

United States Sentencing Commission

*Public Comment Received on
Proposed Guideline Amendments*

March 1994

001-94

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

PROBATION OFFICE

JIM MCKINLEY
CHIEF PROBATION OFFICER

December 31, 1993

ROOM 234
FEDERAL BUILDING
157 N. MID-AMERICA MALL
MEMPHIS, TN 38103
901-344-3255

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

Attention: Public Information Officer
Re: Proposed Amendments

Dear Commissioners:

I am writing to call to the Commission's attention a sentencing issue which, I believe, needs addressing at the next amendment cycle.

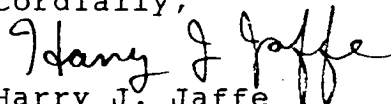
Guideline 4A1.2, comment.(n.3), defines "related cases" by stating, in part, that these are cases "consolidated for trial or sentencing." Within the last year, our Court has been receiving with ever increasing frequency from defense counsel nunc pro tun orders signed by state criminal court judges which consolidate cases retroactively that were disposed of years and years ago. The sole purpose has been to defeat the more onerous sentencing provisions of Guideline 4B1.1 "Career Offender."

For example, the enclosed "Order of Consolidation" signed Oct. 12, 1992, consolidates nunc pro tun three felony convictions disposed of in 1989 (the digits "89" in the masthead of the order indicate the year of filing). While none of our judges has honored any of these retroactive orders, it has been a very, very close call on one or two.

To alleviate this problem of violent, repeat offenders escaping the provisions of 4B1.1, I propose that the Commission add a provision to 4A1.2, comment. (n.3), to the effect that "prior sentences are considered/related if they resulted from offenses that were consolidated for trial or sentencing at the time of said trial or sentencing."

I am certain that this practice of securing nunc pro tun orders consolidating long-ago-disposed-of convictions will spread like the Beijing flu, incapacitating the "Career Offender" provision. For that reason, I am requesting that the Commission set some sort of time frame for the consolidation of cases under 4A1.2, comment.(n.3).

Cordially,


Harry J. Jaffe
Deputy Chief

IN THE CRIMINAL COURT OF SHELBY COUNTY TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

STATE OF TENNESSEE

vs.

NO. 89-04020
89-08148-49

FREDDIE HOWARD,

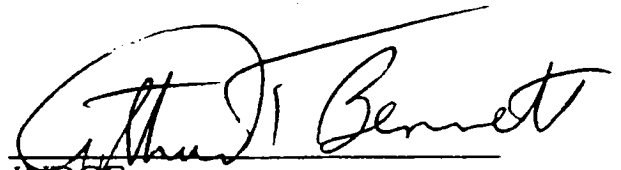
Defendant

ORDER OF CONSOLIDATION

This cause came on to be heard on the 12 day of October, 1992
upon the motion of the defendant, Freddie Howard. Upon good cause shown and for
clarification of the record, the Court finds the following:

1) That the criminal offenses attempted felony in no. 89-04020; theft under
\$10,000.00 in no. 89-08148; and violation of T.C.A. 55-5-113 in no. 89-08149 were
consolidated for the purpose of sentencing in order that the defendant could receive
concurrent time.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that case nos.
89-04020, 89-08148-49 were consolidated for sentencing on the 7 day of
November, ¹⁹⁸⁹1992, in order for the defendant, Freddie Howard, to receive concurrent
time, and the records should reflect such consolidation.


JUDGE *re: Pro. Turn Cl*

John M Hartman
Molly S Hartman
1081 Rosalie Ave
Lakewood, OH 44107

January 6, 1994

Judge William Wilkins, Jr
US Sentencing Commission
One Columbus Circle, NE Suite 2-500
Washington, DC 20002-8002

Dear Judge Wilkins:

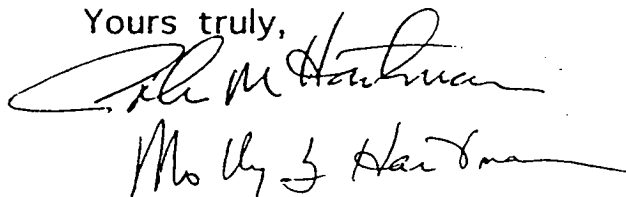
We would like to share our opinion regarding the current Federal Sentencing Guidelines for those people convicted of cultivation of cannabis hemp.

We feel that currently there is some disparity in the sentencing scheme that one cannabis plant would yield one kilogram or 1000 grams per plant. We have received information from Dr Mahoud A Elsohly, Research Professor Coordinator of the Drug Abuse Research Program from the Research Institute of Pharmaceutical Sciences, school of Pharmacy, University of Mississippi located in Oxford, Mississippi, that indicates yields of 100 grams per cannabis plant is more realistic.

The current Guidelines are arbitrary and irrational and should be changed to 100 grams per plant rather than 1000 grams per plant now in effect.

Thank you for this opportunity to express our feelings on this issue that is now before the Sentencing Commission.

Yours truly,

The block contains two handwritten signatures. The first signature is for John M Hartman, written in dark ink with a stylized, cursive script. The second signature is for Molly S Hartman, also in dark ink, appearing more fluid and less formal than the first.

John M Hartman
Molly S Hartman

LAW OFFICES

PRINCE, KELLEY, MARSHALL & BASSINGTHWAIGHTE, P.S.

BANK OF CALIFORNIA CENTER, SUITE 3250

900 FOURTH AVENUE

SEATTLE, WASHINGTON 98164-1005

ROBERT E. PRINCE
J. PORTER KELLEY
DAVID S. MARSHALL
JOAN BASSINGTHWAIGHTE
CRAIG E. COOMBS

TELEPHONE
(206) 382-0000
FAX (206) 382-9109

January 6, 1994

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

Attention: Public Information

Re: Comment on Proposed Amendments to Sentencing
Guidelines

Dear Commissioners:

I write to express my views on several proposed amendments to the guidelines.

I favor proposed Amendment 8(A), keying the mandatory minimum levels in the Drug Quantity Table to levels 30 and 24, and proposed Amendment 33(A) to modify the provisions in section 2D1.1 that distinguish between cocaine and crack cocaine at the ratio of 100-to-1.

As a criminal defense lawyer, I have seen how disproportionately harsh the current provisions are. In particular, I have seen that the 100-to-1 ratio means that black people do more time than white people, since most crack dealers are black.

I also support proposed Amendment 17(A), clarifying the operation of section 1B1.3 concerning conspirator liability. I have two clients who are serving sentences of about eighteen years each because they were found to be minor players in large drug conspiracies. Any step to see that

United States Sentencing Commission
January 7, 1994

Page 2.

offenders are punished according to their own particular
culpability is a step in the right direction.

Thank you for your attention.

Yours truly,

A handwritten signature in cursive script, appearing to read "David S. Marshall". The signature is written in dark ink and is positioned above the printed name.

DAVID S. MARSHALL

DSM;sd



United States Attorney
Eastern District of Louisiana

Hale Boggs Federal Building
501 Magazine Street, Second Floor
New Orleans, Louisiana 70130

(504) 589-2921
FTS 682-2921

January 10, 1994

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

RE: Proposal #32

Dear Judge Wilkins:

Our criminal justice system is based upon a premise of all or nothing. One pleads guilty and admits guilt or avails himself of all legal avenues to defend his position, and through the adversary nature of the proceeding, the truth emerges. As a prosecutor, I derive a sense of security from a belief that the system adequately protects the innocent from a mistaken conviction.

This proposal awards those who fight half-heartedly. There is no place for that in our system. How does one determine that a motion that could have been made can ethically not be made, and a benefit derived? In any case, it is already a lawyer's ethical duty not to make frivolous motions and stipulate appropriately. Why reward defendants lucky enough to have ethical lawyers or provide consolation prizes to those so unlucky as to have non-aggressive ones? This does not promote the overall goal of the fair and just administration of justice and brings into question the entire system.

Sincerely,

Robert J. Boitmann
United States Attorney

RJB:as
misc\guidelin.ltr

Rocket Empire Machine

Div. Engine Parts Network

6935 N.E. Glisan

Portland, Oregon 97213

(503) 257-7947

Ted Stanwood, President

United States Sentencing Commission

One Columbus Circle, N.E., Suite 2-500, South Lobby

Washington, D.C. 20002-8002

11 Jan 94

To Whom it May Concern:

It appears that we finally have an opportunity to correct a wrong in the Laws on sentencing for Marijuana. I understand that this Commission will soon consider changing the guidelines to accurately reflect the amounts a criminal is dealing in.

Many persons are now in prison, at huge costs to us, the taxpayers, for dealing in volumes that are pure fantasy. Everyone knows that it is impossible to produce 1000 grams of this drug per plant, yet we convict and sentence our people on that basis, if they are caught with more than 50 plants.

This is a great wrong, and should be corrected. I also feel quite strongly that the law should be applied fairly to those now in jail, as well as those who will be charged in the future.

It is so incredibly important that the law be fair, and right, for all. That is the only way our laws will hold respect.

Correcting this error would have the added benefit of returning many persons to productive lives, at great savings to the taxpayers.

I think we can all afford to incarcerate hardened criminals, but I protest loudly paying taxes to jail persons who have done no more than make a stupid mistake.

I urge that this commission take the steps now that will make these laws fair for all.

Thank you,

Ted Stanwood

006-41

UNITED STATES GOVERNMENT
MEMORANDUM

DATE: January 14, 1994

REPLY TO

ATTN OF:

BM Santella
Michael J. Santella, Supervising USPO E/D PA

215-597-8583

SUBJECT: Proposed Sentencing Guideline amendment

TO: U.S. Sentencing Commission

The proposal that follows is an attempt to reduce the inordinately long Sentencing Guidelines that apply to street sellers involved in long-term conspiracies assuming correct application of the Relevant Conduct standard. I believe it has merits above other proposals which seek to cap the defendant's culpability by only considering the amount of drugs distributed within a limited period of time[one week or one month}. This type of limitation ignores the highly aggravating factor that such defendants made a conscious decision each and every day to peddle drugs within the community.

The proposed amendment could also be used in deciding whether mandatory minimum terms apply. A few application notes would be necessary for clarification purposes. I have some thoughts on this as well. If you care to hear them, let me know.

Section 2D1.1 {a} [4]

Where the offense level is established largely through the attribution of drugs distributed by others within a jointly-undertaken conspiracy, and the defendant had no decision-making authority and performed only unskilled or unsophisticated tasks, did not possess a firearm or engage in violent conduct during the offense of conviction and all relevant conduct, reduce the offense level established by aggregating all quantities involved in the offense by 25%.

200 PARK AVENUE
NEW YORK, N.Y. 10186-0153
TELEPHONE (212) 878-8000
FACSIMILE (212) 878-8375
TELEX 234493 RKWUR

444 SOUTH FLOWER STREET
LOS ANGELES, CA 90071-2901
TELEPHONE (213) 689-2900
FACSIMILE (213) 689-2999

58 COLEMAN STREET
LONDON EC2R 5BE, ENGLAND
TELEPHONE 44-71-628-0101
FACSIMILE 44-71-638-2008
TELEX 884964 USLAW G

Rogers & Wells
601 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

TELEPHONE (202) 434-0700
FACSIMILE (202) 434-0800

47 AVENUE HOCHÉ
75008 PARIS, FRANCE
TELEPHONE 33-1-47-63-11-00
FACSIMILE 33-1-42-67-50-81
TELEX 651817 EURLAW

53 AVENUE MONTAIGNE
75008 PARIS, FRANCE
TELEPHONE 33-1-42-25-64-45
FACSIMILE 33-1-42-89-22-03

LINDENSTRASSE 37
60325 FRANKFURT/M I
FEDERAL REPUBLIC OF GERMANY
TELEPHONE 49-69-97-57-11-0
FACSIMILE 49-69-97-57-11-33

January 27, 1994

WRITER'S DIRECT DIAL NUMBER

(202) 434-0764

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:

This letter is in response to the Sentencing Commission's request for comment on proposed amendment number 11 which would amend and consolidate U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses.

Proposed amendment number 11 with the modifications suggested below would be in the public interest and should be adopted because it would tie the base offense levels for money laundering violations more closely to the underlying illegal conduct. The suggested modifications would help to carry out this worthwhile objective.

The current money laundering guidelines operate to thwart the Commission's policy determinations because they escalate the sentences above the punishment which the Commission determined was appropriate for non-violent non-drug crimes. As the Commission's Money Laundering Working Group's study clearly demonstrates, simply by adding a violation of 18 U.S.C. §§ 1956 or 1957 the government has been able to obtain a significantly higher guideline sentencing range than the underlying offense would yield in the normal case. The Commission staff's study of 1991 sentences showed that 40 percent of the prosecuted money laundering cases were not related to drug trafficking and in those cases the offense level for the money laundering conduct exceeded that for the underlying conduct 96 percent of the time.

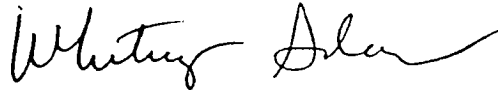
The following modifications to the proposed amendment would better achieve the Commission's stated goal and the public's interest in relating the offense levels more closely to the offense level for the underlying offense from which the funds were derived.

First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level in proposed § 291.1(a)(2) or (3). This offense level then would be increased by any specific offense characteristics under proposed § 291.1(b). To achieve this result, I would suggest deleting from the instruction in § 291.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3).

Second, the Commission should make the base offense level in proposed § 291.1(a)(3) the same as the base offense level for fraud and deceit (§ 2F1.1). Therefore, I would suggest changing proposed § 291.1(a)(3) to a base offense level of 6 plus the number of offense levels from the table in § 2F1.1

I strongly support the Commission's effort to make the sentencing guidelines uniform and fair.

Very truly yours,



Whitney Adams

cc: Amy Rudnick

TO: U. S. SENTENCING COMMISSION
#1 COLUMBUS CIRCLE, NE
SUITE 2-500
SOUTH LOBBY
WASHINGTON D. C. 20002-8002

ATTENTION: MR. MICHAEL COURLANDER

FROM: C. U. R. E. (Citizens for the rehabilitation of Errants) on behalf of the
nearly 90,000 federal prisoners

SUBJECT: REQUEST FOR PUBLIC COMMENT (published in Vol. 58, #243 of the Federal Register
dated December 21, 1993 at page 67522)

C. U. R. E. would like to offer the following comments and proposals relevant to the published request of the Commission. These comments are in the Commission's numbered order:

#7. C.U.R.E. supports the availability of departures for the cultural characteristics or collateral consequences to a Defendant that might come to the attention of public officials. In particular, INS detainees invariably are held far past the termination of their sentences. Until the INS sees fit to deport those detainees whose sentences are finished when those sentences are terminated, it is only fair that since INS holds are suffering collateral consequences not taken into consideration by the Commission, they should have discretionary departures available to them to mitigate the extra time they are kept in prison. C.U.R.E. feels that departures should be allowed for any and all unusual cases, not just those under the heading of "public corruption."

#8(A). C.U.R.E. agrees the lowering of levels for drug and other violations is a good first step towards a more just sentence. However, this lowering of the highest grades, is not enough because at the higher levels, sentence add-ons and enhancements are routinely utilized to make the eventual sentence oftentimes the equivalent of a life term.

#8(B). C.U.R.E. opposes Option #2 and any other amendments that sentence "as if the Defendant had been convicted of a separate count charging such conduct." C.U.R.E. opposes any sentence that provides enhancement for conduct for which a Defendant has not been convicted.

#8(C). C.U.R.E. supports a ceiling in Chapter 2 offense levels for Defendants who receive a mitigating role adjustment under §3B1.2 (Mitigating Role). The current guidelines over-punish low level Defendants because the sentences are now driven by drug quantities. C.U.R.E. would also support a greater level departure than is now available under present guidelines practice.

#8(D). C.U.R.E. supports deemphasis on drug quantity to drive all drug sentences and instead supports emphasis on associated violence as a sentence enhancement. Instead of a broader range of quantity at each level, the levels themselves for the present quantities should be lowered.

#9. C.U.R.E. opposes the proposed amendment to §3B1.1(a) and (b) because it appears to simply lower the threshold for "supervisor" liability from five to four participants. C.U.R.E. also strongly opposes the proposed amendment to Note 1 of the Application Notes of the Commentary to §3B1.1, which will allow undercover law enforcement agents to be counted as participants. This concept totally contradicts the history of the criminal law of this country. Requiring recruitment by a criminally responsible participant simply makes a factual issue, which will ultimately be lost by most Defendants because

of credibility problems (posturing by law enforcement personnel will always triumph over a plea of entrapment by the criminal participant).

The proposed amendment for Note 2 of §3B1.1 should be scrapped. Holding a Defendant responsible as a supervisor of people he doesn't know and never spoke to (thus never knew he was supervising) results when a person can be supervised "indirectly." Intent should be the criteria for management and supervision!

C.U.R.E. also opposes Options #1 & #2 for No. 5 in Application Notes under §3B1.2 because possession of a firearm has nothing to do with a participant's role in the offense. Possession of a firearm is already punished stringently by other Guideline provisions.

#11. C.U.R.E. opposes proposed new §2S1.1(b)(2) and Application Note 5, unless a more specific definition for the word "sophisticated" is forthcoming. In its present form, almost any activity can and will be defined as "sophisticated" by each and every AUSA confronted with a Money Laundering offense (resulting in the Defendant having two levels added to his severity). Sophisticated activity should be that which is extraordinarily difficult to detect, so that run-of-the-mill activity applicable in most cases will not qualify. The definition of "sophisticated" in this section should be at least as well defined as the proposed Amendment #12(A).

#12(B) & (C). C.U.R.E. opposes these proposed amendments and all other amendments that raise sentences higher rather than keeping the level as is and adjusting the other levels in that particular table lower.

#13(C). C.U.R.E. would like to see this particular proposed change go farther because the present proposal does not take into account the discretion vested in AUSAs under Rule 20 FRCrP to prosecute separately cases of multiple drug dealing in more than one jurisdiction. If a drug dealer deals twice with police undercover agents in two jurisdictions and the AUSAs decide to prosecute twice for two separate arrests, the Defendant becomes liable as a "Career Offender," whereas, if only one arrest is made for the two separate violations, the Defendant is not a candidate for enhancement. The draconian sanction for "Career Offender" status should not hang on such procedural niceties for Defendants whose criminal activity happens to be "continuing," whether there is one arrest or two, one AUSA or two, one jurisdiction or two.

#13(D). C.U.R.E. opposes this change because a crime should be considered "violent" only where violence occurs. Burglary of dwellings are not ordinarily crimes of violence and should not be so defined. If violence does occur, that is the time for enhancement, not before! "The conduct of which the Defendant was convicted" should be "the focus of the inquiry" - in the same manner as proposed amendment #13(E)'s new Note 3. C.U.R.E. still opposes the use of a "controlled substance offense" as an equivalent to a "crime of violence" for enhancement purposes (i.e. §4B1.2).

#14. C.U.R.E. supports the proposed amendment to §5K2.0 allowing sentence departures in "exceptional cases," so as to give a judge some discretion in those cases that are truly out of the ordinary.

#16. Aging prisoners: C.U.R.E. has steadfastly called for a new look at the issue of geriatric offenders. There are thousands of aged and infirm federal prisoners, most of whom are housed at the U. S. Medical Center at Springfield, MO., FMCs Rochester and Carville and FCIs Ft. Worth, Butner and Petersburg. Title 18 U.S.C. §3582(c)(1)(A), as it is presently written, is totally inadequate to address the compelling reasons why many of those inmates should be released, simply because it is almost never utilized. This particular code section augments the old Title 18 U.S.C. §4205(g) for Old Law inmates, which is also almost never used. Terminally ill inmates, who should be allowed

to die with dignity are still denied release by an intransigent Bureau of Prisons, who together with the collusion of vindictive AUSAs, feel that it is their mission to only allow these inmates direct transfer to the morgue.

In the year 1993, approximately a dozen inmates died at FCI Ft. Worth. It is reported that over 50 inmates have died in one month at USP Springfield. The Commission is strongly urged to design appropriate criteria for the release of terminally ill inmates and formulate additional criteria for the release of those inmates who are a burden on the federal prison budget (and inevitably the American taxpayers) due to age and/or infirmity and who have long since paid their dues to society. Statistics show that these inmates cost twice as much to house than the general prison population and have little propensity to commit crimes. Those prisoners over 60 years of age should qualify for some relief.

#24. C.U.R.E. supports this proposed amendment that suggests where a Defendant establishes he was not reasonably capable of producing a negotiated amount of drugs or did not intend to produce that amount, the negotiated amount cannot be used for Guideline sentencing purposes.

#27. C.U.R.E. opposes this proposed amendment that provides a 4 level increase if violence or substance abuse offenses are done by members of a "gang." First, the term "gang" is poorly defined and could be used against any group of friends who conspire together and who never thought of themselves as a "gang." Second, a Defendant should not be held more liable for a crime that does not involve the gang, but where the Defendant happens to be a gang member. Third, substance abuse sentencing levels are high enough as it is without subjecting so-called gang members to higher penalties solely because of their social associations.

#28. C.U.R.E. opposes any proposed amendment that calls for higher penalties for offenses in "federal facilities" and/or "school zones" without a) a tight definition of what is to be included in the term "federal facility" (a federal prison, a VA hospital and any building with a federal office in it would all presumably qualify) and b) proof that the Defendant had the requisite knowledge that where he was was a federal facility and/or a school zone, so that intent to violate this provision is proven. As it is now, school zone enhancements apply to Defendants who don't even know that a school is there and schools have been held to include any place where any kind of student is taught.

#30. C.U.R.E. conditionally supports a proposed amendment, which would add additional distinctions for the Criminal History Category, but only if it makes reductions in overall sentences, not additions. C.U.R.E. supports distinctions for specific types of offenses and clean records, but withholds comment until a particular proposed amendment is published and comment invited.

#31. C.U.R.E. supports the modification of §1B1.1(b), so that the amendment designated for retroactive application is applied together with any other amendments that would reduce incarceration time for the Defendant. It makes no sense to apply an amendment retroactively and provide relief for the Defendant, if taken together with a new revised Guideline Manual, the relief becomes ephemeral because the new Manual and retroactive amendment results in an increase or no change in the Defendant's sentence. Any relief from retroactive application should be real relief!

#32. C.U.R.E. urges a one level decrease for a Defendant who goes to trial, but avoids actions that unreasonably delay or burden the proceedings. However, this amendment should eliminate the words "undue burden on the government," otherwise a non-cooperating Defendant, who has been forced to go to trial because of nothing else to gain, will always be opposed by the AUSA who has to try the case.

#33(A). C.U.R.E. strongly urges the acceptance of FAMM's proposed amendment to eliminate differences between cocaine and crack offenses. The ludicrous disparity, which unfairly discriminates against the mostly black users of crack, should be changed to a 1:1 ratio. Otherwise, the Commission has every reason to formulate higher sentences for "skunk" weed as opposed to common Mexican brown marijuana and higher sentences for China white heroin as opposed to Mexican brown and any other silly distinction between different grades of purity of different drugs.

