merely the particular guideline derives from the various sets of guidelines which might conceivably be used. The use of the "guidelines currently in effect" would most probably be interpreted to mean those in effect at the sentence modification, although some might claim it to be those in effect when the defendant's motion is filed, or when the retroactive amendment became effective.

²⁰ The guidelines in effect at sentencing should be applied in their entirety. "However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive." §1B1.11(b)(2).

Clarifying Amendments Are Not "Retroactive"

Truly "retroactive" amendments are distinctively different than all other amendments, clarifying or otherwise. Only those listed in §1B1.10 trigger a post-sentencing modification,²¹ and can be applied post-sentencing or even post-appeal.

"Clarifying" amendments generally do not affect previously sentenced defendants. A defendant cannot successfully receive the benefit of a clarifying amendment adopted after his or her sentence, which is not listed in §1B1.10.²² Some circuits have allowed the application of a "clarifying" amendment adopted while a defendant's direct appeal was pending,²³ while others do not allow such so-called "retroactive" application of "clarifying" amendments.²⁴ Even where allowed, the subsequent clarifying amendment is related to the issue before the court on appeal.²⁵

²¹ Policy Statement §1B1.10 states, "If none of the amendments listed in subsection (d) is applicable, a reduction in the defendant's term of imprisonment under 18 USC §3582(c)(2) is not consistent with this policy statement." §1B1.10(a).

²² There simply is no authority for such an application: §1B1.11 allows application of clarifying amendments to an earlier set at sentencing, and §1B1.10 allows modification of an earlier sentence based on listed amendments. The only possible authority would be 28 USC §2255, contending that the sentence was "illegal," in light of current law. However, the "Savings Statute" (1 USC §109) provides that defendants have no right to post-sentencing reduction of sentence when a penalty is subsequently reduced.

²³ See, e.g., U.S. v. Maseratti, 1 F.3d 330 (5th Cir. 1993)(pet. for cert. filed 12/21/93)(allowing the post-sentencing application of the "clarification" of § 1B1.3); U.S. v. Colon, 961 F.2d 41, 44-46 (2d Cir. 1992)(District court has discretion whether to apply amendments beneficial to defendant adopted while a direct appeal is pending).

²⁴ See, e.g., U.S. v. Williams, 905 F.2d 217 (8th Cir. 1990), cert. den., 111 S.Ct. 687 (1991)(refusing application of amendment #266, adopted during the appeal of the case, which would allow an acceptance of responsibility adjustment for career offenders); U.S. v. Mooneyham, 938 F.2d 139, 140 (9th Cir.), cert den., 112 S.Ct. 443 (1991)(also disallowing the post-sentencing application of #266, and discussing the circuit split over whether to allow application of amendments effective at appeal, and noting that one reason to disallow resentencings using such amendments adopted post-sentencing is to discourage the filing of specious appeals, in the hope that subsequent, favorable amendments might be enacted during the pendency of the appeal).

²⁵ See, e.g., U.S. v. Maseratti, 1 F.3d 330 (5th Cir. 1993)(considering the intervening clarification to relevant conduct in deciding what the proper scope of relevant conduct for the defendant should be). This is entirely different than remanding for the district court to apply new, clarifying amendments which are unrelated and not integral to the issue before the appellate court, which would, in effect, give full, actual post-sentencing "retroactive"

At any rate, it is not consistent with the system otherwise, or with the distinction between clarifying amendments and retroactive amendments to apply all amendments along with the retroactive amendment to modify a sentence. Our proposed procedure, to allow only the use of the retroactive amendment itself to modify a sentence, would in fact reinforce the distinction between "retroactive" amendments listed in §1B1.10 and all others kinds of amendments.

Use of All Clarifying Amendments Not Justified

Nor would it be consistent with the use of clarifying amendments to propose that only clarifying amendments in the new book be used to modify a sentence, along with a retroactive amendment. Such a procedure would be as, or more, complicated as the current procedure of using the whole new book.

As noted, clarifying amendments have a specialized use in the sentencing context in certain cases (where the use of the manual in effect at sentencing would present an ex post facto problem), pursuant to §1B1.11. This limited use of "clarifying" amendments serves to preserve portions of the manual in effect at sentencing (the statutorily preferred manual, pursuant to 18 USC §3553), even when that manual is not being used. However, to use clarifying amendments from the new book to "modify" the original sentencing book would have the opposite effect - of adding additional changes to the sentencing book - contrary to statutory preference.

Moreover, all changes to the sentencing manual further increases the disparity in sentencing between a "modified" defendant and other defendants sentenced at the same time.