#33(B). C.U.R.E. strongly urges the acceptance of 100 grams of marijuana as a ratio for each plant, no matter how many plants are seized (the one kilo per plant equivalency now being used for large seizures has no support from any marijuana experts used by the Government, no less any defense expert). Male plants should be excluded (nobody smokes male plants knowingly) and plants that are immature and not harvestable should be excluded as well.

#34(A) & (B). C.U.R.E. opposes any increase in sentence in multiple victim cases, unless the Defendant knew there would be more than one victim and so intended it.

Once again, C.U.R.E. thanks the Commission for the opportunity to provide input to the rulemaking process that affects the already or soon-to-be incarcerated.

DATED, the 21st day of January, 1994.

009-94

LAW OFFICES
SCHWALB, DONNENFELD, BRAY & SILBERT

A PROFESSIONAL CORPORATION

BURTON A. SCHWALB
CHARLES R. DONNENFELD
JOHN M. BRAY
EARL J. SILBERT
DAVID J. CURTIN
CHARLES B. WAYNE
STEVEN SARFATTI
LUCINDA J. BACH
CARY M. FELDMAN
JOSEPH M. JONES
ADAM S. HOFFINGER
KEVIN M. DINAN
DEBRA ORNSTEIN
ROBERT A. SALERNO
CARMEN R. KELLEY
RICHARD J. OPARIL
JAMES T. PHALEN
JEFFERY A. TOMASEVICH
JAMES P. KENNEDY
ROBERT J. McAULIFFE
ANTHONY W. VERRAN
JEFFREY D. CLARK

SUITE 300 EAST
1025 THOMAS JEFFERSON STREET, N. W.
WASHINGTON, D. C. 20007-5207

TELEPHONE (202) 965-7910

FACSIMILE (202) 337-0676

*NOT ADMITTED IN D.C.

WRITER'S DIRECT DIAL

OF COUNSEL
ELLEN KABCENELL WAYNE

February 3, 1994

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:

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 21, 1993 edition of the Federal Register (Vol. 58, No. 243, Part V). Part of my law practice in Washington, D.C. is in the area of white collar crime. I also have the opportunity to serve on the Practitioners' Advisory Group to the Sentencing Commission. The purpose of this letter is to comment on proposed amendment number 11, which would amend and consolidate U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses.

I urge adoption of proposed amendment number 11 with the modifications suggested below. The proposal would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds. The suggested modifications are intended to help ensure this result.

The commission's proposed amendment constitute a much needed reform. The current Guidelines encourage prosecutors to seek money laundering convictions in non-narcotics related money laundering cases because the resulting sentences under the money laundering sentencing guidelines are much harsher than for the underlying offense, and asset forfeiture (which is not taken into consideration under the current Guidelines) is available. As the October 14, 1992, report to the Commission Staff Director from the Commission's Money Laundering Working group clearly demonstrates,

Mr. Michael Courlander
February 3, 1994
Page 2

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. §§ 1956 or 1957 to the indictment. Moreover, the results of the Working Group's study of fiscal year 1991 sentences showed that 40 percent of the underlying crimes in money laundering cases were not related to drug trafficking but were characterized as "white collar," and that the offense level for the money laundering conduct exceeded that for the underlying conduct 96 percent of the time in non-drug cases.

The proposed amendment seems to recognize that §§ 1956 and 1957 are broad and can apply even in relatively simple fraud and other cases. such cases often involve transactions that are normally not thought of as "money laundering," no less sophisticated money laundering, but which nonetheless are proscribed by §§ 1956 and 1957. Indeed, in some cases, the money laundering offense is difficult to distinguish from the underlying crime. 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 support the Commission's objective, I strongly urge the Commission to make the following modifications to the proposed amendment to achieve the Commission's stated goal of "relating the offense levels more closely to the offense level for the underlying offense from which the funds were derived."

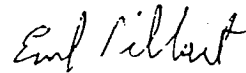
First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not only in those cases where the base offense level would exceed the base offense level in proposed § 2S1.1(a)(2) or (3). This offense level then would be increased by any specific offense characteristics under proposed §2S1.1(b). To achieve this result, I would suggest deleting from the instruction in § 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3).

Mr. Michael Courlander
February 3, 1994
Page 3

Second, I would strongly urge the Commission to make the base offense level in proposed § 2S1.1(a)(3) the same as the base offense level for fraud and deceit (§ 2F2.2). To do this, proposed § 2S1.1(a)(3) should be changed to a base offense level of 6 plus the number of offense levels from the table in § 2F1.1.

The proposed amendment with the suggested modifications would result in a significant improvement to the money laundering guidelines as they presently exist.

Sincerely,



Earl J. Silbert

EJS:gz

c:\letters\sentence.ltr
February 3, 1994

LAW OFFICES OF
NORMAN ELLIOTT KENT, P.A.
Attorney at Law



Suite 300
805 E. Broward Boulevard
Fort Lauderdale, Florida 33301
Telephone: (305) 763-1900
FAX: (305) 763-4792

February 7, 1994

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

Attention: Public Information

Re: MARIJUANA AMENDMENT

Dear Chairman:

I am writing to express support for a change in the Sentencing Guidelines for the manufacture of marijuana. It is my understanding that the guidelines were established to provide uniform and impartial sentencing. For marijuana, however, the guidelines impose an additional penalty for cultivation which is over and above that given for the possession of even large quantities of harvested marijuana. This has caused an inconsistency in sentencing that should be rectified in the interest of justice.

The U. S. Sentencing Commission has recognized that the equivalency of 100 grams of marijuana per plant used in offenses involving fewer than fifty plants is related to the actual yield of marijuana plants grown under a variety of conditions. Congress, however, has arbitrarily assigned a one kilogram weight per plant for over forty-nine plants regardless of the actual weight of the marijuana plant. A person with 100 marijuana plants, only several inches in height, receives the same mandatory five-year sentence as a person who possesses 100 kilograms of dried marijuana for distribution, even if it has been smuggled into the country. This disparity is obviously counter to any equity in sentencing.

The current guideline of one kilogram per plant should be changed to 100 grams per plant for the following reasons:

- a ten-fold increase in weight per plant from plausible yield is arbitrary and excessively punitive;

NORMAN ELLIOTT KENT, P.A....

U. S. Sentencing Commission
February 7, 1994
Page 2

-a marijuana cultivator is no more culpable than a person who possesses marijuana on a regular basis for sale or distribution;

-even with an adjusted weight of 100 grams per plant, the guidelines would ensure that growers with large numbers of plants would be sentenced to longer terms.

I would also request that the U. S. Sentencing Commission strongly consider marking this change retroactive. This would not only help provide needed prison space for hardened or violent criminals, but would ensure complete and impartial parity, which is the premise of our democratic government.

Your consideration and recommendation of this important change in the Sentencing Guidelines would be greatly appreciated.

Sincerely,



NORMAN ELLIOTT KENT, P.A.

NEK:pb

MILBANK, TWEED, HADLEY & McCLOY

INTERNATIONAL SQUARE BUILDING

1825 EYE STREET, N. W., SUITE 1100

WASHINGTON, D.C. 20006

NEW YORK

212-530-5000

FAX: 212-530-5219

LOS ANGELES

213-892-4000

FAX: 213-629-5063

LONDON

44-71-374-0423

FAX: 44-71-374-0912

MOSCOW

TEL/FAX: 7-095-975-2524

FROM OUTSIDE CIS:

TEL/FAX: 7-502-220-4776

202-835-7500

FAX: 202-835-7586

AMY G. RUDNICK

OF COUNSEL

DIRECT DIAL NUMBER

202-835-7554

TOKYO

81-3-3504-1050

FAX: 81-3-3595-2790

HONG KONG

852-526-5281

FAX: 852-840-0792

SINGAPORE

65-224-1955

FAX: 65-224-9172

JAKARTA

CORRESPONDENT OFFICE

62-21-384-9870

FAX: 62-21-380-7950

February 2, 1994

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:

I am a federal criminal defense practitioner in Washington, D.C, and Co-Chairperson of the Money Laundering Subcommittee of the American Bar Association's Criminal Justice Section, White Collar Crime Committee. 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 21, 1993 edition of the Federal Register (Vol. 58, No. 243, Part V). The purpose of this letter is to comment on proposed amendment number 11, which would amend and consolidate U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses.

I strongly recommend adoption of proposed amendment number 11 with the modifications suggested below. The proposal would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds. The suggested modifications are intended to help ensure this result.

The Commission's proposed amendment constitutes a much needed reform. The current Guidelines encourage prosecutors to seek money laundering convictions in non-narcotics related money laundering cases because the resulting sentences under the money laundering sentencing guidelines are much harsher than for the underlying offense, and asset forfeiture (which is not taken into consideration under the current Guidelines) is available. As the October 14, 1992, report to the Commission Staff Director from the Commission's Money Laundering Working Group clearly 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. Moreover, the results of the Working Group's study of fiscal year 1991 sentences showed that 40 percent of the underlying crimes in money laundering cases were not related to drug trafficking but were characterized as "white collar," and that the offense level for the money laundering conduct exceeded that for the underlying conduct 96 percent of the time in non-drug cases.

The proposed amendment seems to recognize that §§ 1956 and 1957 are broad and can apply even in relatively simple fraud and other cases. Such cases often involve transactions that are normally not thought of as "money laundering," no less sophisticated money laundering, but which nonetheless are proscribed by §§ 1956 and 1957. Indeed, in some cases, the money laundering offense is difficult to distinguish from the underlying crime. 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 support the Commission's objective, I strongly urge the Commission to make the following modifications to the proposed amendment to better achieve the Commission's stated goal of "relating the offense levels more closely to the offense level for the underlying offense from which the funds were derived."

First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level in proposed § 2S1.1(a)(2) or (3). This offense level then would be increased by any specific offense characteristics under proposed §2S1.1(b). To achieve this result, I would suggest deleting from the instruction in § 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3).

Second, I would strongly urge the Commission to make the base offense level in proposed § 2S1.1(a)(3) the same as the base offense level for fraud and deceit (§ 2F1.1). Therefore,

I would suggest changing proposed § 2S1.1(a)(3) to a base offense level of 6 plus the number of offense levels from the table in § 2F1.1.

I strongly support the Commission's effort to make the sentencing guidelines uniform and fair.

Very truly yours,


Amy G. Rudnick

AGR:tm

cc: James Becker
Nancy Luque

012-94

MELVIN S. BLACK, P.A.

ATTORNEY AT LAW
GROVE FOREST PLAZA • SUITE 202
COCONUT GROVE
2937 SOUTHWEST 27TH AVENUE
MIAMI, FLORIDA 33133-3703

TELEPHONE (305) 443-1600
FAX (305) 445-9666

February 7, 1994

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

Re: James Edward Dodd, BOP # 45433-004

Dear Sentencing Commission:

I am writing to you with regard to the pending amendments to the Guidelines and Statutes hearing with regard to older, infirm defendants who do not pose a risk to public safety. I represented James Dodd, a 67-year old gentleman who has extremely severe heart problems and other medical problems. He underwent open heart surgery for valve replacement prior to his arrest. He is now on medication to avoid infection and rejection of the valve, which requires very careful monitoring of his condition. I have attempted to make sure that he receives proper medical attention while in custody. Unfortunately, the Bureau of Prisons is not equipped to provide the high level of specialized care required by an individual such as Mr. Dodd. I enclose a copy of a letter of analysis by his private cardiologist.

I recognize that defendants need to be prosecuted on the basis of their offense conduct. However, the law cannot be blind to the unusual suffering which prison sentences impose on older and infirm defendants. I urge consideration of some alternative to strict incarceration of individuals sentenced on Guideline sentences. Perhaps extended confinement outside of regular prison would be a possible option for monitoring an individual such as Mr. Dodd. Your consideration of some more flexibility in the handling of these unusual cases is appropriate.

Very truly yours,



MEL BLACK

MSB:ga

cc: Ruth Dodd
James Dodd

013-91

Eisman & Eisman, P.A.

EUGENE H. EISMAN, M.D.
INTERNAL MEDICINE - CARDIOLOGY

DIANE B. EISMAN
FAMILY PRACTICE

12900 N.E. 17TH AVENUE
SUITE 207
NORTH MIAMI, FLORIDA 33181

TELEPHONE 895-5990

January 31, 1994

re: James Dodd

Melvin Black
Attorney at Law
Suite 202
2937 SW 27 Ave
Miami, FL 33133-3703

Dear Mr. Black:

Enclosed you will find an analysis from a piece of software that lists drug interactions. Sounding interacts with every drug on the list. In each case the patient tends to a state of greater risk of bleeding.

In the case of cimetidine, doxycycline, and ranitidine this is probably not too important - especially if the patient is getting frequent prothrombin times. Some of the other drugs, however, also induce gastric and duodenal ulcer with their associated risk of bleeding. For example, I would be very concerned about a patient taking dolobid, or a salicylate and sounding together.

Only on rare occasions do physicians use none steroidal antiinflammatory agents and sounding together. It is very risky, and the patient must be followed very closely. I am concerned about the kind of care Mr. Dodd is receiving.

Sincerely, 

Eugene H. Eisman, M.D.

The current list contains

- [1] COUMADIN (ANTICOAGULANTS, ORAL)
- [2] DOLOBID (NONSTEROIDAL ANTI-INFLAMMATORY DRUGS)
- [3] DOXYCYCLINE (TETRACYCLINES)
- [4] CHOLINE MAGNESIUM TRISALICYLATE (SALICYLATES)
- [5] ASPIRIN
- [6] RANITIDINE
- [7] CIMETIDINE
- [8] PREDNISONE (CORTICOSTEROIDS)

Interaction for:

- COUMADIN (ANTICOAGULANTS, ORAL)
- DOLOBID (NONSTEROIDAL ANTI-INFLAMMATORY DRUGS)

Adverse effect (Probable Mechanism):

Increased bleeding risk (inhibition of platelets, other mechanisms)[110],[120],[127]

Comments and Recommendations:

Monitor prothrombin time and for occult blood in stool and urine; diclofenac, ibuprofen, and naproxen may not increase hypoprothrombinemic response

Interaction for:

- COUMADIN (ANTICOAGULANTS, ORAL)
- DOXYCYCLINE (TETRACYCLINES)

Adverse effect (Probable Mechanism):

Increased anticoagulant effect (mechanism not established)[139]

Comments and Recommendations:

Monitor prothrombin time

Interaction for:

- COUMADIN (ANTICOAGULANTS, ORAL)
- CHOLINE MAGNESIUM TRISALICYLATE (SALICYLATES)

Adverse effect (Probable Mechanism):

1)Possible increased bleeding risk with aspirin (inhibition of platelet function)[96] 2)Increased hypoprothrombinemic effect with more than 2 grams/day of aspirin (reduction of plasma prothrombin)[96]

Comments and Recommendations:

1)2)Monitor prothrombin time and for occult blood in stool; effect of other nonsteroidal agents on platelets is more rapidly reversible; several case reports of bleeding or elevated prothrombin time with topical salicylates

Interaction for:

- COUMADIN (ANTICOAGULANTS, ORAL)
- ASPIRIN

Adverse effect (Probable Mechanism):

- 1) Possible increased bleeding risk (inhibition of platelet function)[96]
- 2) Increased hypoprothrombinemic effect with more than 2 grams/day of aspirin (decreased plasma prothrombin)[96]

Comments and Recommendations:

Avoid concurrent use, if possible; monitor prothrombin time and for occult blood in stool; effect of other nonsteroidals on platelets is more rapidly reversible

Interaction for:

COUMADIN (ANTICOAGULANTS, ORAL)
RANITIDINE

Adverse effect (Probable Mechanism):

Possible increased anticoagulant effect (decreased metabolism)[133]

Comments and Recommendations:

Probably rare; may occur with high ranitidine dosage; monitor prothrombin time

Interaction for:

COUMADIN (ANTICOAGULANTS, ORAL)
Cimetidine

Adverse effect (Probable Mechanism):

Increased anticoagulant effect (decreased metabolism)[104],[677]

Comments and Recommendations:

Monitor prothrombin time; no interaction with phenprocoumon[105]
nizatidine, ranitidine, and famotidine do not interact

Interaction for:

DOLOBID (NONSTEROIDAL ANTI-INFLAMMATORY DRUGS)
CHOLINE MAGNESIUM TRISALICYLATE (SALICYLATES)

Adverse effect (Probable Mechanism):

Possible increased salicylate toxicity from topical use (mechanism not established)[646]

Comments and Recommendations:

Monitor salicylate concentration

Interaction for:

DOLOBID (NONSTEROIDAL ANTI-INFLAMMATORY DRUGS)
ASPIRIN

Adverse effect (Probable Mechanism):

Possible increased nonsteroidal toxicity or toxicity of both drugs (decreased metabolism and displacement from binding)[486]

Comments and Recommendations:

Avoid concurrent use; interaction with diclofenac may not be clinically significant

Interaction for:

DOLOBID (NONSTEROIDAL ANTI-INFLAMMATORY DRUGS)

CIMETIDINE

Adverse effect (Probable Mechanism):

Possible piroxicam toxicity (decreased metabolism)[840]

Comments and Recommendations:

Based on study in healthy men; clinical significance not established; other NSAIDs probably do not interact

Interaction for:

CHOLINE MAGNESIUM TRISALICYLATE (SALICYLATES)

CIMETIDINE

Adverse effect (Probable Mechanism):

Possible salicylate toxicity (decreased metabolism)[278]

Comments and Recommendations:

Monitor salicylate concentration

Interaction for:

CHOLINE MAGNESIUM TRISALICYLATE (SALICYLATES)

PREDNISONE (CORTICOSTEROIDS)

Adverse effect (Probable Mechanism):

Decreased salicylate effect (mechanism not established)[305]

Comments and Recommendations:

Monitor salicylate concentration; also occurs with intra-articular steroids

End of Interactions.

014-94

RASKIN & RASKIN, P. A.

ATTORNEYS AT LAW

MARTIN R. RASKIN
JANE SERENE RASKIN

GROVE FOREST PLAZA - SUITE 206
COCONUT GROVE
2937 SOUTHWEST 27TH AVENUE
MIAMI, FLORIDA 33133-3703

TELEPHONE
(305) 444-3400
FAX
(305) 445-0268

ROBERT J. BECERRA

February 17, 1994

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Dear Mr. Courlander:

For the past twelve years I have been a federal criminal defense practitioner in Miami, Florida. Before entering private practice I was Chief of the Criminal Division of the U.S. Attorney's Office for the Southern District of Florida. I also served as a Special Attorney with U.S. Justice Department, Organized Crime and Racketeering Section and as an Assistant United States Attorney for the District of New Jersey.

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 21, 1993 edition of the Federal Register (Vol. 58, No. 243, Part V). The purpose of this letter is to comment on proposed amendment number 11, which would amend and consolidate U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses.

I strongly recommend adoption of proposed amendment number 11 with the modifications suggested below. The proposal would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds.

I know that you have received many letters from members of the Bar detailing the problems and abuses that have occurred with the current money laundering guidelines. I will not take your time by rehashing those problems other than to say that they are substantial. I believe that relating money laundering offense levels more closely to the offense level of the underlying offense from which the funds were derived will produce much more uniform and fair sentences. The following modifications will help ensure this result:

Mr. Michael Courlander

February 17, 1994

Page 2

First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level then would be increased by any specific offense characteristics under proposed § 2S1.1(b). To achieve this result, I would suggest deleting from the instruction in § 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3).

Second, I would strongly urge the Commission to make the base offense level in proposed § 2S1.1(a)(3) the same as the base offense level for fraud and deceit (§ 2F1.1). Therefore, I would suggest changing proposed § 2S1.1(a)(3) to a base offense level of 6 plus the number of offense levels from the table in § 2F1.1.

I strongly support the Commission's effort to make the sentencing guidelines uniform and fair.

Very truly yours,



MARTIN R. RASKIN

MRR/mr

015-94

THE LAW OFFICES OF
SHIRLEY BACCUS-LOBEL
ATTORNEY AND COUNSELOR

150 FOUNDERS SQUARE
900 JACKSON STREET
DALLAS, TEXAS 75202

TEL: (214) 760-7318
FAX: (214) 741-9106

February 23, 1994

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Dear Mr. Courlander:

I am a federal practitioner in Dallas, Texas. I am also admitted to practice in Washington, D.C. I do quite a bit of federal criminal defense work. Before that, I served almost 15 years with the U. S. Department of Justice, both in Washington, D.C. and here in Dallas, where I served as the Criminal Chief and later the First Assistant of that office. I am writing in response to the Commission's request for public comment on proposed amendments to the Guidelines governing money laundering offenses. I strongly recommend adoption of amendment 11, with suggested modifications.

The amendment is much needed and long overdue. The current money laundering guidelines encourage prosecutors to seek money laundering offenses in cases for which they are most inappropriate in order to achieve the plea bargaining leverage afforded by the Guidelines. In non-narcotics cases, the money laundering sentence is much harsher than the penalty for the underlying offense. Of particular note, the results of the Commission's money laundering working group demonstrated that in non-drug trafficking cases, 40 percent of the underlying crimes in money laundering cases were white collar rather than drug trafficking and that the offense level for such money laundering conduct exceeded that for the underlying conduct 96 percent of the time in non-drug cases. The proposed amendment recognizes that Sections 1956 and 1957 are broad and can be applied to relatively simple fraud cases. Moreover, those sections can also apply to relatively ordinary transactions which are not usually thought of as money laundering. I have personally experienced cases in which I am confident that violations under Sections 1956 and 1957 were added to the indictment for the plea bargaining leverage presented.

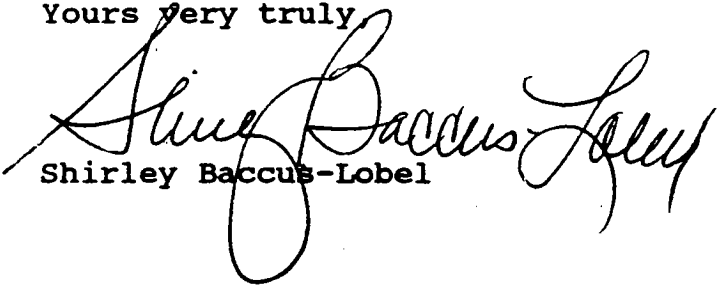
Letter to Mr. Michael Courlander
February 23, 1994
Page 2

Based on the foregoing observations and my personal experience, I certainly support the Commission's objective but I urge as well that certain modifications to the proposed amendment be made. With these modifications, the Commission's stated goal ("relating the offense levels more closely to the offense level for the underlying offense") will be better achieved. First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level in proposed Section 2S1.1(a)(2) or (3). This offense level then would be increased by any specific offense characteristic under proposed Section 2S1.1(b). To achieve this result, I would suggest deleting from the instruction in Section 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3).

Second, I would strongly urge the Commission to make the base offense level in proposed Section 2S1.1(a)(3) the same as the base offense level for fraud and deceit (Section 2F1.1). Therefore, I would suggest changing proposed Section 2S1.1(a)(3) to a base offense level of 6 plus the number of offense levels from the table in Section 2F1.1.

Thank you for your consideration and your effort to make the Sentencing Guidelines more uniform and fair.

Yours very truly


Shirley Baccus-Lobel

SBL:ps

DAVID H. REYNOLDS
Attorney At Law

06-94

Board Certified-Criminal Law
Texas Board of Legal Specialization

1012 Rio Grande St.
Austin, Texas 78701
Off: (512) 472-1950
Fax: (512) 472-4102

February 28, 1994

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

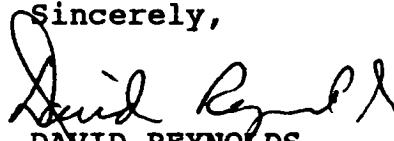
Re: Marijuana Amendment

Dear Mr. Courlander:

The current Federal Sentencing Guidelines assign 40 marijuana plants a weight of 4kg., but treat 50 marijuana plants as weighing 50kg., without regard to the actual weight or gender of any of the plants. If it did not send so many small-time growers to prison for such long terms, it would be as silly as calling ketchup a vegetable.

I support the Marijuana Amendment which treats all plants as weighing 100 grams, regardless of the number of plants. Normally I would not recommend retroactive treatment for changes in sentencing laws because of the difficulty in administration. However, the injustices perpetrated under the current guidelines must be corrected. Reform should be retroactive.

Sincerely,


DAVID REYNOLDS

DR/mkr

HELLMANN COOK & ALEXANDER

ATTORNEYS AT LAW

017-94

ROBERT F. HELLMANN

JESSIE A. COOK

NINA J. ALEXANDER

22 N. Fifth Street, Suite 320

P.O. Box 85

Terre Haute, IN 47808-0085

812-232-4634 (Tel.)

812-235-0292 (FAX)

February 27, 1994

Michael Courlander,
Public Information Specialist
U.S. Sentencing Commission
One Columbus Circle, N.E., Ste. 2-500
Washington, D.C. 20002-8002

Re: MARIJUANA AMENDMENT

Dear Mr. Courlander:

I am writing to express my support for the "Marijuana Amendment" which would establish a 100 gram per plant equivalency for 50 or more plants. I believe that an amendment to the Guidelines is necessary so that punishment of offenders is based upon the actual weight of the plants cultivated, rather than upon an arbitrarily assigned weight equivalent.

I am an attorney in a small firm with a general practice including the defense of persons charged with criminal offenses in both state and federal courts. Over the last few years, I have represented many offenders whose sentences have been calculated under the new Guidelines. While I applaud the Commission's attempt to equalize sentencing across the country, I believe that the Commission's guidelines for marijuana cultivators fly in the face of that attempt.

In Indiana, marijuana is defined by statute as including any part of the cannabis plant, growing or not, except the mature stalks. Possession is punished by reference to the total weight of the plant matter and without reference to the number of growing plants. This seems to be a less arbitrary mechanism than the Guidelines' practice of assessing punishment based upon the number of plants. Under the Guidelines' mechanism, an individual with more than 50 small plants could be punished more harshly than an individual with 40 large plants even if the latter possessed more of the drug being controlled.

For these reasons, I urge the Commission to adopt the Marijuana Amendment and to make that amendment retroactive so that it may be applied in a manner so as to equalize sentences already imposed upon offenders.

Very truly yours,

Jessie A. Cook

[33]

Ed Rosenthal
1635 East 22nd Street
Oakland, CA 94606

Tel: (510) 533-0605
Fax: (510) 535-0437

018-94

March 7, 1994

United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500 South Lobby
Washington, D.C. 20001

Dear Sirs/Mesdames,

For the past six years I have served as an expert on the subject of marijuana cultivation, intent and yield in both federal and state courts. Before that I studied the plant, cannabis, for over fifteen years. As a result of my study and research I have come to the conclusion that federal sentencing in marijuana cultivation cases is inappropriate and unjust. In addition it does not accomplish any of the purposes for which it has been promulgated.

I will discuss several aspects of the sentencing laws. First I will address botanical aspects of marijuana and its cultivation. Secondly, I will briefly cover some of the effects of present policies. Third, I will propose a reasonable set of sentencing policy alternatives. The fourth section covers long-term prospects for the marijuana laws.

BOTANICAL ASPECTS OF MARIJUANA CULTIVATION AS THEY RELATE TO SENTENCING

The Guidelines were created to develop a more uniform method of sentencing for offenses of equal magnitude. The Guidelines, as they pertain to marijuana cultivation do not accomplish this goal. Instead, they create a system of arbitrary and capricious punishment, not justice.

In order to have a clear understanding of the effects of the sentencing regulations as they affect marijuana growers it is helpful to have an understanding of marijuana's botany as it relates to yield, cultivation techniques, patterns of personal use and sales and intent.

Botanically, marijuana is considered a short day or long light plant. That means that its flowering cycle is triggered when the plant receives between 8-12 hours of uninterrupted darkness each evening. Two plants of the same variety, one a seedling and one a large, older plant will both flower at the same time if given the same long night regimen. One implication of this is that plants grown outdoors will flower at a given time during the season no matter what size they are.

Once the plants begin to flower, they stop new growth of branches and stem. Instead, all of the new growth consists of flowers in the male, which then dies, or the flowers of the unpollinated female. If the female remains unpollinated it continues to grow new

TO: United States Sentencing Commission
FROM: Ed Rosenthal

March 7, 1994

flowers which spread along the branches and develop into thick masses commonly called buds or colas. Should the female flowers be pollinated, which occurs through wind pollination in nature, the plant stops growing new flowers and instead devotes its energy to developing seeds.

Marijuana is a dioecious plant, there are separate male and female plants. Males make up half the population. The male is removed from the garden to prevent pollination of the females as soon as its sex is detected. The plant is discarded. If a garden is seized one day, the plant count might be much higher than the next day after males are removed.

Marijuana users prefer to smoke sinsemilla because it produces more weight of useable material and is easier to prepare for use than seeded flowers. The seeds cannot be used for intoxicating purposes and are commonly thrown away.

The size and yield of the plant is dependent on several factors.

1.) Variety.

Since there is no central source for seed, varieties have not been standardized as they have for commercial vegetable and flower crops. Growers either use seed that they have found in marijuana they bought for use, in the same way that a person might start a plant from an avocado pit, or find a source of seeds or cuttings. When they need new plants, they then use seeds which they have produced. Because of this each grower eventually has his/her own distinct variety. There are literally thousands of varieties and each has its own potential yield and prime conditions, climate and weather, gardening technique, water conditions, and date of planting.

2.) Cultivation Technique

No matter what the potential of a particular plant's genetics, cultivation processes determine the actual yield of a particular plant.

A.) Plants which are grown close together stunt side growth so that each has smaller buds with less branching than it would grow given more space. Unreleased DEA studies on spacing and yield confirm this. In these experiments, plants were placed on 6 foot centers (about 36 square feet) and yielded just one pound of bud per plant. A typical indoor garden may be the same size as the single plant grown by the DEA, six by six feet, a total of 36 square feet.

Rather than trying to grow large plants, growers often use a method dubbed, "sea of green". Plants are started four or more per square foot and are never intended to grow out of that space. This

TO: United States Sentencing Commission
FROM: Ed Rosenthal

March 7, 1994

garden may have plants growing at the density of four plants per square foot, a total of 144 plants. Each plant would have a maximum yield under ideal conditions with a high yielding variety of only about one half ounce. The maximum yield of the garden would be four and a half pounds. If the grower were reproducing plants using cuttings, a small tray of them, with a size of less than two square feet, could contain 36 plants.

R.) Plant growth and yield is determined in part by the amount of water the plant receives. Less water results in smaller growth. This is especially important in gardens which receive no irrigation. In parts of the country, there is no water for long periods during the growing cycle. This results in very small plants. Indoors, plants are often over watered, resulting in poor growth.

C.) Plants receiving low light or too intense a light have lower yields than plants receiving optimum light. Because of the necessarily surreptitious nature of growing operations and the need for them to remain hidden, plants are often grown in less than ideal conditions. They are often hidden under the shade of trees or in other areas where they do not receive direct sunlight. Plants receiving these conditions will grow much smaller than plants receiving direct sunlight. In areas of the country where the sun is very intense, plants will be stunted from over-radiation. Indoors, growers often try to grow plants using inadequate lighting, resulting in very low yields.

D.) Outdoors, late planting results in smaller plants, because the plants of a single variety flower at the same time no matter the size. Surreptitious growers often plant late so that there is less time for the plants to be detected and so that stay small, making detection less likely. Indoors, growers using the "sea of green" force the plants to flower when they are only 18 inches high. At maturity, the plants are only two to three feet tall, with no branching and a yield of only one half ounce.

3.) Conditions

A.) Soil fertility and fertilizing regimen plays a part in growth of plants. Plants receiving inadequate nutrients have smaller yields than those obtaining adequate amounts. No two farmers use exactly the same techniques, so each will have different results.

B.) Temperatures which are too high or too low retard both growth and yield. This affects all outdoor crops. Indoors, gardeners often find it difficult to control temperatures because of the heat generated by high intensity of the lights needed for indoor cultivation.

TO: United States Sentencing Commission
FROM: Ed Rosenthal

March 7, 1994

C.) Very high or low humidity lowers the growth rate and yield of the plant by slowing photosynthesis. This leads to lower yields.

D.) Rain may destroy a crop if it occurs close to harvest time because the ripening buds are susceptible to mold under conditions of high humidity and moisture. Once attacked the bud can be destroyed by the spreading fungus overnight.

E.) Insects such as aphids, whiteflies, mites and thrips attack marijuana gardens indoors and out. These insects suck away the plant's vigor, resulting in less growth and yield and even death of the plant.

F.) Animals such as field mice, rats, rabbits, deer and raccoons regularly attack marijuana grown outdoors. They can destroy an entire plant in a few minutes and can attack any time during the season.

All of these factors make it clear that plant counts are an unreasonable method of determining sentencing of people convicted of marijuana offenses. A plant normally yields from 10 grams to about 100 grams.

Dr. Elsohly, at the University of Mississippi in Oxford conducted experiments on weight and spacing. Originally the Drug Enforcement Administration tried to keep the results confidential because they were so damaging to testimony given by DEA officers who testified in state trials that the plants produce between one and two pounds of buds. Dr. Elsohly's report clearly shows that spacing affects yield tremendously.

As enlightening as his experiment was, Dr Elsohely tested only one variety, growing for a single length of time and he has not tested for other environmental factors such as shading, water stress, weather, improper irrigation and nutrient problems. That is, the problems faced by all gardeners. The plants he grew were given ideal nutrients, plenty of sun and a uniform planting date. The goal of the experiment was to produce the largest plant possible.

EFFECTS OF PRESENT POLICIES

The effects of the present policies which result in severe penalties and high risk have been a disruptive source on cultivation and domestic supply. Over the years growers have become aware of the harsh penalties and have either stopped cultivating or downsized their operations so that they face lower sentences if caught. This has led to a shortage of domestic marijuana and the price has climbed. As a result many people who would prefer to use domestic have switched to lower price imports.

TO: United States Sentencing Commission
FROM: Ed Rosenthal

March 7, 1994

For instance, in Portland, OR, a center of indoor cultivation, domestic buds sell for \$300 an ounce and Mexican buds, slightly less potent, retail for as little as \$125 an ounce. The situation is similar in other areas. Rather than unorganized cultivators a more organized criminal element is getting involved in supplying the market.

Since somebody will always be around to meet demand, no matter what risks they may face, making the laws or penalties harsher presents a niche for the more desperate and reckless person as the supply side is vacated by people who do not think possible gain is worth the risk. This is not a good trade-off.

SENTENCING POLICY ALTERNATIVES

It is inherently unfair to sentence a grower for yields that s/he wasnot expecting nor able to produce. As it stands now, a person with a small garden which has a potential yield of about two kilograms can be sentenced to 63 months or more, while an individual with a garden with many fewer, but much larger plants might receive only 10 months.

Rather than fixing an arbitrary weight to each plant, which is not based on a realistic assessment of the individual situation, the guidelines in the case of cultivators should be amended to reflect either the potential yield or the yield at seizure. In this way, the system will be more equitable. Although it would take more work by the courts, it would lead to a system of justice based on rational consideration.

The law has been particularly hard on indoor growers who use the "sea of green method" and fall under the mandatory minimum sentencing laws. Under these provision a minimum sentence of five years is required for the cultivation of 100 plants or more, and ten years for 1000 plants. The Sentencing Commission should recommend that the law be changed to reflect the actual yields of the plants in the same way that weight is considered for other marijuana offenses.

If the Sentencing Commission desires to allocate a specific weight to each plant, the weight of 100 grams per plant, which is applicable up to 49 plants at present in sentencing procedures should be extended to all plants, and the Sentencing Commission should recommend that the law should be changed to reflect this.

If a plant count is to be used, consideration should be made for plants not likely to be harvested. Clones and seedlings have a variable success rate and consideration should be made for clones not likely to grow to maturity. Perhaps the best way to do this would be to exclude all plants under six inches tall from the plant count.

Male plants are ordinarily removed from the garden, so that should

TO: United States Sentencing Commission
FROM: Ed Rosenthal

March 7, 1994

be taken into account in figuring the plant count in gardens which have not been "sexed".

The Guidelines should also be amended so that the court can consider downward departures based on mitigating circumstances for marijuana crimes of Level 24 and under. Penalties other than incarceration should be considered for first time offenders in these cases. This would free the courts of many small and relatively minor cases as well as limiting the possibility of these offenders mingling with hardened criminals.

It would be a step in the right direction if penalties for all marijuana offenses were lowered, especially considering that violent crimes and crimes against property are treated lighter in sentencing than some marijuana offenses. Certainly possessing, growing or selling marijuana is not as serious threat to society than a crime with a clear victim who complains.

Obviously, neither the people who are buying nor selling feel victimized. In order to apprehend these people police must employ snitches and invade privacy, two things considered un-American until a few years ago. The Constitution is bent by assaults by the prosecution on the First, Fourth, Fifth, Ninth and Fourteenth Amendments.

LONG TERM PROSPECTS FOR THE MARIJUANA LAWS

the campaign to wipe out marijuana is doomed to failure for reasons which are not applicable to other drugs. Heroin, opiates and other drugs which induce a physical dependence seem to the user to limit free choice. They are dependent on the drug just as we need food, several times a day. Cocaine users over a period of time become dysfunctional. Marijuana however, does not induce a physical dependency and rarely induces a dysfunctional situation. Instead, most marijuana users enjoy its recreational use. They do not feel that it has caused them much harm except possibly for legal hassles.

If you asked most heroin or cocaine addicts whether they regret their use, most would answer affirmatively. The same is not true of marijuana. Most people who use it feel it has been a positive thing in their lives. You can lock a person up and throw away the key, but s/he will still tell you that your law is wrong and that the law should be changed.

No matter how harsh the laws are you cannot hide the truth that people enjoy using marijuana and will risk liberty to indulge in it. The current policy does the exact opposite of its intentions. By making marijuana hard to get through interdiction or destruction of plants, the price goes up because of reduced supply. This induces more people into the trade and at the same time causes a certain

TO: United States Sentencing Commission
FROM: Ed Rosenthal

March 7, 1994

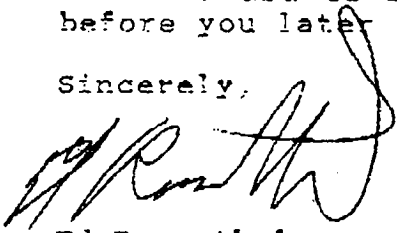
group of people who are experimenting with drugs to choose less expensive substances such as cocaine, crack or heroin. Certainly members of the committee would consider it more serious to the persons health and well being if a family member was using heroin or cocaine than if they lit up an occasional joint.

With the civil regulation of marijuana, use of hard drugs such as heroin and cocaine would plummet. This has been proven in Holland. Which has developed a successful hard drug-soft drug policy. Members of the committee who say we cannot take the risk should look at the dismal failure of the current regulatory system, which has been in effect since 1937, 57 years, most of our lives.

In 1937 there were estimated to be 50,000 marijuana users. Now estimates for regular users run between 25,000,000 - 50,000,000 people. That is an increase of 50,000 - 100,000%. Criminal regulation of marijuana, no matter how harsh or inappropriate the penalties will not work because a large minority of our citizenry know that marijuana use is not very risky to health and is very enjoyable.

I hope you will take the information I have provided into account during your consideration of the Sentencing Guidelines. I look forward to answering any questions you may have when I speak before you later in March.

Sincerely,



Ed Rosenthal

LEWIS D. FRAZIER
CHIEF PROBATION OFFICER

253 U. S. Court House
811 Grand Avenue
Kansas City
Missouri 64106-1970
816-426-3921

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
PROBATION OFFICE

February 28, 1994

Reply to: Kansas City

019-9
131 West High Street
Post Office Box 1764
Jefferson City
Missouri 65101-1764
314-634-3293

Suite 1300
222 North John Q. Hammons Parkway
Springfield
Missouri 65806-2530
417-831-6421
417-831-6896

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

Re: §2D1.1(c) -- Drug Quantity Table

Dear Chairman Wilkins:

Reference is made to Guidelines Manual §2D1.1(c), Drug Quantity Table, and Appendix C, Amendment 487.

The definition of "cocaine base" as defined in §2D1.1(c) seems to be vague and misleading. I would recommend that the explanation about forms of cocaine base other than crack, as clarified in Amendment 487, be included in the definition of crack. In other words, I am suggesting the following statement:

"Cocaine base," for purposes of this guideline, means "Crack." "Crack" is the street name for a form of cocaine base usually prepared by processing cocaine hydrochloride and sodium bicarbonate and usually appearing in a lumpy, rock like form. Forms of cocaine base other than crack (e.g., coca paste, an intermediate step in the processing of coca leaves into cocaine hydrochloride, scientifically is a base form of cocaine, but it is not crack) will be treated as cocaine."

I believe that including the clarifying statement about cocaine base with the definition of crack will help alleviate confusion.

Respectfully,


Christopher R. Buckman
U. S. Probation Officer

CRB:br

cc: Probation Officer's Advisory Group
426 U. S. Courthouse
110 South 4th Street
Minneapolis, MN 55401-2295
Attention: Mr. Jay F. Meyer
U. S. Probation Officer

ZUCKERMAN, SPAEDER, TAYLOR & EVANS

ATTORNEYS AT LAW
201 SOUTH BISCAYNE BOULEVARD
SUITE 900

MIAMI, FLORIDA 33131

(305) 579-0110

TELECOPIER
(305) 579-9749

TAMPA OFFICE

101 EAST KENNEDY BOULEVARD, SUITE 3140
TAMPA, FLORIDA 33602
(813) 221-1010

FORT LAUDERDALE OFFICE

1750 EAST SUNRISE BOULEVARD
FORT LAUDERDALE, FLORIDA 33304
(305) 525-0531

WASHINGTON, D.C. OFFICE

1201 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036
(202) 778-1800

MARYLAND OFFICE

100 EAST PRATT STREET
BALTIMORE, MARYLAND 21202
(410) 332-0444

NEW YORK OFFICE

415 MADISON AVENUE, 18TH FLOOR
NEW YORK, NY 10017
(212) 906-8308

ERIC F. FAGER
MARSHALL S. WOLFF
MARY LOUISE AMERINE
BLAIR G. BROWN
BARBARA KRAMER MORGAN
LESLIE M. BERGER
XONNA M. CLARK
ROSEMARIE SCHMIDT
DEBORAH J. JEFFREY
GARY D. WEINFELD
BARBARA L. WARD
LOUISE A. STOVALL
THOMAS B. MASON
BRUCE AMON JAMES
RICHARD B. ROSENBLATT
ELEANOR H. SMITH
ELLEN FISHBEIN MILLS
ALAN H. SCHEINER
SUSAN E. KESTNER
VIRGINIA A. WHITEHILL
ROBERT GULACK
NORMAN L. EISEN
MARIA A. STAMOULAS
TURNER SWAN
JULIE A. BELL
GREGORY H. GUST
DAVID U. GOUREVITCH
RESIDENT IN MARYLAND*
HERBERT BETTER
DONALD J. MCCARTNEY
MARTIN S. HIMELER, JR.
CYRIL V. SMITH

JOHN F. EVANS
(1941-1988)

RESIDENT IN FLORIDA
RONALD B. RAVIKOFF
MICHAEL S. PASANO
MORRIS WEINBERG, JR.
JOHN F. LAURO
HUMBERTO J. PEÑA
SHARON L. KEGERREIS
THOMAS J. MEEKS
MICHAEL S. GREENE
GUY A. RASCO
BRYAN R. CLEVELAND
JENNIFER R. COBERLY
LAURA L. VAUGHAN
TERESA HALLIGAN
MELISSA HAMMERSLEY CLARK
MARC N. BELL
JEFFREY P. AORON
JILL M. GRANAT
RESIDENT IN WASHINGTON, D.C.*
ROGER E. ZUCKERMAN
MARK W. FOSTER
ROGER C. SPAEDER
BRUCE GOLDSTEIN
WILLIAM W. TAYLOR, III
PETER R. KOLKER
ARTHUR K. MASON
STEPHEN H. GLICKMAN
MICHAEL R. SMITH
ANTHONY THOMPSON
NELSON C. COHEN
STEVEN M. SALKY
EDWARD C. BERKOWITZ
JUDITH STURTZ KARP
*NOT ADMITTED IN FLORIDA

March 2, 1994

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:

I am a federal criminal defense practitioner in Miami, Florida. I am also Chairman of the ABA Criminal Justice Section Defense Function Committee; Chairman of the Florida Regional Subcommittee of the ABA White Collar Crime Committee; and a Vice-chair of the White Collar Crime Committee. 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 21, 1993, edition of the Federal Register (Vol. 58, No. 243, Part V). The purpose of this letter is to comment on proposed amendment number 11, which would amend and consolidate U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses.

I strongly recommend adoption of proposed amendment number 11 with the modifications suggested below. The proposal would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds and constitutes a much needed reform.

Mr. Michael Courlander
March 1, 1994
Page Two

The proposed amendment seems to recognize that §§ 1956 and 1957 are broad and can apply even in relatively simple fraud and other cases. Such cases often involve transactions that are normally not thought of as "money laundering," no less sophisticated money laundering, but which nonetheless are prosecuted under §§ 1956 and 1957. Indeed, in some cases, the money laundering offense is difficult to distinguish from the underlying crime.

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.

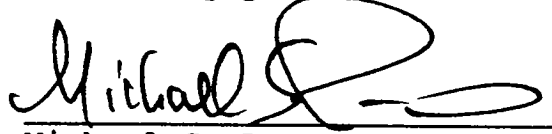
While I support the Commission's objective, I strongly urge the Commission to make the following modifications to the proposed amendment to better achieve the Commission's stated goal of "relating the offense levels more closely to the offense level for the underlying offense from which the funds were derived."