Nor could one argue that fairness dictates that a defendant receive all post-sentencing favorable amendments, whenever a modification is computed. The "Savings Clause" (1 USC §109) prevents the retroactive application of post-sentencing reductions in penalties.²⁶ The exception is where a penalty reduction is specifically made retroactive, like those listed in §1B1.10.

Finally, the law is too unsettled regarding clarifying amendments to justify broadening the use of clarifying amendments to the sentence modification context. For example, as noted, the courts disagree whether clarifying amendments can be used upon resentencing

force to a clarifying amendment (not listed in 1B1.10), about which there is no pending appeal. As far as can be determined, this has not been done.

²⁶ See, e.g., U.S. v. Jacobs, 919 F.2d 10 (3d Cir. 1990)(holding that ineligibility for probation is a type of penalty, and therefore the savings statute prohibited the application of the amendment to defendant), cert den., 111 S.Ct. 1333 (1991); U.S. v. Garcia, 877 F.2d 23 (9th Cir. 1989)(holding that a special parole term is a penalty and therefore the amendment to 21 USC §841(b) is not retroactive).

when in effect at the time of a direct appeal.²⁷ This is partly because they even disagree on when an amendment is actually clarifying: that is, an amendment passed to "clarify" a split in the circuits is only "clarifying" to the circuits which have held in concert with the amendment; however, it represents a substantive change in the law to those circuits which have held contrary to the Commission's clarification. Therefore, some circuits hold that an amendment cannot be clarifying (regardless of its own terms) if it conflicts with prior circuit law.²⁸

Nor can any useful analogy can be drawn from when courts vacate a sentence and order a "resentencing", because a) the courts do not agree on resentencing procedure,²⁹ and b) a resentencing is only partially analogous to a sentence modification procedure, where the original sentence is not vacated but merely modified. If a complete new book is not applied at a resentencing following a vacation of the original sentence, it is even less likely to be applied at a sentence modification.

Of course, in the rare case where a clarifying amendment is directly and integrally involved in the application of a retroactive amendment, it would be applied while applying the retroactive amendment.

Therefore, to allow all clarifying amendments to be applied during a sentence modification process along with the retroactive amendment would complicate rather than streamline the process, and would still result in disparity among defendants sentenced under

²⁷ See notes 23 and 24, *supra*; also, *see* discussion by J. White, dissenting on denial of certiorari in *Early v. U.D.*, 112 S.Ct. 330 (1991). The Supreme Court in *Stinson v. U.S.*, 113 S.Ct. 1319 (1993), held that commentary is binding on subsequent circuit law, but did not decide whether a clarifying amendment can be applied "retroactively" upon appeal to a prior sentence.

²⁸ For discussion of this and other points, see "Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues", FJC, August 1993, §1(E), comparing, e.g., *U.S. v. Saucedo*, 950 F.2d 1508, 1512-1517 (10th Cir. 1991) and *U.S. v. Prezioso*, 989 F.2d 52,53-54 (1st Cir. 1993), with *U.S. v. Fitzhugh*, 954 F.2d 253,255 (5th Cir. 1992) and *U.S. v. Caballero*, 936 F.2d 1292, 1299 (D.C.Cir. 1991), *cert den.*, 112 S.Ct. 943 (1992).

²⁹ Some courts have held that new factors could be considered upon resentencing, and the sentence is determined de novo, where a sentence has been vacated and remanded for resentencing. *See, e.g., U.S. v. Smith*, 930 F.2d 1450, 1456 (10th Cir.), *cert den.*, 112 S.Ct. 225 (1991). Other courts do not allow de novo sentencing, but a narrower "modification", similar to a § 1B1.10 proceeding. *See, e.g., U.S. v. Apple*, 962 F.2d 335 (4th Cir. 1992); *U.S. v. Prestemon*, 953 F.2d 1089 (8th Cir. 1992). In *U.S. v. Maseratti*, 1 F.3d 330 (5th Cir. 1993), the court allowed the application of the "clarification" to §1B1.3 upon resentencing, but directed specifically that "the revised guidelines are not applicable to the Appellants" upon resentencing, and that the resentenced should be done only "in light of the clarification" at issue. *Id.* at 340.

the same book, originally. The application of only the retroactive amendment (and any clarifying amendment directly involved with its application) maintains the integrity of the original sentencing guidelines to the maximum extent possible.