First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level in proposed § 2S1.1(a)(2) or (3). This offense level then would be increased by any specific offense characteristics under proposed § 2S1.1(b). To achieve this result, I would suggest deleting from the instruction in § 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3).

Second, I would strongly urge the Commission to make the base offense level in proposed § 2S1.1(a)(3) the same as the base offense level for fraud and deceit (§ 2F1.1). Therefore, I would suggest changing proposed § 2S1.1(a)(3) to a base offense level of 6 plus the number of offense levels from the table in § 2F1.1.

I strongly support the Commission's effort to make the sentencing guidelines uniform and fair.

Very truly yours,


Michael S. Pasano

MSP:mdv

021-94

February 24, 1994

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

Dear Public Information Specialist:

In regards to proposed amendment #18, which will disallow courts from using acquitted conduct at sentencing, except for a limited purpose of an upward departure, and only after a preponderance of evidence finding, I would like to tell this story.

My friend since approximately 1950, Gerald Winters, was convicted in the U.S.D.C. for the District of New Jersey, before Honorable Maryanne Trump Barry, for a RICO Conspiracy, RICO Enterprise, and related substantive offenses. He received both a New Law sentence of 235 months, and an Old Law sentence totalling 15 years. These sentences were ordered to run consecutively.

My friend, 'Jerry', was acquitted of several of the charges in the indictment, but at sentencing, the court made a preponderance of evidence finding using acquitted conduct to place him in the New Law. By doing this, an additional sentence of 235 months was added to his Old Law sentence.

As a long-time friend of the Winters family, a continuously employed taxpayer, and a registered voter, I strongly disagree with the courts present authority to use acquitted conduct to place my friend Jerry in the New Law. In fact, I disagree and protest that acquitted conduct can be used against anyone, post-trial (where the jury finds innocence).

Jerry's verdict was shocking; and the verdict was even more so. It was shocking that the court was able to use acquitted conduct to sentence my friend as a New Law offender, especially since the jury acquitted all other co-defendants of the RICO conspiracy. By a preponderance of evidence finding, the court found that my friend conspired with other co-defendants who themselves were found not-guilty of the RICO conspiracy. For this, he received an additional sentence of 235 months under the U.S.S.G.

Daily the news reports are full of criminals nation wide receiving only the mildest sentences. But my friend received a heavy punishment, and then additional years on top of that. Even from a conservative view point, it's hard to believe such a practice is acceptable in an American court room.

I strongly recommend that the Sentencing Commission pass proposed amendment #18. Make it retroactive: help correct some of the injustices handed out to some defendants. Faith in our judicial system disintegrates with errors and uneven sentencing. Please help to change this.

Respectfully submitted,


Carol M. Biechlin

022-9

February 24, 1994

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

Dear Public Information Specialist:

Concerning Proposed Amendment #18 to the U.S.S.C., which disallows the courts to use acquitted conduct at sentencing, except by a preponderance of evidence finding, and then only to use it for an upward departure.

Please forward this Amendment to Congress in May 1994 for their approval. I urge you to recommend that this Amendment be applied retroactively to help alleviate unjust sentences based on acquitted conduct.

As a concerned citizen I would like to add my voice to positive support of this matter.

Sincerely,



Carol M. Biechlin

023-9

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

To whom it may concern,

I am writing in regards to the current debate dealing with the disparity between crack and powder cocaine sentencing. Based on the evidence that was presented at the hearing held by your commission on Nov 9, 1993, I firmly agree with the many professional individuals who stated that the present sentencing practice is unfair and simply doesn't make sense. Most notable, I agree with the statement of Mr. Steven Belenko of the New York Criminal Justice Agency, who stated that the response to crack cocaine has not been based on empirical evidence, but is merely the result of law enforcement and media hysteria.

In closing, I would like to say that I do encourage and thus support any change that would totally eliminate this current sentencing disparity. I also believe that this change should be applied retroactive to provide relief to anyone who is currently sentenced based on this current disparity.

Thank you,
A concern citizen,

Eldara Williams

024-9

February 28, 1994

Judge William Wilkins, Jr.
U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, D.C. 20002-8002
ATTN: PUBLIC INFORMATION

Dear Judge Wilkins,

I understand the US Sentencing Commission is considering a change in the Sentencing Guidelines regarding the cultivation of marijuana plants.

THE CURRENT SCHEDULE ASSIGNING A WEIGHT OF 1000 GRAMS (1KILOGRAM) TO EVERY PLANT OVER A COUNT OF FIFTY IS ARBITRARY AND IRRATIONAL AND SHOULD BE CHANGED. FURTHERMORE, THE NUMBER OF PLANTS REQUIRED TO TRIGGER THE FIVE YEAR MANDATORY MINIMUM AND TEN YEAR MANDATORY MINIMUM, RESPECTIVELY, SHOULD BE ADJUSTED TO REFLECT THIS CHANGE IN ASSIGNED WEIGHT PER PLANT.

Dr. Mahmoud A. Elsohly, Research Professor and Program Coordinator of the Drug Abuse Research program at the University of Mississippi, has been researching factors involving the production of marijuana since 1976 and is, in fact, the only person licensed by the federal government to grow marijuana for research. He has written over 100 research papers and testified at over 60 criminal trials related to drugs of abuse, particularly marijuana. DR. ELSOHLY HAS TESTIFIED THAT THE CURRENT SENTENCING GUIDELINE BASED ON 1000 GRAMS, OR 1 KILOGRAM, PER PLANT IS EXTREMELY IRRATIONAL AND UNREASONABLE, BUT A SENTENCING SCHEME BASED ON 100 GRAMS PER PLANT WOULD BE REALISTIC AND REASONABLE.

The Sentencing Guidelines currently assign a five year mandatory minimum for possessing 100 kilograms of marijuana of 100 marijuana plants, and a ten year minimum for possessing 1000 kilograms or 1000 plants. The segment of this guideline requiring mandatory minimums for 100 and 1000 kilograms, respectively, is justified; HOWEVER, THE SEGMENT RELATING TO 100 AND 1000 PLANTS IS NOT JUSTIFIED, PRIMARILY BECAUSE 100 PLANTS CANNOT PRODUCE 100 KILOGRAMS OF MARIJUANA, AND 1000 PLANTS CANNOT PRODUCE 1000 KILOGRAMS OF MARIJUANA.

Based on Dr. Elsohly's research, and based on the underlying premise of parity inherent in the Sentencing Guidelines, I urge the Sentencing Commission to do three things:

1. CHANGE THE CURRENT GUIDELINE AND ASSIGN A WEIGHT OF 100 GRAMS PER PLANT REGARDLESS OF NUMBER OF PLANTS INVOLVED
2. REFLECT THIS CHANGE IN THE GUIDELINES BY ADJUSTING THE NUMBER OF PLANTS REQUIRED TO TRIGGER THE FIVE YEAR AND TEN YEAR MANDATORY MINIMUMS
3. MAKE THESE CHANGES RETROACTIVE.

Thank you for your time and interest in this matter.

Sincerely,

J. Sylvia Meloch

February 28, 1994

U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, D.C. 20002-8002
ATTN: PUBLIC INFORMATION

Re: Marijuana Amendment

Dear Chairman,

I am writing to express support for a change in the Sentencing Guidelines for the manufacture of marijuana. It is my understanding that the guidelines were established to provide uniform and impartial sentencing. For the marijuana, however, the guidelines impose an additional penalty for cultivation which is over and above the given for the possession of even large quantities of harvested marijuana. This has caused an inconsistency in sentencing that should be rectified in the interest of justice.

The U.S. Sentencing Commission has recognized that the equivalency of 100 grams of marijuana per plant used in offenses involving fewer than fifty plants is related to the actual yield of marijuana plants grown under a variety of conditions. Congress, however, has arbitrarily assigned a one kilogram weight per plant for over forty-nine plants regardless of the actual weight of the marijuana plant. A person with 100 marijuana plants, only several inches in height, receives the same mandatory five-year sentence as a person who possesses 100 kilograms of the dried marijuana for distribution, even if it has been smuggled into the country.

The current guideline of one kilogram per plant should be changed to 100 grams per plant for the following reasons:

- A ten fold in weight per plant from plausible yield is arbitrary and excessively punitive
- A marijuana cultivator is no more culpable than a person who possesses marijuana on a regular basis for sale or distribution
- Even with an adjusted weight of 100 grams per plant, the guidelines would ensure that growers with large numbers of plants would be sentenced to longer terms.

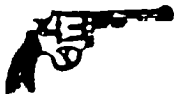
I would also request that the U.S. Sentencing Commission strongly consider making this change retroactive. this would not only help provide needed prison space for hardened criminals, but would ensure complete and impartial parity, which is the premise of our democratic government.

Your consideration and recommendation of this important change in the Sentencing Guidelines would be greatly appreciated.

Sincerely,

Chris + Jane Gehring

026-94



GUNN & ASSOCIATES

P.O. BOX 1449
FERNLEY, NEVADA 89408



(702) 343-0200

FAX: 343-0202

March 4, 1994

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

To whom it may concern,

The law dictating the use of mandatory sentencing in non-violent crimes must be reconsidered. First time offenders, without criminal history are punished much more severely than violent habitual criminals.

As an American citizen and taxpayer, I resent the tax liability and attitude taken by judicial law makers in this situation. I believe that our money could be better allocated to the benefit of humanity. This would be done by treating the violent criminal more harshly than the non-violent element.

As I understand mandatory sentencing was directed towards the war on drugs. I think that most Americans feel that the current approach to the war on drugs is not effective and will never be.

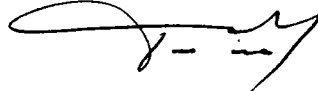
Many non-violent first time drug offenders are good productive citizens, whom have made a serious mistake. Due to mandatory sentencing they are sitting in over crowded medium security institutions. Costing taxpayers millions of dollars, when perhaps a strong reprimand, large fine, enforced community service, and public humiliation could well address the felon. Along that same line, they should be forced to have continued employment, and pay their fair share of the tax base requirements of our country.

I feel that non-violent first time offenders should be excluded from mandatory sentencing laws. Especially in the area where misdemeanor crosses the line to a felony. Any and all sentencing changes should be retroactive.

[51]

Americans want a proper perspective in the laws governing criminal sentencing, not an unbalanced costly program allowing violent felons easy access back into the community. And hard working non-violent tax paying felons being neutralized through lengthy incarceration, and perhaps endangering the development of American families and their prospects.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Tom Gunn', with a stylized flourish at the end.

Tom Gunn
Gunn & Associates

TG:scm

Honorable Chairman & Members
United States Sentencing Commission
Room 2-500 Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Date 2-14-94

Re; Proposed Sentencing Guideline Changes for effective date of
November 01, 1994: Public Commentary on Retroactivity,
Title 28 U.S.C. Section 994(O), 994 (s)(1)(2)(3):

Dear Mr. Chairman & Members:

The proposed amendments to the U.S. Sentencing Guidelines as reported in
The Criminal Law Reporter 54 CrL 2023-2046, Section 2, December 22, 1993
have been reviewed and I am submitting my public comments for the
consideration of the U.S. Sentencing Commission on the issue of whether
or not these proposed amendments should be applied retroactively.

The amendments to Chapter Two, Part D (Offenses involving Drugs) and
Chapter Three, Part B (Role in the Offense) demonstrates this Commission
has recognized the harshness of the severity of sentencing under the
U.S. Sentencing Guidelines. While the Commission has reduced some of the
severity my position is that a further step should be taken to ensure
that disparity of sentencing does not occur.

Secondly, each of these amendments should be applied retro-
actively to currently incarcerated inmates through U.S.S.G. 1B1.10(d).

Thirdly, the mechanism of a motion under Title 18 U.S.C. 3582 should be
allowed as is being utilized in cases of the amendment regarding LSD.

I would also comment to this Commission that the 100-1 ratio from Cocaine
base to Powdered Cocaine is unreasonable, unworkable and class based
discrimination against minorities and the poor. Cocaine base and Powdered
cocaine should be addressed at the level in which powdered Cocaine is
currently being applied. The mitigating factors of 3B1.2(a)(b) should be
used and applied.

Lastly, prison space is a expensive proposition. The cost of building of
a prison is merely a downpayment of my tax dollars. It still requires \$12-
14 Million dollars per year thereafter construction is over to operate the
facility. I do not want my tax dollars directed to locking up the non-vio-
lent, first time offender. I want that money being directly applied toward
housing the violent offenders in the CURRENT existing space of the non-vio-
lent, first time and offenders are currently housed.

The Bureau of Justice Statistics currently has a excellent summary and
study on Fine based incarceration and how well it works in the State Courts
and I see no reason (as fine based sentencing has not been tried on the
Federal Level) why the federal level cannot take advantage especially
given the expediture of public monies for this study and the public
deserves the benefits of the monies expended in this area and fine based
sentencing being actually tried on the federal level and upon a large
scale with non-violent, first time offenders.

I will appreciate acknowledgement of my submission for public commentary¹
on the U.S. Sentencing Guidelines proposed amendments for enactment after
November 1, 1994. I will also appreciate the numbers on submissions for
and against retroactivity of these proposals.

Sincerely Yours,

Helen Shipman

Rt 4, Box 402

Marshall, Ia 52550

1/ I back this commentary with my vote at the ballot box.

Cc; Congressional Black Caucus
344 House Annex 2
Washington, D.C. 20515-6805

Democratic Caucus
House Annex 1
Washington, D.C. 20515-6524

Congressional Hispanic Caucus
557 House Annex 2
Washington, D.C. 20515-6526

Republican Committee on Committees
U.S. Capital Bldg. Room H-230
Washington, D.C. 20515-6543

028-99

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
United States Post Office & Courthouse
Post Office Box 999
Newark, New Jersey 07101-0999

Honorable Joseph Anderson
Honorable Richard J. Arcara
Honorable Richard H. Battey
Honorable Charles R. Butler, Jr.
Honorable Stanley S. Harris
Honorable George P. Kazen
Honorable Charles P. Kocoras
Honorable Richard P. Matsch
Honorable David A. Nelson
Honorable David D. Noce
Honorable Stephen V. Wilson
Honorable Mark L. Wolf

March 11, 1994

(201) 645-2133

FACSIMILE

(201) 645-6628

Maryanne Trump Barry
Chair

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

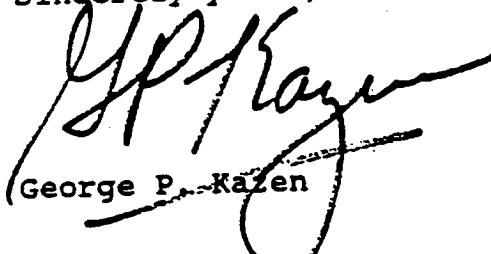
Dear Chairman Wilkins:

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

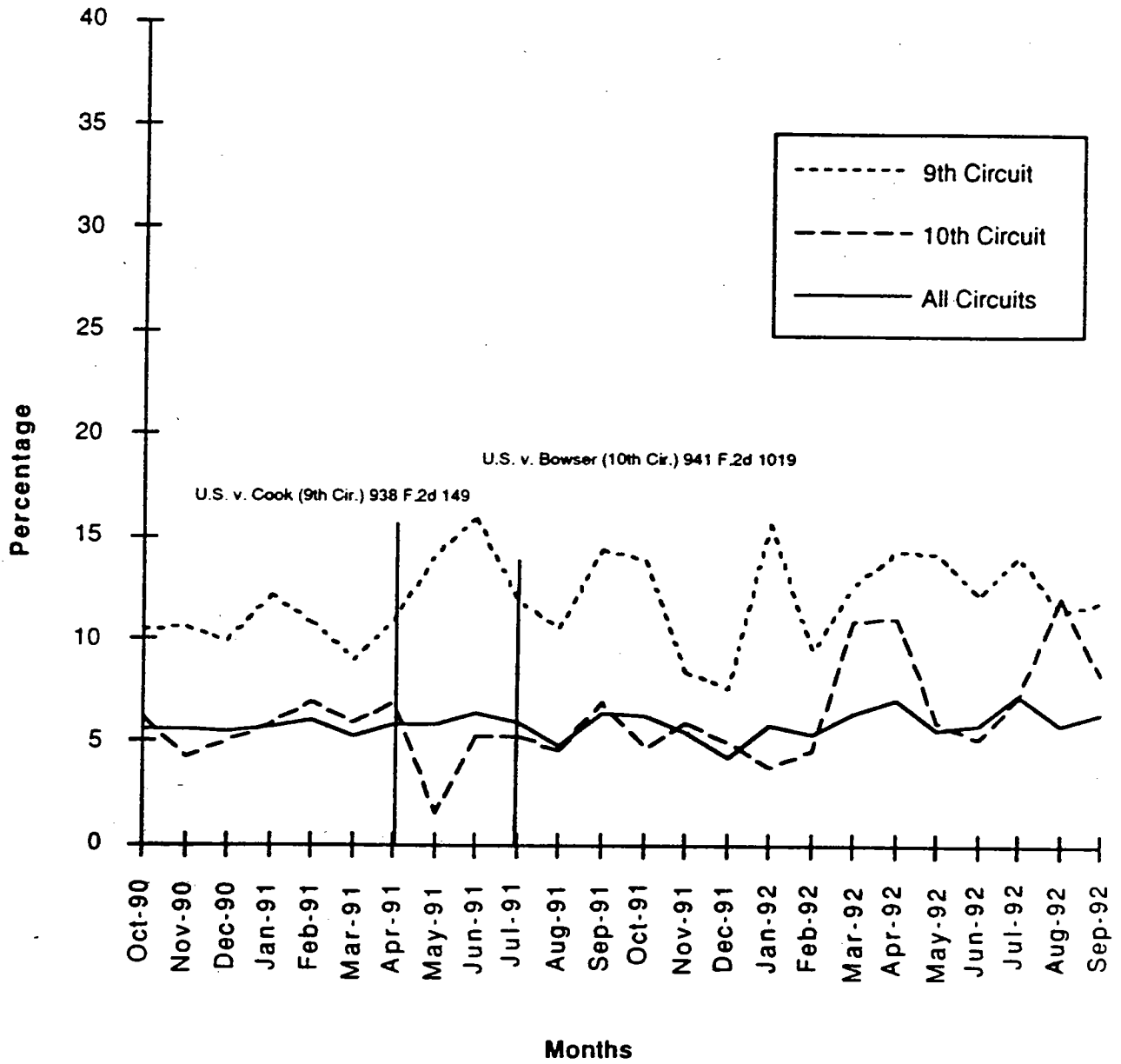
By adopting Amendment #14, the Commission would resolve a split in the circuits, it would incorporate for the first time a mitigating circumstance identified by the courts, it would provide a framework for useful feedback for further fine-tuning of the guidelines, and it would preserve the guideline 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

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

JENNIFER K. ANDERSON
ATTORNEY AT LAW

1230 S.W. FIRST AVENUE, SUITE 300
PORTLAND, OREGON 97204
TELEPHONE (503) 224-0282
FACSIMILE (503) 224-0517

029-94

March 7, 1994

Attn: Public Comment
U.S. Sentencing Commission
One Columbus Circle, NE #2-500
Washington, DC 20002-8002

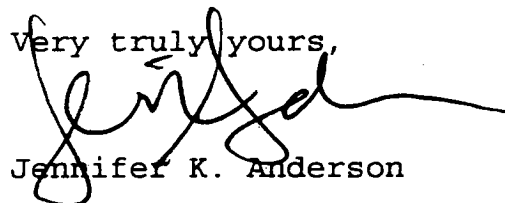
Re: U.S. Sentencing Guideline Amendment/Marijuana Weights

To the U.S. Sentencing Commission:

I am an attorney in Portland, Oregon, and am writing in support of the proposed guideline amendment regarding weights of marijuana plants.

I firmly believe that the current method of assigning weights to marijuana plants should be replaced either by the 100 grams-per-plant valuation or by an amount established by a scientific study of marijuana plant yield. The current weight system is not only unfair to individual defendants, but is also a major contributor to the burgeoning prison population.

Please consider and adopt an alternative weight schedule for marijuana plants.

Very truly yours,

Jennifer K. Anderson

5817

030-91

STEPHEN A. HOUZE
ATTORNEY AT LAW
SECURITY PACIFIC PLAZA
SUITE 1150 • 1001 SW FIFTH AVENUE
PORTLAND, OREGON 97204-1199
TELEPHONE 503/299-6426
FAX 503/299-6428

March 7, 1994

ATTN: Public Comment

U.S. Sentencing Commission
One Columbus Circle, N.E. #2-500
Washington, D.C. 20002-8002

Dear Sir or Madam:

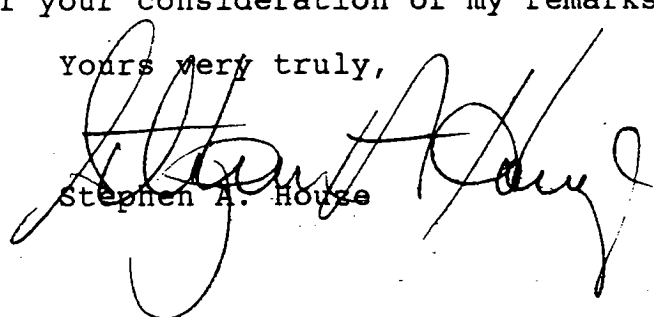
I am writing at this time as a concerned citizen and criminal defense attorney with much experience in the sentencing guidelines. My particular purpose in writing to you is to urge you to seriously consider proposals which have been made regarding the amelioration of the harsh guideline treatment in the area of marijuana possession, cultivation, and sale.

Although Oregon is a federal district in which federal marijuana prosecutions are common, the harsh treatment accorded such offenders under the guidelines is clearly disproportionate. Moreover, the end result of these harsh penalties is to fill our federal facilities with precisely the wrong individuals. Because prison space is such a rare commodity, that space should be reserved for the most serious and violent of offenders in our system. Instead, the system is being filled to overflowing with these generally nonviolent first offenders.

Without attempting to engage in a debate on the merits of the so-called War on Drugs, I would hope that common sense would prevail at the Sentencing Commission regarding this very critical issue.

Thank you very much for your consideration of my remarks.

Yours very truly,


Stephen A. Houze

SAH/cb
cc: Sue Wiswell

[82]

031-94

McDonough & Associates, p.c.
ATTORNEYS AND COUNSELORS AT LAW

March 7, 1994

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
One Columbus Circle, N. C.
Suited 2-500, South Lobby
Washington, D. C. 2002-8002-

Dear Mr. Courlander:

As federal criminal defense practitioners in Houston, Texas. We write in response to the United States Sentencing Commission's request for public comment upon proposed amendments to the Sentencing Guidelines published in the December 21, 1993 edition of the Federal Register (Vol. 58, No. 243, Part V). The purpose of this letter is to comment on proposed amendment number 11, which would amend and consolidate U.S.S.G. §§ 2S1.1 and 2S1.2 governing money laundering offenses.

We strongly recommend adoption of proposed amendment number 11 with modifications. The proposal would tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal proceeds. The suggested modifications are intended to help ensure this result.

The current Guidelines encourage prosecutors to seek money laundering convictions in non-narcotics related money laundering cases because the resulting sentences under the money laundering sentencing guidelines are much harsher than for the underlying offense, and asset forfeiture (which is not taken into consideration under the current Guidelines) is available.

The proposed amendment seems to recognize that §§ 1956 and 1957 are broad and can apply even in relatively simple fraud and other cases. Such cases often involve transactions that are normally not thought of as "money laundering," no less sophisticated money laundering, but which nonetheless are proscribed by §§ 1956 and 1957. Indeed, in some cases, the money laundering offense is difficult to distinguish from the underlying crime. *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 \$3,000.00 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 § 1956 and § 1957 count. 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

COURLANDER
PAGE 2

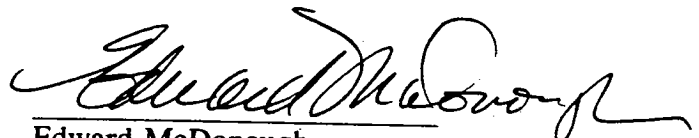
count manipulation." U.S.C.G., Chapter 1, Part A, Paragraph 3.

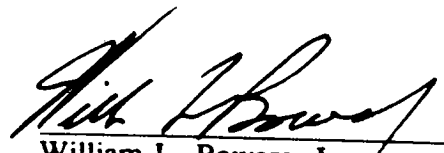
While we support the Commission's objective, we strongly urge the Commission to make the following modifications to the proposed amendment. First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level in proposed §2S1.1 (a) (2) or (3). This offense level then would be increased by any specific offense characteristics under proposed §2S1.1 (b). To achieve this result, I would suggest deleting from the instruction in § 2S1.1 (a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3).

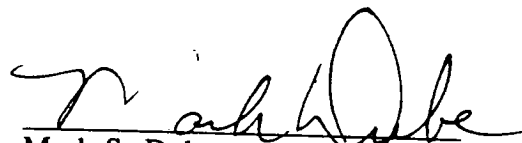
Second, we would strongly urge the Commission to make the base offense level in proposed § 2S1.1 (a) (3) the same as the base offense level for fraud and deceit (§ 2F1.1). Therefore, we would suggest changing proposed § 2S1.1 (a) (3) to a base offense level of 6 plus the number of offense levels from the table in § 2 F1.1.

Very Truly yours,

MCDONOUGH & ASSOCIATES, p.c.


Edward McDonough


William L. Bowers, Jr.


Mark S. Dube

EMcD/bjr

032-9

MICHAEL TANAKA
09014017
SCP PM3 352
POB 2650
JESUP, GA 31545-
2650

U.S. SENTENCING Commission
ONE Columbus Circle, NE
Suite 2500, South Lobby
Washington, D.C. 20002-8002

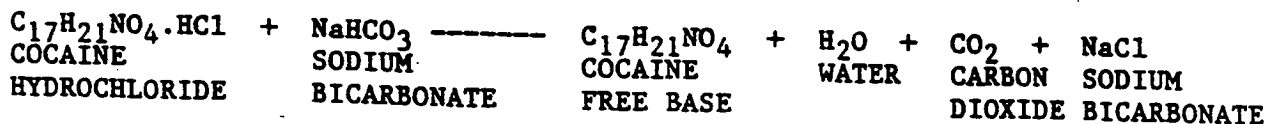
ATTORNEY SUZANNE HASHIMI
GEORGIA NORTHERN PUBLIC DEFENDER
101 MARIETTA TOWER SUITE 3310
ATLANTA, GEORGIA 30303

DEAR ATTORNEY HASHIMI | United States
SENTENCING Commission

I READ AN ARTICLE IN THE ATLANTA CONSTITUTION THAT STATED THAT YOU ARE PREPARING A CHALLENGE TO THE EXISTING CRACK LAW.

THE SENTENCING GUIDELINES MAKE 1 GRAM OF CRACK EQUIVALENT TO 100 GRAMS OF POWDER COCAINE. I AM CHEMIST. WHEN COCAINE IS PROCESSED IN COLOMBIA IT IS CHANGED FROM THE LEAVES TO A COCAINE BASE CALLED BASURO. THEN, THE COCAINE BASE IS PROCESSED TO COCAINE HYDROCHLORIDE BY ADDING HYDROCHLORIC ACID. THE CHANGE TO THE HYDROCHLORIDE FORM IS MADE FOR TWO REASONS. ONE, THE HYDROCHLORIDE GIVES THE PRODUCT A GREATER SHELF LIFE. TWO, THE HYDROCHLORIDE MAKES THE COCAINE SOLUBLE IN WATER. THE COCAINE BASE IS NOT WATER SOLUBLE.

COCAINE FREE BASE(CRACK) IS MADE BY ADDING A BASE SUCH AS AMMONIA, SODIUM HYDROXIDE, OR SODIUM BICARBONATE(BAKING SODA) TO THE COCAINE HYDROCHLORIDE. THE HYDROCHLORIDE IS AN ACID WHICH IS NEUTRALIZED BY THE BASE. THE RESULT IS COCAINE FREE BASE. THE REASON THAT ONE CONVERTS THE HYDROCHLORIDE TO THE BASE IS THAT THE HYDROCHLORIDE VAPORIZES AT A TEMPERATURE OF APPROXIMATELY 190°CENTIGRADE; WHEREAS, THE FREE BASE VAPORIZES AT 95°CENTRIGRADE. SO, THE FREE BASE CAN BE CHANGED INTO A SMOKE AT A LOWER TEMPERATURE. THE STOICHIOMETRIC CHEMICAL EQUATION IS LISTED BELOW.



339 GRAMS

303 GRAMS

THE CHEMICAL EQUATION SHOWS THAT 303 GRAMS OF FREE BASE IS PRODUCED FROM 339 GRAMS OF COCAINE HYDROCHLORIDE. THE RATIO OF POWDER COCAINE(HYDROCHLORIDE) TO FREE BASE(CRACK) IS 1.11 TO 1, NOT THE 100 TO 1 RATIO STATED IN THE GUIDELINE.

[95]

COCAINE CAN BE USED IN THREE WAYS. IN ORDER TO BE EFFECTIVE, COCAINE MUST ENTER THE BLOODSTREAM. COCAINE THAT IS INHALED IS ABSORBED THROUGH THE NASAL MUCOSA IN THE NOSE, AND THROUGH THE ALVEOLAR-CAPILLARY MEMBRANE IN THE LUNGS, MAKING ITS WAY INTO THE BLOODSTREAM. COCAINE THAT IS SMOKED PASSES THROUGH THE ALVEOLAR-CAPILLARY MEMBRANE TO THE BLOODSTREAM. HOWEVER, WHEN COCAINE IS INJECTED INTRAVENOUSLY WITH A NEEDLE, IT GOES DIRECTLY INTO BLOODSTREAM.

POWDER COCAINE CAN BE USED IN ALL THREE WAYS. IT CAN BE INHALED AS A POWDERED SUBSTANCE. POWDER COCAINE CAN BE SMOKED DIRECTLY AS IT COMES IN THE HYDROCHLORIDE FORM, OR IT CAN BE CONVERTED TO FREE BASE AND SMOKED. SINCE POWDER COCAINE IS READILY SOLUBLE IN WATER, IT CAN BE USED IN THE MOST DIRECT AND POTENT WAY. POWDER COCAINE CAN BE DISSOLVED IN WATER AND INJECTED DIRECTLY INTO THE BLOODSTREAM. SMOKING COCAINE IS THE SECOND, NOT THE FIRST, MOST POTENT WAY OF USING COCAINE.

COCAINE FREE BASE CAN BE USED IN ONLY ONE WAY. SINCE COCAINE FREE BASE IS NOT WATER SOLUBLE, IT CAN ONLY BE SMOKED. THE FREE BASE CANNOT BE USED IN THE MOST POTENT WAY--INJECTION. ONLY COCAINE HYDROCHLORIDE(POWDER) CAN BE DISSOLVED IN WATER AND INJECTED DIRECTLY INTO THE BLOODSTREAM. ALSO, COCAINE FREE BASE CANNOT BE INHALED BECAUSE IT IS INSOLUBLE IN THE FLUIDS OF THE NOSE AND LUNGS. IF COCAINE FREE BASE WERE INHALED, IT WOULD REMAIN IN THE NOSE AND LUNGS AS INSOLUBLE PARTICLES.

IF POWDER COCAINE CAN BE SMOKED, WHY IS IT CONVERTED INTO COCAINE FREE BASE BEFORE IT IS SMOKED? COCAINE IS CONVERTED FROM POWDER TO FREE BASE BECAUSE THE FREE BASE TURNS INTO SMOKE AT A LOWER TEMPERATURE, MAKING IT EASIER TO SMOKE.

IF THE SOCIAL RAMIFICATIONS ARE EXPLORED, WE CAN CONCLUDE THAT SMOKING CRACK DIVERTS USERS FROM INTRAVENEOUS INJECTION OF SOLUBLE POWDER COCAINE. FEWER INTRAVENEOUS USERS RESULTS IN FEWER CONTAMINATED NEEDLES WITH THE CORRESPONDING RISK FOR AIDS.

LET US ASSUME THAT THE SENTENCING GUIDELINES RATIO , 1 GRAM OF CRACK EQUALS 100 GRAMS OF POWDER COCAINE, IS CORRECT. A PERSON COULD INHALE APPROXIMATELY 10 TO 20 PUFFS OF SMOKE FROM 1 GRAM OF CRACK. ON THE OTHER HAND, WITH 100 GRAMS OF POWDER COCAINE, USING A DOSE OF 0.2 GRAM, A PERSON COULD INJECT HIMSELF 400 TO 500 TIMES. OR, A PERSON COULD SMOKE THE POWDER COCAINE DIRECTLY, WITHOUT CONVERSION TO THE FREE BASE. IF A PERSON DECIDED TO SMOKE 100 GRAMS OF POWDER COCAINE, HE COULD GET 1,000 DOSES(INHALATIONS), ASSUMING EACH INHALATION USES 0.1 GRAM.

IN CONCLUSION, NO SCIENTIFIC OR LOGICAL BASIS CAN JUSTIFY THE CURRENT CRACK LAW. CONSEQUENTLY, THE LAW SHOULD BE EXAMINED FOR THE POSSIBILITY OF RACIAL BIAS, WHICH SEEMS TO BE SUPPORTED BY STATISTICS.

THANK YOU FOR YOUR KIND CONSIDERATION OF THIS MATTER.

SINCERELY,

MICHAEL Y. TANAKA

033-
94

KETTLE, CARTER & MACKENZIE

ATTORNEYS & COUNSELORS AT LAW

98 WASHINGTON AVENUE

PORTLAND, MAINE 04101

TELEPHONE 207-774-4322

207-775-0028

TELECOPIER 207-879-2619

DONALD CARTER
STEPHEN MACKENZIE

BURT KETTLE
145 MAINE STREET
BRUNSWICK, MAINE 04011
207-729-1500

CRACK/COCAINE AMENDMENT

March 1, 1994

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

To Whom It May Concern:

I would like to make my opinion known concerning the current status of sentencing for crack/cocaine offenders, and the need for significant changes to be made in the sentencing guidelines as applied to offenses relating to this drug.

In my view the current sentencing scheme for crack/cocaine offenders represents an absurd waste of federal resources and is tantamount to the wholesale warehousing of human beings. While there is no dispute that crack/cocaine is a dangerous drug, there is little logic in a scheme which sentences someone to a ten fold greater sentence for taking powdered cocaine, mixing it with baking soda, heating it up on a stove so that the molecular structure can be changed such that it may be smoked rather than snorted. There is significant evidence available which shows that powdered cocaine is in fact more dangerous than crack/cocaine and is responsible for far more deaths than crack/cocaine.

It has also become extremely clear that this statute/sentencing scheme has a racially disparate impact on African-Americans. In fact recent studies show that while approximately 50% of powdered cocaine defendants are white, 96% of crack/cocaine prosecutions are against blacks. The constitutional implications of this scenario are obvious.

cc: Sub B, 1
cc: Sub C, 1
cc: Sub D, 1
cc: Sub E, 1

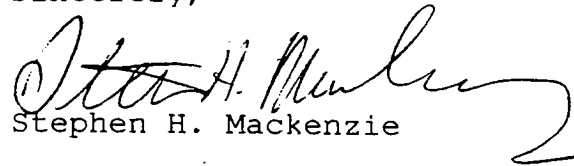
United States Sentencing Commission
March 1, 1994

Page -2-

I hope that the Sentencing Commission will take the time to rectify this travesty of justice, and enact sentencing guidelines, RETROACTIVE to the enactment of the differentiation between powder and crack/cocaine under the guidelines, which will punish all cocaine offenders equally.

I thank the Commission for taking my opinion into its consideration.

Sincerely,



Stephen H. Mackenzie

SHM:psw

cc: Daryl Singleterry

Law Offices
THOMAS W. TANNER
P.O. Box 480
Covington, Louisiana 70434

034-94

Telephone: (504) 892-0202
Fax: (504) 892-9576

March 15, 1994

424 Vermont Street
Covington, LA

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

Attention: Public Information

Dear Commission Members:

As Chairman of the Louisiana Sentencing Commission, a retired judge, and now a practicing attorney, I have been following the federal sentencing guidelines and would like to urge the Commission to support the changes or amendments to the Sentencing Guidelines for United States Courts recommended by the Commission, which are the subject of the public hearing to be held March 24, 1994 and which may be reported to Congress by May 1, 1994.

I am particularly in support of, and strongly urge, that the Commission recommend the proposed amendment to Chapter Two, Part S revising and consolidating Sections 2S1.1 and 2S1.2.

I also urge the adoption of the proposed amendment to Section 1B1.10 but believe that instead of "the Court may consider a reduction in the defendant's term of imprisonment", this provision should read "the Court shall consider a reduction in the defendant's term of imprisonment" if the guidelines range applicable to the defendant has been lowered as a result of an amendment. To do otherwise would deny justice to people already sentenced merely because the date sentencing occurred was prior to the passage of the amendment.

I also favor, and urge you to recommend, that all amendments to the sentencing guidelines be made retroactive. To do otherwise would again deny justice, decency and fair play to defendants already sentenced.

I believe that an extraordinary effort should be made to recommend the proposed changes to Congress by May 1, 1994, and that the commission members do all in their power to insure passage of the recommendations.

Thanking you for your assistance and cooperation in this matter, I am,

Sincerely,

A handwritten signature in dark ink, appearing to read "Thomas W. Tanner". The signature is fluid and cursive, with the first name "Thomas" being more prominent.

Thomas W. Tanner

TWT:ege

cc: Hon. J. Bennett Johnston
Senate Office Building
Washington, D.C. 20510

Hon. John Breaux
Senate Office Building
Washington, D.C. 20510

Hon. Robert L. Livingston
House Office Building
Washington, D.C. 20515

035-92

LAW OFFICES
RODRIGUE & RODRIGUE
604 EAST RUTLAND STREET
COVINGTON, LOUISIANA 70433

JULIAN J. RODRIGUE, JR.

JULIAN J. RODRIGUE
OF COUNSEL

TELEPHONE 892-3171

FAX 892-7278

March 9, 1994

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

Attention: Public Information

Dear Commission Members:

I have been a practicing attorney for forty-three years in the Eastern District of Louisiana, New Orleans Division, and I am active in criminal defense work in both State and Federal Courts, after serving as a prosecutor in State Courts for eighteen years. I strongly support the changes or amendments to the Sentencing Guidelines for United States Courts recommended by the Commission, which are the subject of the public hearing to be held March 24, 1994, and which may be reported to Congress by May 1, 1994.

I am particularly in support of, and strongly urge, that the Commission recommend the proposed amendment to Chapter Two, Part S revising and consolidating Sections 2S1.1 and 2S1.2.

I also urge the adoption of the proposed amendment to Section 1B1.10 but believe that instead of "the Court may consider a reduction in the defendant's term of imprisonment", this provision should read "the Court shall consider a reduction in the defendant's term of imprisonment" if the guidelines range applicable to the defendant has been lowered as a result of an amendment. To do otherwise would deny justice to people already sentenced merely because the date sentencing occurred was prior to the passage of the amendment.

I also favor, and urge you to recommend, that all amendments to the sentencing guidelines be made retroactive. To do otherwise would again deny justice, decency and fair play to defendants already sentenced.

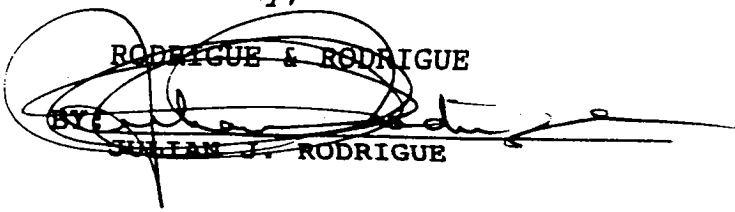
5117

I believe that an extraordinary effort should be made to recommend the proposed changed to Congress by May 1, 1994, and that the Commission members do all in their power to insure passage of the recommendations.

Thanking you for your assistance and cooperation in this matter, I am

Sincerely,

RODRIGUE & RODRIGUE


JULIAN J. RODRIGUE

JJR/cvb

cc: Hon. J. Bennett Johnston
Senate Office Building
Washington, D. C. 20510

Hon. John Breau
Senate Office Building
Washington, D. C. 20510

Hon. Robert L. Livingston
House Office Building
Washington, D. C. 20515

036-94

DVORAK & FINCKE, S.C.
ATTORNEYS AND COUNSELORS AT LAW
823 NORTH CASS STREET
MILWAUKEE, WISCONSIN 53202-3908

ROBERT J. DVORAK
ALSO ADMITTED IN MINNESOTA
WARING R. FINCKE
ALSO ADMITTED IN PENNSYLVANIA

TELEPHONE
(414) 273-0373
FACSIMILE
(414) 273-0554

March 9, 1994

Michael Courlander
Public Information Specialist
U.S. Sentencing Commission
Suite 2-500 South Lobby
1 Columbus Circle, NE
Washington, DC 20002-8002

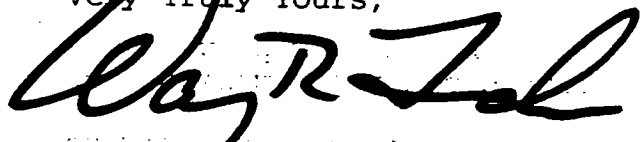
Dear Mr. Courlander:

Regarding the Marijuana Amendment to the Federal Sentencing Guidelines, I support the Marijuana Amendment establishing a 100-gram-per-plant equivalency for fifty or more plants, regardless of how many plants are grown, and that this change be made retroactive.

As a criminal defense practitioner in federal courts, I have represented many young people accused of violation of controlled substances laws. The marijuana equivalency tables in the current Federal Sentencing Guidelines are draconian at best and make no sense when considered vis-à-vis the growing of a fewer number of plants than fifty. The extrapolation of the current guidelines from the applicable mandatory minimum is not required by statute and creates penalties wholly disproportionate to the actual harm involved.

I strongly urge the Commission to accept the amendment which establishes a hundred-gram-per-plant equivalency for fifty or more plants, regardless of how many plants are grown, to the current marijuana sentencing guideline chart.

Very Truly Yours,



Waring R. Fincke
Attorney at Law

WRF:dlt

037-9

BENDER & WAHLBERG, P.C.
ATTORNEYS AT LAW

DOUGLAS A. BENDER
P. DAVID WAHLBERG*

* Board Certified - Criminal Defense

March 11, 1994

1208 WEST AVENUE
AUSTIN, TEXAS 78701
(512) 474-2315

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

Re: Proposed Changes to Federal Sentencing Guidelines

Gentlemen:

For the past several years, I have become increasingly concerned about the unreasonably harsh guidelines in drug cases, particularly those relating to marijuana. The sentences imposed and actually served are so dramatically different under the Federal Sentencing Guidelines that State law enforcement agencies actively forum shop in order to seek prosecution in Federal Court. While I feel that it is pointless, at this time, for me to address the enforcement of drug laws in general, there is one particular area that is so grossly unfair that I believe your attention is appropriate.

Specifically, your attention is directed to that provision in Section 2D 1.1 in which it provides that in the event of possession of fifty or more marijuana plants, each plant shall be deemed to be the equivalent of one kilogram; that in the case of possession of fewer than fifty marijuana plants, each plant shall be treated as the equivalent of one hundred grams of marijuana. This provision establishes nothing more than a presumption; it is clearly not based on any factual considerations. For a person in possession of fifty marijuana plants to be punished at a rate ten times that of a person who had one plant fewer is ludicrous.

I recently handled a marijuana case involving the possession of approximately one hundred marijuana plants. Under the Guidelines, this individual was held responsible for the equivalent of more than two hundred twenty pounds of marijuana. In truth, the marijuana actually weighed forty-seven pounds.

If truth in sentencing is indeed the goal of the Sentencing Guidelines, then we should agree that this provision is not factually accurate.

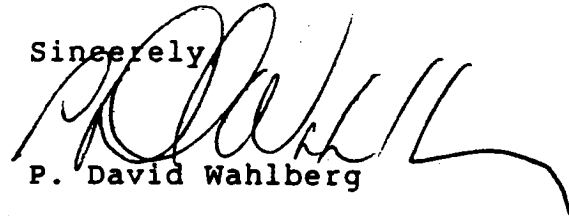
FED/SHELTON/22

[ca]

United States Sentencing Commission
March 11, 1994
Page 2.....

It is my suggestion that this provision be deleted and that the punishment for possession of marijuana plants should be based on the actual weight of the marijuana involved (excluding dirt, roots, stalks, and stems, because they are generally not consumed).

Sincerely,

A handwritten signature in black ink, appearing to read 'P. David Wahlberg', written over the typed name.

P. David Wahlberg

PDW/rbp

FED/SHELTON/22

[G6]

STATE REPRESENTATIVE
36th DISTRICT
JEANNE KOHL
MAJORITY WHIP

State of
Washington
House of
Representatives



EDUCATION
ENVIRONMENTAL AFFAIRS
JUDICIARY
TRANSPORTATION

038

March 17, 1994

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

Re: U.S. Sentencing Commission Hearings on Adjustment of Sentencing
Guidelines on Marijuana Growing on Federal Lands.

Dear Judge Wilkins:

I am writing as a member of the Washington State House of Representatives Judiciary Committee. As I understand, the U.S. Sentencing Commission is receiving public comments through March 18 before conducting hearings beginning March 24.

Overall, I am very concerned about the present system of imposing mandatory minimum sentences of five years and ten years based on use of a cookbook list of x number of marijuana plants equaling x amount of weight determining x number of months in prison. This system seems particularly inequitable when contrasted with the penalties imposed for growing marijuana on state or private lands. Neither does it seem very practical to clog the correctional facilities with non-violent offenders, leaving insufficient space for violent offenders.