Reconsideration of Use of the New-Book in §1B1.10

Statutory Authority

The Commission clearly has statutory authority to determine the procedure for making certain amendments retroactive. 28 U.S.C. §994(u) provides:

"If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

This authority appears to be broad enough to allow the Commission to decide either that the entire current manual be used or that only the retroactive amendment be used in effecting a sentence modification. However, 18 USC §3553 requires the court to apply the guidelines in effect at sentencing. Therefore, to apply only the retroactive amendment comports with retaining the manual in effect at sentencing more than does the application of a new manual. Thus, current practice does not conform as closely to statutory authority as does our proposal.

The statutes regarding modification appear not only to allow, but to support, the use of only the retroactive amendment, because they refer to reducing (28 U.S.C. §994(u); 18 U.S.C. §3582(c)), or modifying (18 U.S.C. §3582(c)) a term of imprisonment. "Modification" and "reduction" imply a specific change to an otherwise unchanged whole, rather than the creation of a new whole.

Retention of One-Book for Sentencing

It is undisputed that the "one-book" rule (use of an entire set of guidelines), as set out in §1B1.11(c), is appropriate for the sentencing process, in order to "preserve a cohesive and integrated whole."³⁰ Our proposal would not affect or diminish the "one-book" rule for sentencings in any way, because procedures under §1B1.10 are not sentencings. In fact, we believe our proposal would actually reinforce that rule, by preserving the manual which was used at the actual sentencing to the maximum extent possible. Our proposal would allow a specific, narrow modification of a previously imposed sentence which remains

³⁰ U.S. v. Stephenson, 921 F.2d 438 (2d Cir. 1990).

unchanged in all other respects.³¹ This also, to the maximum extent possible, preserves uniformity between the sentencing of this defendant and that of all the other defendants sentenced at the same time as this defendant.

A sentence modification using the entire new manual allows the possibly dangerous interpretation that the modification is a complete resentencing, with any number of possible implications which may result. The original sentencing is not vacated. Only the imprisonment component is involved.³² The facts of the defendant's criminal history are those not at the time of modification, but those at the time of the (actual) sentencing.³³ Also, as noted, to use the new manual is actually contrary to the statutory mandate to use the guidelines in effect at the sentencing.

Any symmetry or consistency gained in trying to apply an entire new book to modifications as well as to sentencings is outweighed by the increase in disparate applications and complications created by doing so. As noted, we believe that to apply only the retroactive amendment, in a "laser-beam" modification procedure, better preserves the original, otherwise coherent, sentence. Moreover, a streamlined retroactive procedure would also pose less of an administrative burden to be factored into the decision on retroactivity by the Commission. Our proposal would also help to avoid the paralysis of the system which could result from application of future amendments (such as strong modifications to drug computations) which are potentially very broadly applied, if such amendments are made retroactive.

Further, as a policy matter, as well as a matter of expediency and clarity, the wholesale reconsideration of an entire sentence under the auspices of the retroactive application of a single guideline to modify a sentence should not be permitted. Further, the current procedure not only complicates proceedings, but does not appear to support Congress's efforts to bring finality to the process (for example, by repealing the "old" Rule 35 which allowed reconsideration of any aspect of a sentence).

Finally, perhaps the most troublesome problem with the current procedure concerns simple fairness and uniformity of application - certainly one of the main goals of the guideline system. Applying the current manual generates disparity in guideline application

³¹ In the rare situation where two amendments or guidelines actually cross-affect each other, and one is made retroactive, rather than make the whole book retroactive the Commission could designate both guidelines as retroactive.

³² However, the more drastically and profoundly a sentence is modified by applying a de novo calculation of the guidelines, other factors such as offense classification and fine calculation can also be affected.

³³ In considering whether to reduce the sentence, the court should "consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect at that time." § 1B1.10 (emphasis added).

among defendants. Defendants sentenced pursuant to the set of guidelines in effect, for example, in 1991 are all sentenced according to the same rules. Those defendants should remain sentenced under that same set of rules in all respects other than the application of a specific amendment which has been expressly made retroactive. The current system would lift those few 1991 defendants out of the 1991 book, and apply the subsequent (e.g. 1994) book to them for all respects, including many aspects of which are not only unrelated to the reason for the modification, but denied to all the other 1991 defendants sentenced at the same time as these few defendants.

Conclusion

A reconsideration of the procedure for applying amendments specifically made retroactive is needed, now that several years of amendments have been developed, and some of the amendments are being more widely applied. Problems which were not apparent prior to years of accrued amendments or mass applications, are now becoming evident.

The reasons the current procedure needs modifying involve major concerns for the guideline system, first, avoidance of unnecessary complication, hearings, or litigation, and secondly, avoidance of disparate application of the guidelines.