We in Washington state are currently facing this problem. Our legislature had passed the Omnibus Drug Act of 1989, requiring cookbook type of standards for sentencing. However, unlike the federal system, we do provide some discretion to the judge, an option of imposing sentences below the standard range on the basis of mitigating, case-specific factors (not because the judge believes the mandatory minimum sentence to be unfair). Even so, we now find our prisons brimming with inmates convicted of drug-related offenses, leaving insufficient room for those convicted of violent crimes.

Thus, I urge the Sentencing Commission as well as the Senate Judiciary Committee to make changes in the sentencing guidelines for drug-related offenses. The "War on Drugs" produced even more severe sentencing standards at the federal level than the already severe standards established at our state (and many other states) level. With the increasing rate of violent crimes being committed -- especially by our youth and of a random nature -- it is time to reshift our priorities and redirect our resources to deal with this deadly phenomenon.

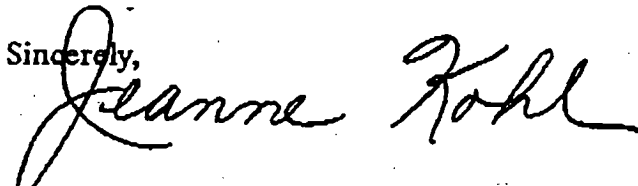
rah

Also, I urge the Commission to make the changes retroactive, as was done with the change in sentencing standards for LSD possession.

As both a state legislator serving on the House Judiciary Committee and as a sociologist on the faculty at the University of Washington, I strongly believe that five- and ten-year mandatory minimum sentences too frequently reap unintended consequences that are dysfunctional for convicted individuals and for protection of our citizens. Locking up someone for five years minimum may in effect be counterproductive for his or her rehabilitation and becoming a contributing citizen, as well as resulting in taking up space that could be used for incarcerating a violent offender who presently is likely to be let off due to lack of prison space. I believe that imposition of more equitable punishments accompanied by rehabilitation efforts make more sense fiscally, and in preventing recidivism.

I thank you for considering my input. I would be please to provide further comment if you wish.

Sincerely,



JEANNE KOHL
State Representative
36th District



039-94

THE CATHOLIC UNIVERSITY OF AMERICA

*Columbus School of Law
Office of the Faculty
Washington, D.C. 20064
(202) 319-5140*

March 15, 1994

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

Re: Proposed Guideline Amendments
& Issues for Comment-1994 Cycle

Dear Chairman Wilkins:

On behalf of the Practitioners' Advisory Group (hereinafter called "PAG"), I am writing to you to provide the views of our Group concerning the proposed amendments and issues for comment which are before the Commission on the 1994 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 comment. We are also especially grateful in regards to the willingness of the Commission to facilitate our monthly PAG meetings by allowing us to teleconference in members of the PAG who are unable to attend the meetings. We also wish to commend the Commission on the willingness of the leaders of the various Working Groups of the Commission to meet and work closely with liaison members of the PAG on the various Working Groups.

TO AMEND OR NOT TO AMEND THE GUIDELINES

The views of the PAG on this issue have been consistent throughout the period of our existence: we favor change where wisdom and experience call for change and where inter-Circuit conflicts cry out for resolution by the Commission--especially in light of the fact that the Supreme Court has indicated that it is

looking to the Commission to resolve most of the problems in applying and interpreting the guidelines. See, United States v. Braxton, 111 S. Ct. 1854 (1991) [Commission has been given the power by Congress to amend guidelines to resolve Circuit conflicts]. 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 the enabling legislation.

SPECIFIC AMENDMENT PROPOSALS

The PAG has broken down its comments by following the index to the proposed guideline amendments for public comment (reader friendly version). Thus, our numbered paragraph 1 will be our comment on proposed amendment (or issue for comment) number 1 and so forth.

1. Proposed Amendment #1-Theft, Property Damage, Fraud (Chapter Two, Parts B & F)

§2B1.1. The PAG opposes this proposed amendment as written. The Introductory Commentary states that Chapter 2, Part B (including §2B1.1) "address[es] the most basic forms of property offenses." §2B1.1 encompasses theft and theft-related offenses. Such offenses are inherently pecuniary in nature, and are almost always motivated by pecuniary gain. Although §2B1.1 contains several specific non-monetary offense characteristics, there is no mention of the kinds of non-pecuniary motive, and non-pecuniary harm, addressed by this proposed amendment. Therefore, those rare situations are adequately addressed by §5K2.0, which already permits upward departure where "there exists an aggravating . . . circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Indeed, as §5K2.0 points out, "[c]ircumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed or analyzed in advance."

The PAG also suggests that this proposed amendment, as drafted, is overbroad. For example, it is suggested that an upward departure may be warranted "if the offense involved a substantial invasion of a privacy interest." Such harm may be wholly unintended. At a minimum, consideration should be limited to harm which is either intended or reasonably foreseeable.

Moreover, any new commentary should provide clear guidance regarding how reasonable foreseeability is to be determined. The ability to predict harm often will vary significantly with the defendant's level of sophistication. If additional commentary is adopted, it should clarify that the determination of reasonable foreseeability should be made from the perspective of a person who possesses the defendant's level of skill and sophistication.

§ 2B1.3. The PAG does not oppose the proposed amendment to Application Note 4, with the following reservation. The PAG believes that neither the Commission nor the courts has yet acquired sufficient experience with computer-related cases to predict with any certainty what sorts of conduct warrant upward departure. Accordingly, the word "would" in the last sentence of Application Note 4 should be replaced with the word "may."

Although the PAG does not oppose it in principle, proposed Application Note 5, as presently constituted, raises a number of difficult issues. This proposal observes that monetary harm sometimes will not be an adequate measure of the seriousness of certain offenses, such as the destruction of a computer data file, and that an upward departure may be appropriate in such cases. However, the PAG believes that this amendment should also acknowledge that a downward departure may be equally appropriate in those cases where an offense results in wholly unintended and unforeseeable monetary damage. Indeed, the consequences of a computer-related offense will sometimes be impossible to predict. For example, supplying an acquaintance with a game disc that contains a computer virus, for home use, can result in disabling an entire office network where, in violation of the copyright laws, the disc is shared freely with the recipient's officemates. It would be inappropriate to hold a defendant automatically accountable for all such consequences.

In addition, any new commentary should acknowledge that quantifying the loss and/or cost of repairing computer data files will be extremely difficult. Repair, in particular, often will involve numerous variables, such as the skill of the individual who performs the work, and the evolution of technology. the process of attributing such costs to a defendant is also subject to error and abuse. (See, e.g., the March 22, 1993 written submission of Thomas A. Guidobini in connection with the 1993 amendment cycle.) The PAG believes, therefore, that the Commission should consider adopting an additional application note which cautions that this kind of "loss" warrants careful scrutiny.

Finally, proposed Application Note 5 might more appropriately be made a part of §2F1.1 Application Note 7, which already contains a lengthy and detailed discussion of calculating loss. This would have the obvious advantage of presenting a single, comprehensive discussion of loss, rather than addressing the subject piecemeal.

§ 2F1.1. The PAG opposes this proposed amendment as unnecessary. The kinds of harm covered by the proposed amendment are adequately addressed by existing Application Note 10(a), which authorizes upward departure where "the primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm."

Proposed Application Note 10(g), which addresses the invasion of a privacy interest, is objectionable for additional reasons. First, this proposed amendment would explicitly authorize upward departure in the case of a wholly unintended and unforeseeable harm. If such commentary is adopted, the PAG believes that, as with the proposed amendment to §2B1.1, and consistent with Application Note 10(a), consideration should be limited to those cases where the privacy invasion was either intended or reasonably foreseeable, as defined by the Commission.

Furthermore, proposed Application Note 10(g) fails to provide any guidance as to the kinds of privacy interests whose invasion may warrant upward departure. The invasion of a specified privacy interest is required to establish a violation of various subsections of 18 U.S.C. §1030. See, e.g., 18 U.S.C. §§1030(a) (1) (restricted information relating to national defense, foreign relations and the Atomic Energy Act of 1954); (a)(2) (financial institution and credit information); (a)(5)(B) (information relating to medical treatment and (a)(6) (computer passwords and similar information). Therefore, where a conviction is under one of those subsections, an invasion of the specified privacy interest is already accounted for in the base offense level. It would constitute unfair double counting for the same privacy invasion to be used as the basis for upward departure. The PAG believes that, at a minimum, any new application note should exclude consideration of those kinds of invasions. The far better practice would be to include commentary which provides explicit guidance regarding the kinds of invasions that warrant additional punishment.

The PAG opposes proposed Application Note 10(h). A "conscious or reckless risk of serious bodily injury" is already a specific offense characteristic, warranting a two level increase (to a minimum of level 13) pursuant to §2F1.1(b)(4). Other "substantial non-monetary harm" is covered by §2F1.1 Application Note 10(a). The only thing added by proposed Application Note 10(h) would be the possibility of upward departure for a risk of insubstantial bodily injury, whereas serious bodily injury would result in only a two level increase.

Appendix A (Statutory Index). The PAG endorses this proposed amendment.

2. Proposed Amendment #2-Public Corruption

Amendment 2(A). For the reasons stated in the synopsis of the proposal, the PAG does not oppose the proposed amendment to consolidate §2C1.3 (Conflict of Interest) and §2C1.4 (Payment or Receipt of Unauthorized Compensation).

Amendment 2(B). The PAG does not oppose the consolidation of §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) and

§2C1.6 (Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper), for the reasons set forth in the Synopsis of Proposed Amendment. The PAG wishes to emphasize, however, its opposition to the existing increases for more than one gratuity. The PAG also opposes the 8 level increase, or any increase, for an official holding a so-called "high-level decision-making or sensitive position," particularly in cases involving gratuities. It is the PAG's position that any adjustment which depends on the recipient's position should be made by the sentencing judge within the appropriate guideline offense.

Amendment 2(C). The PAG opposes the proposed consolidation of §2C1.1 (Bribery) and §2C1.2 (Gratuity) into one guideline. The differences between a bribe and a gratuity are substantial, and any consolidation would encourage courts to blur the distinction in their sentencing function. A bribe requires a corrupt intent and a quid pro quo, whereas a gratuity requires neither. Congress recognized the distinction between the offenses when it assigned a statutory penalty of fifteen years for bribery, compared with two years for gratuity offenses. Also in contrast to bribery, the statutory definition of gratuity is extremely broad, and can include such conduct as payment of a meal for a public official for or on account of official functions already performed or to be performed by the official. Based on the foregoing, the gratuity offense level of 7 is unreasonably high, and should not exceed 5 under any circumstances.

3. Proposed Amendment #3 (Issue for Comment) - Public Corruption

The PAG favors modification of the base offense levels for Blackmail, Bribery Affecting Employee Benefit Plans, and Gratuities Affecting Employee Benefit Plans, so that base level offenses for non-public corruption offenses are lower than those for public corruption offenses. The PAG opposes any modification which would equate guidelines for public corruption offenses and non-public corruption offenses. This is avoided by lowering the base offense level for non-public corruption offenses such that an adjustment from §3B1.3 (permitting a 2-level enhancement for Abuse of Position of Trust) would always put these latter offenses at a level below the corresponding public corruption offenses. This would be a logical modification of the existing guidelines both because the base offense levels for public corruption offenses already account for abuse of position of trust, and because of the clear difference in the order of magnitude between commercial bribery and bribery of a public official.

The PAG again emphasizes that the guidelines must clearly distinguish between bribery and gratuity offenses when determining appropriate levels. This includes a definition of bribery which encompasses both a corrupt intent and a quid pro quo, neither of

which is an element of gratuity.

The PAG opposes the proposed base level increase from level 10 to 14 for §2C1.1, as well as any increase in the base offense level for §2C1.2 and §2C1.7, because the penalty for bribery should not be imprisonment in all cases. The PAG also favors lowering the offense level for the corruption gratuity from level 7 to 5.

The PAG believes that §2C1.1(c)(1) should be modified to eliminate the overly broad cross reference that applies the non-public corruption guideline notwithstanding the defendant's intent to commit the other offense. The PAG wishes to ensure that the Commission differentiate between offenders who intentionally engage in bribery in order to facilitate another criminal offense, and those offenders whose bribery offense inadvertently leads to another criminal offense. Such a delineation would be in keeping with the mens rea requirement which is ordinarily necessary to sustain a charge of criminal conspiracy against a defendant. This modification would also be consistent with the Commission's desire to account for the seriousness of the crime in a relative context.

4. Proposed Amendment #4-Public Corruption

Amendment 4(A). As established by USSC data, most bribery and gratuity cases involve multiple incidents of payments. Accordingly, the PAG emphatically opposes the 2-level enhancements at §§ 2C1.1(b)(1) and 2C1.2(b)(1) on the basis of improper double counting of characteristics already considered by the value table. Thus, with regard to clarifying the adjustment for more than one incident of bribery, extortion, or gratuity, the PAG favors OPTION 2 which eliminates the adjustment as duplicative with the second adjustment based on value or benefit of the payment which is intended to reflect the severity of the offense. The PAG also supports a reduction of the base offense level for gratuity from 7 to 5.

Amendment 4(B). Commentary discussion of the adjustments for multiple payments in §§2C1.1(b)(1) and 2C1.2(b)(1) should be eliminated consistent with OPTION 2, noted above.

5. Proposed Amendment #5-Public Corruption

Amendment 5(A). The PAG opposes the proposed amendment to make adjustments for value of the payment and for high-level official cumulative. Rather, the PAG support the current system whereby any increases are in the alternative.

The PAG favors a reduction in the mandatory 8 level enhancement for high-level officials, particularly in light of the ambiguous guideline language: "Any official holding a high-level

decision-making or sensitive position." The enhancement produces results too severe in nature and the guideline language encourages inconsistent, arbitrary and excessive sentences. The enhancement is unnecessary because currently the judge can use the official's position as a factor in determining the appropriate sentence. If official position must be used as an enhancement factor, the increase should not exceed 2 levels.

The current 8 level increase for a high level official involved in a gratuitous transaction, when coupled with the current base offense level of 7, provides for a minimum offense level of 15, which translates into a statutory maximum of 18 to 24 months imprisonment. This can yield incongruous results, such as a mandatory sentence of 18 months to two years for a meal paid to an individual determined to be a high-level official. The increase for so-called high-level officials should be eliminated, for both bribery and gratuity, to avoid such an outcome. Again, if the increase is unavoidably retained in cases of gratuity, it should not be in excess of level 2, and the statutory language should be narrowed and clarified.

Amendment 5(B). The PAG favors elimination of any enhancement depending on position of the bribee, but if there must be an enhancement it should not exceed 2 levels. The PAG opposes the use of charts or other objective criteria in determining the appropriate level of officialdom, as this tends to encourage increased attention to the maximum level of 8, or to the even larger increase proposed by the Justice Department. If the Commission determines that there must be an increase for the official level of the bribee, and that a 2 level increase is too small, then the increase should range from 2 to 6 levels. The current 8 level increase is too severe, given that the base offense level for bribery is as high as 10. (See our discussion in paragraph 2 at comment to Amendment 5(A), above.)

The PAG also favors the proposed adjustment for high-level officials in §2C1.2 for reduction by [2-6] levels to limit the frequency with which the adjustment results in sentences at the statutory maximum.

The PAG also favors amending the commentary to provide for downward departure in unusual cases such as those involving low-level elected public officials.

6. Proposed Amendment # 6-Public Corruption

Amendment 6(A). The PAG does not oppose the proposed amendment to clarify in §2C1.1 and §2C1.7 that the payment involved in the offense need not be monetary but rather may be anything of value, and that in offenses involving extortion under color of official right, value includes the value of the benefit that would have been

denied to, or the loss that would have been effected on, the victim had the victim not made the extorted payment(s).

The PAG favors the proposed amendment to §2C1.7 to clarify that private officials are not considered high-level officials for purposes of the 8-level enhancement. The PAG also notes its opposition to the 8 level increase for a public official, however, particularly as presently defined but even if defined more precisely.

Amendment 6(B). The PAG favors the definition of "benefit received" discussed by the Seventh Circuit in United States v. Narvaez, wherein the individual making a bribe is not liable for the actions of others which were not reasonably foreseeable to him. United States v. Narvaez, 995 F.2d 759, 763 (7th Cir.1993). Thus, the net "benefit received" should be limited to that which personally accrues to the defendant, regardless of the operations of a large-scale organization of which he might have been aware. Id. The PAG therefore rejects the position of the Fourth Circuit in United States v. Muldoon, which suggests that an individual may be held responsible for the actions of others based on a corporate perspective, rather than the perspective of the individual making the bribe. United States v. Muldoon, 931 F.2d 282 (4th Cir.1991).

Amendment 6(C). The PAG opposes the proposed upward departure where the offense involves ongoing harm or a risk of ongoing harm to a government entity or program, regardless of actual benefit received. It is the risk to the integrity of a proposed program that causes bribery to have a base offense level as high as 10, the same base offense level as offenses in §2(C)1.7. Moreover, the phrase "risk of on-going harm" is overly vague and subject to dissimilar interpretations and applications. Any need to account for a risk of ongoing harm to the government can be accomplished by the judge in selecting the higher range of the already stringent base offense level. Finally, the court already has departure authority pursuant to §5K2.7, Disruption of Governmental Function.

7. Proposed Amendment # 7(Issue for Comment)-Departures

While the PAG does not necessarily share the view that the holdings of the three cases cited and the requirements contained within 28 U.S.C. §994(d) provide an example of a critical policy matter that warrants immediate Commission attention, we believe that issues such as this should typically be allowed to additionally percolate throughout the federal court system before the Commission attempts to resolve or bring cloture to them. For the present, we believe that the trial and appellate courts should be permitted to read both 28 U.S.C. §994(d) and 18 U.S.C. §3553(b) and then decide for themselves whatever tensions might exist between the two provisions and how to resolve same in the context

of the facts and circumstances before them. With the arguable exception of the "Crack" provisions, the Commission has significantly and successfully performed its §994(d) obligation and there exists no present need to revisit that effort for cultural matters in general for public corruption cases in particular.

PROPOSED DRUG AMENDMENTS

(Amendments 8A,8B,8C,8D,9,10,24 and 33)

The Practitioners Advisory Group most strongly favors a comprehensive set of amendments to alter sentencing for controlled substance violations so as to create a more rational drug sentencing policy but to preserve the basic philosophical choices originally made by this Commission relating to drugs.

We favor, as a package, reducing the quantity table by two levels, eliminating levels 42 and 40, creating a cap for minor participants, adding an enhancement for assaultive behavior, and improving the commentary to the role in offense adjustments.

This package of amendments should be considered as a group in total because they represent compromises reached concerning drug sentencing policy between competing interests. The three-year debate concerning these changes have synthesized various proposals to the point that we feel a consensus has been achieved as to changes which should be made in drug sentencing provisions. No other proposal has emerged which prudently offers positive change in this troubling area. The time to act is now without further delay. We endorse in the strongest manner as possible this package of amendments.

8. Proposed Amendment 8A-Drug Trafficking and Role in the Offense

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. 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 a 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. Proposal 8A would establish level 38 as the upper end for quantity. The 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. This proposal impacts upon 15% to 20% of offenders while preserving congressional mandates. This proposal is strongly endorsed by the PAG.

8. Proposed Amendment 8B-Drug Trafficking and Role in the Offense

During the last Amendment cycle the Practitioners Advisory Group proposed that a 4-level increase be added for the following:

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.

The increased possession, display and use of firearm in association with drug offenses remains a societal problem which demands increased protection. However, the Practitioners Advisory Group was divided between the above proposal and Option two below which was only slightly favored.

Option One can be interpreted to apply to all participants in jointly undertaken activity and was therefore disfavored. Applying a 4-level enhancement to minimal or minor participants is simply not appropriate and casts too large a net. The former Practitioners Advisory Group proposal covered those who discharge and those who direct or induce. We felt that these were the appropriate participants who should be sanctioned for this conduct. The reasonably foreseeable standard offers no protection to the minor participant here because guns are involved in a significant enough percentage of drug offenses to foster the argument that the discharge of a weapon in a drug offense is always reasonably foreseeable. Sanctioning those who discharge firearms and those who direct such use appropriately narrow the application of this characteristic to only those who should be held accountable for this behavior.

The 2-level increase for serious bodily injury is unanimously disfavored by the Practitioners Advisory Group because this conduct is included in the use or discharge provisions discussed above. Again, any serious injury aggravator should only apply to those perpetrators actually causing serious injury or directing that it be caused.

Option Two was recommended by the Practitioners Advisory Group by a one-vote margin over our former proposal. By creating a directive that assaultive behaviors which occur during drug crimes are to be treated as separate non-grouped offenses, the Commission would create two ranges of offenses which add from 0 to 2 points to the highest of the two ranges. Based on weight, the offense level for drug crimes ranges from 6 to 42 currently and would range from 6 to 38 under proposed Amendment 8(A). Based on a variety of factors such as use of weapon, injury seriousness, intent to murder and the pecuniary nature of the transaction, the range for engaging in an aggravated assault is from Level 15 to 36. These two levels are compared and if they differ by 0 to 4 points, 2 points are added to the highest range, but no points are added if the differential is 9 points or more. If the difference is 5 to 8 points, only one point is added. Those favoring this proposal felt it was consistent with guidelines principles.

8. Proposed Amendment 8C-Drug Trafficking and Role in the Offense

During the last amendment cycle the PAG proposed the following amendment to §2D1.1(a)(3):

"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."

This proposal capped base offense levels for serious drug offenses such as distributions of Heroin and Cocaine at 32 for those offenders who qualify for a mitigating role adjustment. Those mitigating offenders who commit less serious drug crimes had their base offense levels capped at 24.

The PAG favors this proposal over the current proposal of a single cap of level 32/30 because of this differentiation between the so-called "hard" and "soft" drugs. The PAG believes that this differentiation more significantly protects against overly harsh punishment for offenders whose involvement is peripheral. However, if given the choice of no change at all or a cap of level 30, the Practitioners Advisory Group would favor this cap or, as a final measure, a single cap of 32.

Restructuring the drug table downward, capping offenders who are peripherally involved and differentiating between those who aid in the distribution of more and less addictive substances will result in significant punishments remaining for drug offenders but will reduce the opportunity for excessive penalties.

8. Proposed Amendment 8D-Drug Trafficking and Role in the Offense

While we welcome the continued invitation to de-emphasize weight in the drug calculus, we do not favor further delay in enacting Amendments 8A, 8B and 8C so as to further study quantity. Study has occurred, and now the time is to act. We ask that these amendments be adopted.

9. Proposed Amendment 9-Role in the Offense

The main thrust of this amendment is to count undercover law enforcement officers as participants in jointly undertaken activity for the purpose of determining aggravating role. There appears to be no good reason to change what has been a seven-year practice of not including officers in counting the number of persons a leader supervises in assessing the appropriate aggravation. The PAG does not favor this proposal but does favor deleting the language "or otherwise extensive," from §3B1.1(a) and (b).

10. Proposed Amendment 10-Role in the Offense

This amendment revises the introductory comment to the guidelines section on the role in offense adjustment. It is a welcomed clarifying addition which parallels the recent amendments to 1B1.3 (relevant conduct). Because some courts have inconsistently interpreted the role adjustments according to past Commission studies, this clarifying language is strongly supported by the PAG.

The remaining changes in the commentary to mitigating role can be endorsed by the PAG provided certain provisions are altered.

In §2(c) the PAG favors deleting the phrase "i.e., a value of \$1,000 or less generally in the form of a flat fee." Tying mitigation to a \$1,000 fee is far too limiting. Providing guidance that compensation should be small in amount without pinning down a specific amount is far more consistent with the underlying philosophy of assessing role in the context of the activity for which the defendant is being held accountable. In a "mega" kilo conspiracy a \$5,000 fee for one act might not disqualify, while in a small crack ring whose total profits are \$10,000, such a fee would eliminate mitigation.

The PAG also believes that paragraph (4) should be deleted. "Mules" should be treated in the context of the entire conspiracy, and removing minimal role consideration for a one-time courier is too inflexible. Again, role in the offense should be determined in the context of the activity for which the defendant and his co-conspirators are being held responsible.

Likewise, paragraph (5) should be eliminated. The use of firearms has nothing to do with the role an offender plays in the offense for which he is being held accountable. Firearms possession and use are appropriately considered as specific offense characteristics and in fact are taken into consideration as those factors. A minimal participant is treated less severely because he played a minimal role. If he used, possessed or carried a weapon, his base offense level will be increased for that activity. Disqualifying the mitigating role adjustment because of activity unrelated to role is not consistent with the structure of the guidelines.

The remaining changes in the commentary to the mitigating role adjustment are clarifying and will help eliminate the inconsistent application of the mitigating adjustment.

24. Proposed Amendment 24-Drug Trafficking

The PAG strongly endorses this proposal. Currently when negotiations do not lead to a completed drug transaction §2D1.1 Note 12 advises that the amount that was the subject of the negotiations determines the offense level, but adds that if the defendant establishes that he did not intend and was not capable of delivering the negotiated amount the offense level is reduced. The proposal changes the word "and" to "or" so that either capability or intent can reduce the amount negotiated. A skilled law enforcement officer can drive the amount unrealistically upward because he is familiar with the guidelines. In such a situation a defendant may have intent but no capability or may have capability but no intent. Under either scenario, the defendant is less culpable and should not be held to the higher amount because under either set of facts the higher amount would not have been distributed if the offense had been completed.

33. Proposed Amendment 33-Drug Trafficking

The PAG strongly supports this issue for comment which would provide that the Commission would modify or eliminate the provisions that distinguish between the punishment for powder and crack cocaine at the quantity ratio of 100 to 1.

The PAG also supports the proposition that the Commission should modify the 1 kilo per plant weight allocation for marijuana. The guidelines should reflect scientific reality not arbitrary allocations.

PRACTITIONERS ADVISORY GROUP

PROPOSED MODIFICATIONS TO DECEMBER, 1993, AMENDMENTS

AMENDMENT 8A:

Text recommended as published.

AMENDMENT 8B:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These offenses); Attempt or Conspiracy

* * *

(b) Specific Offense Characteristics

(1)(A) 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.

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

AMENDMENT 8C:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These offenses); Attempt or Conspiracy

* * *

(a)(3) the offense specified in the Drug Quantity Table set forth in subsection (c) below. *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.

AMENDMENT 9:

The Practitioners Advisory Group rejects this proposal, but favors the following:

§3B1.1. Aggravating Role

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

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants ~~or was otherwise extensive~~, increase by 4 levels.
- (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants ~~or was otherwise extensive~~, increase by 3 levels.
- (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

AMENDMENT 10 - Introductory Comment:

Text recommended as published.

§3B1.2 Mitigating Role

* * *

- (a) If the defendant was a minimal participant, decrease by 4 levels.
- (b) If the defendant was a minor participant, decrease by 2 levels.

Commentary

Application Notes:

1. *This section provides a downward adjustment in offense level for a defendant who has a mitigating (minimal or minor) role in the criminal activity for which the defendant is accountable under §1B1.3 (Relevant Conduct). One factor that determines whether a defendant warrants a mitigating role adjustment is the defendant's role and relative culpability in comparison with other participants, including any unindicted participants, in the criminal activity. "Participant" is defined in the Commentary to §3B1.1 (Aggravating Role).*

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 role. Example: Defendant A plans a bank robbery and hires Defendant B to commit the robbery. Defendant B commits the actual robbery. Both defendants plead guilty to bank robbery, and each has a Chapter Two offense level of 24. Although Defendant B may be less culpable than Defendant A who will receive an upward adjustment under §3B1.1 (Aggravating Role), Defendant B does not have a minimal or minor role in respect to the robbery.

2. *The following is a non-exhaustive list of characteristics that ordinarily are associated with a mitigating 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 [~~i.e., value of \$1,000 or less, generally in the form of a flat fee~~]; and*
 - (D) *the defendant did not exercise any supervision over other participant(s).*

In addition, although not determinative, a defendant's lack of knowledge or understanding of the scope and structure of the criminal activity and of the activities of others may be indicative of a mitigating role.

3. *With regard to offenses involving contraband (including controlled substances), a defendant who*
 - (A) *sold, or played a substantial part in negotiating the terms of the sale of, the contraband;*
 - (B) *had an ownership interest in any portion of the contraband; or*

(C) *financed any aspect of the criminal activity*

shall not receive a mitigating role adjustment below the Chapter Two offense level that the defendant would have received for the quantity of contraband that the defendant sold, negotiated, or owned, 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 defendant 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 role adjustment. In contrast, a defendant 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 role adjustment in respect to that jointly undertaken criminal activity, but the resulting offense level may not be less than the Chapter Two offense level for the 100 grams of cocaine that the defendants sold.

~~4. A defendant who is entrusted with a quantity of contraband for purposes of transporting such contraband (e.g., a courier or mule), shall not receive a minimal role adjustment for that quantity of contraband that the defendant transported. If such a defendant otherwise qualifies for a mitigating role adjustment, consideration may be given to a minor role adjustment.~~

~~5. [Option 1: This section does not apply if the defendant possessed a firearm or directed or induced another participant to possess a firearm in connection with the criminal activity.]~~

~~[Option 2: A defendant who possessed a firearm or directed or induced another participant to possess a firearm in connection with the criminal activity shall not receive a minimal role adjustment. If such a defendant otherwise qualifies for a mitigating role adjustment, consideration may be given to a minor role adjustment.]~~

~~64.~~ To qualify for a minimal role adjustment under subsection (a), the defendant must be one of the least culpable of the participants in the criminal activity within the scope of §1B1.3 (Relevant Conduct). Such defendants ordinarily must have all of the characteristics consistent with a mitigating role listed in Application Note 2(a)-(d) above.

~~75.~~ To qualify for a minor role adjustment under subsection (b), the defendant must be one of the less culpable participants in the criminal activity within the scope of §1B1.3 (Relevant Conduct), but have a role that cannot be described as minimal. Such defendants ordinarily must have most of the characteristics listed in Application Note 2(a)-(d) above.

86. Consistent with the structure of the guidelines, the defendant bears the burden of persuasion in establishing entitlement to a mitigating role adjustment. In determining whether a mitigating 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.

97. If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

Background: This section provides a range of adjustments for participants in the criminal activity within the scope of §1B1.3 (Relevant Conduct). The determination whether to apply subsection (a) or (b) involves a determination that is heavily dependent upon the facts of the particular case.

AMENDMENT 24:

Text recommended as published.

AMENDMENT 33:

Text recommended as published.

End of Text and Discussion on Proposed Drug Amendments

11. Proposed Amendment #11-Money Laundering

The PAG strongly supports the proposed amendments to §§ 2S1.1-2S1.2, pertaining to money laundering offenses. The 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. While the amendment constitutes a much needed reform, we believe that the

underlying objective of the amendment, achieving "real offense" sentencing, could best be achieved by the modifications to the proposal which are set forth below.

Initially, the need for some amendment to the existing money laundering guidelines is substantial. The money laundering statutes, 18 U.S.C. §§ 1956 and 1957, are quite expansive. Indeed, the Department of Justice in its policy statement, dated October 1, 1992, recognized that the statutes are "extraordinarily broad," and that they "apply to the movement of funds derived from most serious federal crimes and a larger number of state crimes, as well." In our experience, the statutes have been applied in relatively minor fraud and other cases in which the defendant merely deposited the proceeds of illegal activity into his or her bank account. See, e.g., United States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991) (Affirming conviction under 18 U.S.C. § 1956 where state official deposited into his personal checking account a \$3000 check representing a bribe).

Furthermore, 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 Working Group recognized, 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 significantly reduce 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.

However, in order to achieve the Commission's stated goal of "relating offense levels more closely to the offense level for the underlying offenses from which the funds were derived," we recommend that the Commission make the following modifications to the proposal:

First, where the defendant committed the underlying offense and the offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases where the base offense level would exceed the base offense level in proposed § 2S1.1(a)(2) or (3). This offense level then would be increased by any specific offense characteristics under proposed § 2S1.1(b). To achieve this result, we suggest deleting from the instruction in § 2S1.1(a) "(Apply the greatest)" and suggest inserting the term "otherwise" after subparagraph (3). Without this modification, the proposed guideline would maintain an inequity where a defendant was charged with mail or wire fraud rather than money laundering for virtually identical conduct and would not eliminate the potential for sentence manipulation by over-zealous prosecutors or law enforcement agents in the context of an

undercover sting case.

Second, 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. While we understand the Commission'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 force 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).

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 \$5 million dollar insurance policy. See, e.g., United States v. Smith, 13 F.3d 1421, 1428 (10th Cir. 1994) (Noting that money laundering counts should not be grouped for sentencing with wire fraud counts "because there are different victims and separate and distinct losses.")

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 amendment's 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 table should be employed.

Third, if the Commission nevertheless determines to incorporate the fraud table into the money laundering guidelines, then the amendment should be revised so that the base offense level in § 2S1.1(a)(3) is the same as the base offense level for fraud and deceit § 2F1.1. Without this revision, a defendant who committed a \$1600 mail fraud and then deposited the proceeds of the fraud in the bank could be charged with mail fraud and/or money laundering. As a mail fraud case, the defendant's offense level is 6; but, as a money laundering case, his or her level would be 8. There is no logical basis for this distinction. Further, equating the two base offense levels makes particular sense in light of the comparable two point adjustment where the fraud involved more than minimal planning, pursuant to § 2F1.1(b)(2), and the two point adjustment where the financial transaction involved actual money laundering, pursuant to § 2S1.1(b)(1).

Fourth, 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. This obviously provides continued opportunities for sentence manipulation given that the government controls the "value of funds" involved in the transaction and exacerbates the problem of using the elevated offense levels which would be dictated by the fraud table.

In order to prevent such guideline manipulation in sting cases, we suggest that the Commission include as the following statement as Application Note 6.

If a defendant is convicted in an undercover sting, pursuant to 18 U.S.C. § 1956(a)(3), and the Court finds that the government agent influenced the "value of funds" involved in the transaction in order to increase the defendant's guideline level, a downward departure may be warranted.

12. Proposed Amendment # 12-More than Minimal Planning

The PAG supports the changes proposed in Amendment 12(A) that would result in the elimination of the term "more than minimal planning" as a specific offense characteristic in several guidelines and that would substitute in its stead the term "sophisticated planning." We believe that this change will improve the structure of the guidelines in two significant respects.

First, the continued recognition of planning and preparation as an important factor in assessing relative culpability is consistent with the analysis that the Commission conducted on pre-guideline practices. However, it appears that the courts, in interpreting the existing language, have found "more than minimal planning" in virtually all the facts and circumstances that they face. As a result, the basic guideline heartland-type concept of differentiating base offense level cases from others through the use of specific offense characteristic adjustments has seemingly been lost: if all defendants receive the associated level increase for clearly dissimilar quantities/qualities of planning, then the specific offense characteristic serves no function other than to indirectly increase the base offense level. Therefore, the various guidelines would advance the original intent of the Commission in this regard and would promote fairness by providing the courts with a better mechanism to rationally distinguish between offenders and their offenses.

As regards the proposal in Amendment 12(B) that seeks to raise the base offense level in §2B1.1 to the same as that in §2F1.1, the PAG opposes this change. We maintain that there

exists sufficient differences between and amongst larceny and theft cases and fraud and deceit cases (particularly at the low end) as to warrant the current base level differential. We believe that prior practice correctly reflected those differences and that the change as proposed would tend to increase disparity by treating dissimilar cases similarly.

If, however, the Commission were to continue to view the need for seeming consistency as an imperative, then we suggest the formation of a working group to further study the issue. Without a thorough examination of the circumstances of the cases that have arisen under these two provisions, it is not possible to either demonstrate the true need for this change and/or to eliminate the potential that such a change might then result in increased disparity by imposing the same sentencing consequence for clearly disparate conduct. If the results of such a study were to uncover both a real need to harmonize these two provisions and a limited potential for disparate results, then the PAG would support a reduction to the base offense level in §2F1.1 rather than an increase in that level under §2B1.1.

Finally, as Amendment 12(C), the Commission has sought comment on changing the increments in the loss tables for §§ 2B1.1, 2F1.1 and 2T4.1, offering two options in that regard. The stated reason for such a change relates to the non-uniform slop of the existing tables. The PAG is strongly opposed to any change in these tables. While we do not view the rationale offered as a sufficient reason to undertake such a change, we also remain concerned about the guideline application confusion that such a change would engender. And, again, if the Commission is convinced that this type of tinkering is important, we recommend the formation of a working group to establish and demonstrate how the new amount threshold better differentiate between offenses.

13. Proposed Amendment #13-Career Offender

The PAG opposes Proposed Amendment 13(A) which would add additional background commentary explaining the commission's rationale and authority for Section 4B1.1 (Career Offender). In United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993) the court invalidated application of the career offender guideline to a defendant convicted of a drug conspiracy because 28 U.S.C. Section 994(h), which the Commission cites as the mandating authority for the Career Offender Guideline, does not expressly refer to inchoate offenses. While the court in Price indicated that it did not foreclose Commission authority to include conspiracy offenses and other inchoate offenses under the Career Offender Guideline, the PAG believes that a person should not be eligible for Career Offender status based on a conviction for a conspiracy to commit a substantive offense or for an attempt to commit a substantive offense. Conspiracies and attempts do not present the same kinds of harm as do completed offenses and career offender status should be reserved for the truly serious federal crimes, *i.e.*, completed crimes of violence or completed drug offenses.

The PAG favors Proposed Amendment 13(B) which would revise Section 4B1.1 (Career Offender) by defining the term "offense statutory maximum" as the statutory maximum prior to

any enhancement based on prior criminal record. Thus, if this amendment passes an enhancement of the statutory maximum sentence that itself was based upon the defendant's prior criminal record would not be used in determining the offense level under Section 4B1.1. Such an amendment would avoid what now appears to be unwarranted double-counting.

The PAG supports Proposed Amendment 13(C) - Option 1 - which would have the effect of making Section 4B1.1 (Career Offender) more of a true "recidivist" provision by providing that the offenses that resulted in the two qualifying prior convictions must be separated by an intervening arrest for one of the offenses. We oppose Option 2 because it would unduly broaden the portion of the Career Offender provision for prior convictions of a crime of violence or possession of a weapon during, and in relation to, a drug offense.

The PAG favors the adoption of Proposed Amendment 13(D), which would have the effect of providing that a non-residential burglary is not a crime of violence under Section 4B1.2.

Finally, the PAG favors the adoption of Proposed Amendment 13(E). We agree with the position taken by the Third Circuit in United States v. Parson, 955 F.2d 858 (3d. Cir.1992) wherein the court indicates that application note 2 of Section 4B1.2 calls for a considerably broader reading of the definition of "crime of violence" than is set forth in 18 U.S.C. Section 924(e). The Proposed Amendment is needed and would have the effect of narrowing the portion of the definition of crimes of violence that "otherwise involve conduct that presents a serious risk of physical injury" to offenses that are in some respect similar to the offenses expressly listed.

14. Proposed Amendment #14-Specific Offense Characteristics and Departures.

The PAG supports in part and opposes in part Proposed Amendment 14. We favor the amendment to the Introductory Commentary of Part H and the proposed amendment to Section 5K2.0, with the bracketed language "or combination of characteristics or circumstances". We note the Judicial Conference Committee on Criminal Law also supports our position.

We oppose that portion of proposed amendment 14 which would add to the Commentary to Section 5K2.0 the United States v. Rivera, 994 F.2d 942 (1st Cir. 1993) so called "analytic framework" for departure circumstances. This is only one Circuit's formulation of the framework and the Commission should not give its "blessing" to any particular framework.

We strongly favor the inclusion of the bracketed language "or combination of characteristics or circumstances" as part of the proposed amendment. The PAG notes that a majority of the Circuits that have considered this issue have held that the sentencing court can consider a combination of characteristics or circumstances, as opposed to a single characteristic or circumstance, that may distinguish a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines. See, United States v. Cook, 938 F.2d 149, 153 (9th

Cir.1991); United States v. Peña, 930 F.2d 1486, 1494-96 (10th Cir.1991); United States v. Big Crow, 898 F.2d 1326, 1331-32 (8th Cir.1990); United States v. Naylor, 735 F.Supp. 928 (D.Minn. 1990); United States v. Ramirez, 792 F.Supp. 922-923 (E.D.N.Y. 1992).

15. Proposed Amendment #15-Consolidated of Offense Guidelines.

The PAG strongly supports Proposed Amendment 15 which would provide for the additional consolidations of closely-related guidelines. This amendment is welcomed because it would further simplify the operation of the guidelines.

16. Proposed Amendment # 16(Issue for Comment)-Aging Prisoners

While the PAG believes that it is most appropriate to provide more flexibility throughout the entire system as regards older and infirmed and older, infirmed defendants, the issue is not one that lends itself to simple, discrete suggestions. It is recommended, therefore, that the Commission develop a working group (made up of Commission and Bureau staff and others) to explore this issue and its guideline and statutory ramifications. The goal of such an effort would be, amongst other things, to develop a uniform set of criteria and definitions to inform the initial sentencing decision, to develop similar criteria and definitions for changes in circumstances during the period of confinement and supervision and to develop a mechanism for addressing those changed circumstances in a uniform, expeditious and consistent manner. Given the fact that the overall federal prison population is rapidly aging and considering the fact that current legislative initiatives may result in more individuals serving longer periods of time, the need to address this issue in a more systemic manner appears imperative.

17. Proposed Amendment #17-Miscellaneous, Substantive, Clarifying and Conforming Amendments.

The PAG favors Proposed Amendment 17(A), which would clarify the operation of Section 1B1.3 (Relevant Conduct) in respect to the liability of a defendant for actions of co-conspirators prior to the defendant's joining the conspiracy. Proposed Amendment 17(A) would also add a well-phrased formulation for analyzing the same course of conduct, as provided by the Ninth Circuit in United States v. Hahn, 960 F.2d 903 (9th Cir.1992).

The PAG also favors Proposed Amendment 17(B) which would make conforming changes to the interaction of Chapter 2 (Offense Conduct) and Chapter 8 (Sentencing of Organizations).

The PAG supports Proposed Amendment 17(D) which would add definitions of hashish and hashish oil to Subsection (c) of Section 2D1.1 (unlawful manufacturing, importing, exporting, or trafficking; attempt or conspiracy) in the notes following the Drug Quantity Table.

The PAG does not oppose Proposed Amendment 17(E) which would provide that Section 3B1.1 (Aggravating Role) would be applied independently of the operation of Section 2D1.2.

The PAG does not oppose the adoption of Proposed Amendment 17(F).

The PAG does not oppose the adoption of Proposed Amendment 17(G).

The PAG does not oppose the adoption of Proposed Amendment 17(H).

The PAG opposes in part, and supports in part, proposed Amendment 17(I). The PAG opposes any attempt at clarification of the application of subsection (c) of Section 2K2.1 as the PAG favors the position taken by the court in United States v. Concepcion, 938 F.2d 369 (2d Cir.1992).

The PAG does not oppose that portion of Proposed Amendment 17(I) that would substitute a single, revised definition of firearms listed under 26 U.S.C. Section 5845(a).

The PAG favors the adoption of Proposed Amendment 17(J).

The PAG does not oppose the adoption of Proposed Amendment 17(K).

The PAG does not oppose the adoption of Proposed Amendment 17(L).

The PAG favors the adoption of Proposed Amendment 17(M) because by expressly listing additional sections under subsection (d) of Section 3D1.2 (Groups of Closely Related Counts) the Commission will be simplifying the application of this guideline.

The PAG does not oppose the adoption of Proposed Amendment 17(N).

The PAG supports the adoption of Proposed Amendment 17(O).

The PAG does not oppose the adoption of Proposed Amendment 17(P).

As to Proposed Amendment 17(Q), the PAG would support proposed option 1 of this amendment which would provide that a false statement made to a probation officer during supervision is to be treated as a Grade C violation (absent a felony conviction for such false statement).

18. Proposed Amendment #18-Acquitted Conduct.

As we have consistently in the past, the PAG strongly supports the adoption of Proposed Amendment 18, which would provide that conduct of which the defendant has been acquitted after a trial may not be used in determining the guideline range, but may, if found by a

preponderance of the evidence, provide the basis for an upward departure. While this proposed amendment may not be constitutionally required, it makes good sense. If a defendant is acquitted after a court or a jury trial there may be reasons specific to that case as to why the sentencing court may not want to use such acquitted conduct in determining the guideline range, even if the government could prove such conduct by a preponderance of the evidence. The proposed amendment authorizes (but does not require) a district court judge to use acquitted conduct as a basis for an upward departure. This is a much more flexible way to handle the matter of acquitted conduct than automatically requiring the use of such conduct in determining the guideline range if the sentencing judge finds the conduct to have been proven by a preponderance of the evidence.

19. Proposed Amendment #19 and Issue for Comment #31-Revisions to Clarify the Operation of Section 1B1.10 (Retroactivity of Amended Guideline Range).

The PAG firmly supports Proposed Amendment 19, which would make a number of minor revisions to clarify the operation of 1B1.10 (Retroactivity of Amended Guideline Range) and which would delete current Section 1B1.10 (c), which is a rather complex subsection. This proposed amendment would assist trial courts and the parties in more easily applying the provisions of Section 1B1.10.

The PAG, in responding to the Issue for Comment set forth in Proposed Amendment 31, would support a modification of Section 1B1.10 (b) so that the amended guideline range under Section 1B1.10 would be determined by using only those amendments that have been expressly designated for retroactive application -- such amendments would be applied in conjunction with the Guidelines Manual used at the defendant's original sentencing. This Issue for Comment makes good sense because if the amended guideline range is determined by applying the revised Guidelines Manual in its entirety, all other amendments that have taken place from the time of the defendant's original sentencing would be used in determining the amended guideline range, even though these other amendments would not have been made retroactive by the Commission. Moreover, other amendments may be harmful to the defendant and for true retroactivity to apply, the defendant should not have to be burdened by unfavorable amendments to the guidelines that have not been made retroactive by the Commission.