For all these reasons, the Judicial Conference Committee on Criminal Law, through the Subcommittee on Criminal Law and Sentencing Procedures, asks that the Commission amend Policy Statement §1B1.10 to provide that only the amendment made retroactive by that Policy Statement be used to compute the modified sentence. The attached Exhibit A contains some suggested versions of how such a procedure might be worded, along with some suggested commentary.

Proposed Amendment to §1B1.10 U.S.S.G.¹

§1B1.10

(b) In determining whether a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. §3582(c)(2), the court should consider the sentence that it would have originally imposed had the AMENDED guidelines, as amended, been in effect at that time.

[or: the guideline, as amended, been in effect at that time]
[or: the guideline listed in (d), been in effect at ...]

Commentary, Application Note 1 to §1B1.10:

1. Although Eligibility for consideration under 18 U.S.C. §3582(c)(2) is triggered only by an amendment listed in subsection (d) of this section. The amended guideline range referred to in subsections (b) and (c) of this section is to be determined by applying all amendments to the guidelines (i.e., as if the defendant was being sentenced under the guidelines currently in effect) SUBSTITUTING THE AMENDED GUIDELINE FOR THE EXTANT GUIDELINE USED AT THE SENTENCING, AND RECOMPUTING THE SENTENCING RANGE, WITH ALL OTHER ASPECTS OF THE SENTENCE CALCULATION REMAINING UNCHANGED.

[Suggested addition to commentary: THE AMENDED GUIDELINE, INSERTED INTO THE ORIGINAL SET OF GUIDELINES USED AT SENTENCING, SHOULD BE USED TO CALCULATE THE MODIFIED SENTENCING RANGE, BASED ON THE LAW AND FACTS AS RELIED UPON, AND DETERMINED BY, THE SENTENCING COURT, IN ORDER TO EFFECT A NARROW AND SPECIFIC MODIFICATION OF THE ORIGINAL SENTENCE IMPOSED, RATHER THAN A NEW SENTENCE OR A RESENTENCING.]

Other optional versions or additions to commentary:

ALL OTHER ASPECTS OF THE GUIDELINE COMPUTATION ORIGINALLY USED AT THE SENTENCING WILL REMAIN IN EFFECT. OTHER (BUT NON-LISTED) AMENDMENTS PASSED SUBSEQUENT TO SENTENCING WOULD NOT BE APPLIED IN DETERMINING THE MODIFIED SENTENCING RANGE.

THE USE OF AN AMENDED GUIDELINE IN THE CONTEXT OF AN EARLIER SET OF GUIDELINES FOR SENTENCE MODIFICATION DOES NOT AFFECT, AND IS NOT CONTRARY TO, THE RULE IN §1B1.11(b)(2) U.S.S.G. APPLIED TO SENTENCINGS, THAT "THE GUIDELINES MANUAL IN EFFECT ON A PARTICULAR DATE SHALL BE APPLIED IN ITS ENTIRETY." A MODIFICATION OF A PREVIOUSLY IMPOSED SENTENCE PURSUANT TO THIS POLICY STATEMENT IS NOT A SENTENCING.

¹ Underlined language is to be removed, capitalized language is to be inserted.

259-93 (5880)
 October 26, 1993
 Attachment A, Page 1

THIS IS ONLY AN ILLUSTRATIVE PLEADING. INMATES SHOULD CONTACT THEIR ATTORNEYS AND ARE RESPONSIBLE FOR DRAFTING THEIR OWN MOTION.

IN THE UNITED STATES DISTRICT COURT FOR
 THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Case No. CR-1-90
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

MOTION TO REDUCE TERM
OF IMPRISONMENT

Comes now the defendant John Doe, and moves this Court to reduce the above named defendant's sentence of imprisonment, and as grounds therefor states as follows:

1. On December 1, 1990, defendant John Doe was sentenced to the custody of the Bureau of Prisons for Eighty months, plus a Four year term of Supervised Release, pursuant to his plea of guilty of Distribution of LSD, in violation of 21 U.S.C. § 841.

2. The defendant is currently incarcerated at F.C.I. Fort Worth.

3. Effective November 1, 1993, the United States Sentencing Commission amended U.S. Sentencing Guideline 2D1.1(c), which establishes the offense levels for LSD offenses, and voted to make that amendment retroactive.

4. Applying the amended Guideline may result in a shorter prison term for John Doe.

EXHIBIT B

[78]

WHEREFORE, it is respectfully requested that the Court reduce defendant's term of imprisonment pursuant to Title 18 U.S.C. § 3582(c)(2), and in conformity with amended U.S. Sentencing Guideline 2D1.1(c).

DATED:

Respectfully submitted,

John Doe