20. Proposed Amendment # 20-Theft and Fraud

Amendment 20(A). The PAG favors the proposed revision to the Commentary to §2F1.1 providing for greater consistency between definitions of loss in §2B1.1 and §2F1.1.

Amendment 20(B). The PAG favors the proposed alteration in the Commentary to §2B1.1 such that it conforms to §2F1.1 by stating that a victim's loss be reduced to reflect the amount which was recovered prior to discovery of the offense, or which is expected to be recovered. The PAG also favors downward departure where actual loss overstates the seriousness of defendant's conduct.

Amendment 20(C). The PAG favors the proposed revision to the provisions concerning loss in Chapter Two, Parts B and F, to clarify that interest is not to be counted under any circumstances in the calculation of loss. This will prevent a court's erroneous inclusion of lost interest when calculating loss, which recently occurred in the 6th and 4th Circuits.

21. Proposed Amendment # 21-Attempt

The PAG strongly supports proposed amendment #21, for the reasons listed by the Commission.

22. Proposed Amendment # 22-Diminished Capacity

The PAG supports Option 1 as a more rational and reasoned approach to the issue and opposes the need for the additional sentence that forms Option 2. Option 1 appears to well capture and explicate the intent of the Commission and should serve to resolve the cited circuit conflicts. The synopsis contained within the published proposal adequately addresses the matter and needs little further comment.

23. Proposed Amendment # 23-Multiple Sentences

The PAG opposes this amendment. While the language of new section (c) would appear on its face to afford more flexibility for the imposition of concurrent or consecutive sentences, the other changes as proposed actually will require defendants to serve unnecessarily longer and often disparate periods of incarceration. The current version of §5G1.3 should be maintained.

While the amendment is designed in an attempt to resolve the difficulty in obtaining information about prior unexpired state and local offenses and the problems in accurately applying such information to the guideline process, the PAG believes that that difficulty and those problems has been overstated. While recognizing that the Commission has long struggled with this issue as reflected by the numerous changes to this provision, we maintain that further change at this time will not achieve the desired results.

24. Proposed Amendment # 24-Drug Trafficking

Discussed on page 14, supra, under Proposed Drug Amendments.

25. Proposed Amendment # 25-Escape

In the name of consistency, the PAG support Option 1 of this proposal.

26. Proposed Amendment # 26-Obstructing an Election

The PAG does not oppose the proposed amendment.

27. Proposed Amendment # 27 - Enhancements for Gang Memberships

The PAG strongly opposes the two amendments to § 2K2.1 and § 2K2.5 proposed by the Department of Justice which would impose a 4 point enhancement where the defendant committed the offense "as a member of, on behalf of, or in association with a criminal gang." The definition of criminal gang is "a group, club, organization, or association of five or more persons whose members engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or controlled substance offenses as defined in § 4B1.2."

The obvious problems with these proposals are manyfold. First, the requirement of the defendant's involvement with the "gang" is too expansive. Under the proposals, merely being a member of the gang would justify the enhancement, even if the firearm possession had nothing to do with gang activities. Indeed, the "association" element is independent of the membership requirement, and thus suggests that a defendant could be subject to the enhancement where the defendant was not a member of the gang but somehow "associated" with it. Such broad and undefined terms permit too much prosecutorial discretion.

Second, the due process and overbreadth problems regarding the required relationship between the defendant and the gang are exacerbated by the definition of "gang," which includes any "association of five or more persons" whose members engage in a "continuing series" of violent and/or drug crimes. These issues arose when Congress initially passed the RICO statute. Indeed, the reason for the elaborate enterprise formulations in that statute was to avoid status offense problems that would arise from punishing people criminally for merely being members of the gang. The guideline, by providing an enhanced sentence for mere membership in a gang, would trip over the same Constitutional problems that have plagued this area of the law for quite some time.

Under the terms of this amendment, there is no requirement of a prior criminal conviction by the other gang members. The amendment uses the term "engaged in" rather than "convicted of" the continuing series of crimes. In addition, there is no required nexus between the prior bad acts by the "gang's" members and the gang. Accordingly, a defendant may receive an enhanced sentence because of unknown criminal activities by a club's members although those prior activities were before the other members joined the club and were completely unrelated to club business. For example, a member of the Kiwanis or of Congressional Country Club could find an enhancement if other members of the club engaged in prior criminal conduct, like spousal abuse or drug possession, even if the defendant was unaware of it.

Third, there is no definition of "continuing series of crimes." Accordingly, it would appear that merely two prior criminal acts by other club members could expose a third club

member to the enhancement.

Fourth, the enhancement as provided for in the amendment would result in double or triple counting. A defendant would be exposed to an aggravating role enhancement under § 3B1.1 if he supervised or managed five or more participants in the gang, club, or organization. The instant proposal would add an additional 4 point enhancement for the same conduct. This would be further compounded if the defendant were convicted of a RICO or CCE since the elements of these crimes include the existence of a criminal "enterprise."

28-30. Proposed Amendments #28-30-Issues for Comment

The PAG does not believe that any of the areas suggested in Issues for Comment, Numbers 28-30, would be useful at the present time. In particular, with regard to Issue Number 28, the primary question is whether the defendant's possession of a loaded gun or his discharge of the weapon should subject him to an additional enhancement under § 2K2.5. At the outset, it is clear that having a loaded firearm is heartland conduct under this guideline. While having an unloaded weapon perhaps should provide grounds for a downward departure, there is no basis for suggesting that having a loaded weapon or possessing ammunition should result in an additional enhancement. Section 2K2.1(b)(5) already provides for a four point enhancement, with a minimum offense level of 18, where a "defendant used or possessed any firearm or ammunition in connection with another felony offense" and there is no evidence to suggest that this offense level is not sufficiently punitive. Issue Number 28 also seeks comment on whether § 2K2.1 should be amended in order to increase the base offense level from 12 to 14 for persons who sell firearms with knowledge or reason to believe that the buyer is a prohibited purchaser. Again, there is no evidence to suggest that this additional enhancement is necessary, and § 2K2.1(b)(5) enhancement also applies where a defendant "transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense."

Regarding Issue Number 29, the PAG is not aware of any evidence to suggest that a specific enhancement is necessary in order to address the rare case in which a gang member is prosecuted for committing, or requiring another gang member to commit, a violent crime in order to obtain membership in the group.

Issue Number 30 re-visits the question regarding whether or not there should be additional distinctions in the criminal history categories. Given the extensive discussion and study of this issue by the Commission in previous years, the PAG sees no reason to re-open the debate at this point in time.

31. Proposed Amendment #31(Issue for Comment)-Retroactivity

Covered on page 27, supra, along with discussion on Proposed Amendment #19.

32. Proposed Amendment #32-Additional One-Level Decrease Under Acceptance of Responsibility.

The PAG strongly opposes Proposed Amendment 32 which would provide an additional one-level decrease for a defendant who goes to trial but avoids actions that unreasonably would delay or burden the proceedings or place an undue burden on the government. As a matter of policy, the PAG opposes this proposed amendment because it seems to suggest that a defendant who goes to trial but basically participates in a "slow guilty plea" should be rewarded. The proposed amendment seems to suggest that those defendants who go to trial and vigorously contest the government's proof by objections, vigorous cross-examination, etc., should be placed in a worse situation than those defendants that go to trial and meekly contest the government's proof. While perhaps well intended, this proposed amendment should be opposed by any defense attorney worth his/her salt.

33. Proposed amendment # 33 (Issue for Comment)-Drug Trafficking

Covered on page 14,supra, under discussion of Proposed Drug Amendments.

34. Proposed Amendment #34-Adjustments to Address the Harm Caused When There is More than One Victim.

The PAG strongly opposes Proposed Amendment 34(A) recommended by the United States Postal Service which would create a new adjustment in Chapter 3, Part A, to address the harm caused when there is more than one victim. There are already enough Chapter 3 upward adjustments, including Part A (Victim Related Adjustments). The mere number of victims, absent other factors, should not be the basis of an upward adjustment under any circumstances.

As to Proposed Amendment 34(B) - Issue for Comment - the PAG favors the continued use of special offense characteristics, as opposed to the use of a victim table, to reflect the harm when there is more than one victim of the offense. In other words, on certain offenses the criminal law should more severely punish a defendant if more than one victim of the offense is harmed. This can be taken care of by adding an offense level/levels by way of a special offense characteristic for that specific crime.

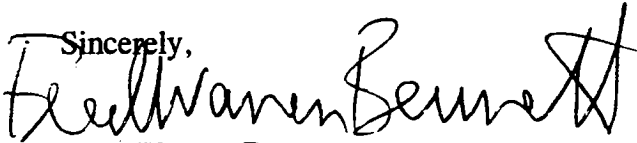
35. Proposed Amendment # 35-Theft

PAG opposes the amendment as proposed. The amendment contains no definition of the key word "organized." As drafted, therefore, the amendment could apply to several persons, even only two or three, working together to steal letters with objects in them that have the feel of coins. That certainly does not warrant an offense level of fourteen.

The proposed amendment requires no minimum amount of gain or loss. Establishing a base offense level of fourteen, greater than bribery, for example, is disproportionate. The present guidelines with increase in the offense level for the amount of gain or loss and for a supervisory role are sufficient. There is no need to single out in the proposed vague way an

alleged "organized" scheme to steal, what that may mean.

On behalf of the Practitioners' Advisory Group, thank you for allowing us to comment on the Proposed amendments and Issues for Comment and we look forward to working with the Commission during this amendment cycle.

Sincerely,

Fred Warren Bennett
Chairman
Practitioners' Advisory Committee

cc: Commissioner Julie E. Carnes
Commissioner Michael S. Gelacak
Commissioner A. David Mazzone
Commissioner Ilene H. Hagel

040-94

LAW OFFICES

COZEN AND O'CONNOR

A PROFESSIONAL CORPORATION

CHARLOTTE, NC

COLUMBIA, SC

DALLAS, TX

THE ATRIUM

1900 MARKET STREET

PHILADELPHIA, PA 19103

(215) 665-2000

(800) 523-2900

FACSIMILE

(215) 665-2013

NEW YORK, NY

SAN DIEGO, CA

SEATTLE, WA

WESTMONT, NJ

MICHAEL R. MCCARTY

ADMITTED TO PRACTICE IN IL

DIRECT DIAL (215) 665-2076

March 14, 1994

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

Dear Mr. Courlander:

Pursuant to the Sentencing Commission's request for public comment on the proposed amendments to the Sentencing Guidelines published in 58 Fed.Reg. No. 243, Part V of December 21, 1993, I wish to register the following suggestions. The specific purpose of my letter is to comment on Proposed Amendment No. 11, and which would amend and consolidate USSG §§2S1.1 and 2S1.2 (money laundering offenses).

I am strongly in favor of adoption of the proposed Amendment No. 11, subject to modifications which I suggest below. The proposed amendment would tie the base levels of money laundering violations more closely to the underlying conduct which was the source of the illegal proceeds. My suggested modifications are intended to insure this result.

The Commission's proposed amendment satisfies a much needed reform. Although the current guidelines arise from concerns regarding drug trafficking, they have caused and encouraged prosecutors to seek money laundering convictions in non-narcotics related money laundering cases merely because they can gain guidelines sentences which are much harsher than those applicable to the underlying offense, as well as asset forfeitures, a factor not taken into consideration under the current Guidelines.

As the October 14, 1992 Report to the Commission Staff Director from the Commission's Money Laundering Working Group clearly demonstrates, there are cases from around the country in

which the Government, simply by adding a violation of 18 USC §§1956 and 1957 to the indictment, has been able to obtain significantly higher guideline sentencing ranges than would have been the case if the guideline for the underlying offense had controlled. Moreover, the results of the Working Group's study of Fiscal Year 1991 sentences showed that 40% of the underlying crimes in money laundering cases were not related to drug trafficking, but were characterized as "white collar" crime, and that the offense level for the money laundering conduct exceeded that for the underlying conduct 96% of the time in non-drug cases.

The proposed amendment seems to recognize that §§1956 and 1957 are broad and can apply even in relatively simple fraud and other cases. Such cases often involve transactions that are normally not thought of as "money laundering", much less sophisticated as money laundering, but which nonetheless are proscribed by §§1956 and 1957. Indeed, in some cases, a money laundering offense is difficult to distinguish from the underlying crime. See, United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991) (state public official was convicted of money laundering under 18 USC §1956 based upon the deposit into his personal checking account of a single \$3,000 check representing a bribe.)

The current guidelines make it easy for the Government to substantially influence plea bargaining negotiations by merely threatening to include a count charging a violation of §1956 or §1957 in the indictment. The proposed amendment goes a long way towards addressing this problem and ultimately will help to achieve the Commission's mandated and stated goal of "eliminating unfair treatment that might flow from count manipulation." USSG, Chapter 1, Part A, Paragraph 3.

PROPOSED MODIFICATION

While I support the Commission's objective, I urge the Commission to make the following modification to the proposed amendment in order to better achieve the Commission's stated goal of "relating the offense levels more closely to the offense level for the underlying offense from which the funds were derived."

First, where the defendant committed the underlying offense and where the underlying offense level can be determined, the base offense level for the underlying offense should be applied in all cases, not just in those cases in which the base offense level would exceed the base offense level as in proposed §2S1.1(a)(2)(4). The offense level of the underlying offense would

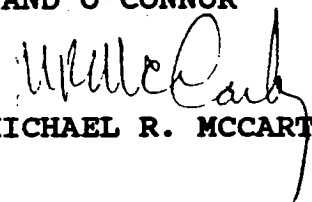
then be increased by any specific offense characteristics under proposed §2S1.1(b). To achieve this result, I suggest deleting from the instruction in §2S1.1(a) the term "(Apply the greatest)" and further suggest inserting in its place, the term "otherwise" after sub-paragraph (3).

Second, I strongly urge the Commission to make the base offense level in proposed §2S1.1(a)(3) the same as the base offense level for fraud and deceit found in §2F1.1. Accordingly, I suggest changing proposed §2S1.1(a)(3) to a base offense level of 6, plus the number of offense levels taken from the table in §2F1.1.

As a practicing criminal defense counsel who frequently appears in federal criminal trials in Philadelphia, Pennsylvania (as well as in other federal districts), I strongly support the Commission's efforts to make the Sentencing Guidelines uniform and fair.

Very truly yours,

COZEN AND O'CONNOR


BY: MICHAEL R. MCCARTY

MRM/jm

041-94

GIBSON, DUNN & CRUTCHER
LAWYERS
2029 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067-3026

JAS. A. GIBSON 1852-1922
W. E. DUNN 1861-1925
ALBERT CRUTCHER 1860-1931

LOS ANGELES
333 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA 90071-3197

ORANGE COUNTY
4 PARK PLAZA
IRVINE, CALIFORNIA 92714-8557

SACRAMENTO
400 CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814-4407

SAN DIEGO
750 B STREET
SAN DIEGO, CALIFORNIA 92101-4605

SAN FRANCISCO
ONE MONTGOMERY STREET TELESIS TOWER
SAN FRANCISCO, CALIFORNIA 94104-4505

DALLAS
1717 MAIN STREET
DALLAS TEXAS 75201-7390

DENVER
1801 CALIFORNIA STREET
DENVER, COLORADO 80202-2694

SEATTLE
999 THIRD AVENUE
SEATTLE, WASHINGTON 98104-7089

WRITER'S DIRECT DIAL NUMBER
(310) 551-8736

(310) 552-8500
TELEX: 188171 GIBTRASK LSA
FACSIMILE: (310) 277-5827

March 17, 1994

VIA FEDERAL EXPRESS

NEW YORK
200 PARK AVENUE
NEW YORK, NEW YORK 10166-0193
WASHINGTON
1050 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036-5306
BRUSSELS
AVENUE LOUISE 66
B-1050 BRUSSELS, BELGIUM
PARIS
104 AVENUE RAYMOND POINCARÉ
75116 PARIS, FRANCE
LONDON
30-35 PALL MALL
LONDON SW1Y 5LP
HONG KONG
8 CONNAUGHT PLACE
HONG KONG
TOKYO
1-1-3 MARUNOUCHI, CHIYODA-KU
TOKYO 100, JAPAN
AFFILIATED SAUDI ARABIA OFFICE
JARIR PLAZA, OLAYA STREET
P.O. BOX 15870
RIYADH 11454, SAUDI ARABIA

OUR FILE NUMBER
G 99999-00007

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 to Proposed Amendment No. 11

Dear Mr. Courlander:

On behalf of our firm's Business Crimes Practice Group, we are writing in response to the United States Sentencing Commission's request for public comment upon the proposed amendments to the Federal Sentencing Guidelines as published in the December 21, 1993, edition of the Federal Register (Vol. 58, No. 243, Part V). In particular, we wish to comment on and recommend the adoption of a form of the proposed Amendment No. 11, which would revise and consolidate U.S.S.G. §§ 2S1.1 and 2S1.2. These sections currently govern, in most circumstances, convictions for money laundering offenses under 18 U.S.C. §§ 1956 and 1957.

The proposed amendment reflects a fundamental philosophical change in the sentencing of federal money laundering offenses. The amendment proposes to combine those two guideline sections and to tie the base offense levels for money laundering violations more closely to the underlying conduct that was the source of the illegal monetary proceeds.

Our recent experiences suggest that the Commission's proposed Amendment represents a much needed change from the

current guidelines approach which may and, in our experience, does encourage federal prosecutors to pursue money laundering charges in non-narcotics cases simply because the resulting sentences under the money laundering guidelines sections are far harsher than for the underlying offense(s). As the Commission is certainly well aware, particularly in straight-forward fraud cases ordinarily sentenced under Section 2F1.1, the element of proof needed to establish the § 1956 or § 1957 violation is almost always present -- the receipt, use, and/or deposit of the proceeds of the fraud. See, e.g., United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991). While the Commission's original structuring of Guideline §§ 2S1.1 and 2S1.2 may have been consistent with the Congressional intent of severely punishing the use of funds derived from drug trafficking, the application of those sections to non-drug-related offenses is simply draconian. In fact, as the October 14, 1992, Report to the Sentencing Commission Staff Director from the Commission's Money Laundering Working Group fully demonstrates, the government has routinely been able to obtain a significantly higher guideline sentencing range than would result from a calculation of the guideline section normally applicable to the underlying offense, simply by adding a violation of either 18 U.S.C. § 1956 or § 1957 to the indictment.

An additional reason for attempting to tie the Guidelines section for a money laundering conviction more closely to the offense level for the underlying conduct is to remove the incentive for prosecutors to influence plea negotiations by either threatening to include or actually including in an indictment counts charging violations of either § 1956 or § 1957. The proposed Amendment addresses this problem and will ultimately help the Commission achieve its stated goal of "eliminating unfair treatment that might flow from count manipulation." U.S.S.G., Chapter 1, Part A, ¶ 3.

While we strongly support the proposed Amendment, we also urge the Commission to modify the proposed Amendment to better achieve the Commission's stated goal of "relating the offense levels more closely to the offense level for the underlying offense from which the funds were derived." With respect to proposed § 2S1.1(a), we suggest that the base offense level for the underlying substantive offense should be the base level for use in the money laundering guideline section calculation (absent any otherwise appropriate departure). Accordingly, we respectfully disagree with the proposal that the base offense level for the underlying offense be applied only where that base offense level would exceed the base offense levels set forth in proposed subsections (a)(2) and (a)(3). Instead, we suggest that after the underlying offense base level is determined, the revised section 2S1.1 then provide for an increase by an established number of levels to reflect any additional

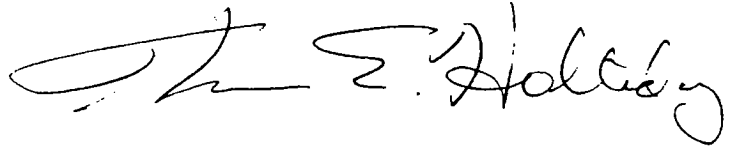
Mr. Michael Courlander
March 17, 1994
Page 3

punishable conduct comprising the money laundering offense, such as has been done in proposed subsection (b).

Alternatively, we propose that the base offense level in proposed § 2S1.1(a)(3) be the same as the base offense level for "fraud and deceit" under Guidelines § 2F1.1. In that manner, the base offense level for money laundering under § 2S1.1(a)(3) would be six, plus the number of offense levels from the 2F1.1 fraud table, depending upon the amount of the funds laundered. This has the benefit of uniformity and eliminates the severe effect of this guideline on prosecutors' charging decisions in "run-of-the-mill" fraud cases.

In sum, however, we believe the proposed changes to the money laundering guidelines are much needed and long overdue, and we support the Commission's efforts in this regard.

Very truly yours,

A handwritten signature in dark ink, appearing to read "J. E. Hattery", is written over the typed name.

Gibson, Dunn & Crutcher

CL940690.032/9+

042-9

CHARLES A. ASHER
ATTORNEY AT LAW
400 TRIGON BUILDING
224 WEST JEFFERSON BOULEVARD
SOUTH BEND, INDIANA 46601-1824
TELEPHONE (219) 233-9341
FACSIMILE (219) 233-9342

March 17, 1994

UPS NEXT DAY AIR

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

Attention: Public Information Office

Dear Members:

I see that you are inviting public comment on your latest proposed round of amendments. Here goes.

I am enclosing a copy of my letter of April 15, 1992. If you find nothing redeeming in that letter, you can dispense with considering this one as well.

In six years, you have enacted 502 Amendments to the Guidelines. So far as I can tell, the only thing useful to be produced by these Amendments is more Amendments.

There is no elimination of disparity; there has been a proliferation of disparity in many cases from application of the Guidelines.

There has been no diminution in crime. Very few of the Guidelines, or the 502 Amendments, are carefully considered by those contemplating the commission of a federal offense.

No restraint on our country's unprecedented experiment in incarceration rates has been achieved.

If anything, the Guidelines and their Amendments have only added to pushing up the price of drugs, and thus the stakes of drug dealing and the seriousness of the crimes some people are willing to commit.

Improvement in America's sobriety would better be served by government telling the public the truth--that there is no supply-side answer (or any other government answer) to drug abuse. Armed with this indispensable piece of sober wisdom, we would be shocked at the millions of users who would take responsible steps on their own behalf.

CHARLES A. ASHER

March 17, 1994

Page Two

I can't help but wonder about the Sentencing Commission's past and present criticisms of Congressional legislation that is in no important respect different from its own work. The Commission's criticism of mandatory minimums is especially hard to understand if one appreciates that the Commission's Guidelines are the largest and most unwieldy set of mandatory minimums ever enacted by any sovereign.

This country does not need any more Amendments to the Sentencing Guidelines. It needs someone to step forward to say that all of these penological measures (and even other appeals to government such as calls for federal treatment plans), are the problem--not the solution.

I am also enclosing a copy of a letter sent today to the Drug Policy Foundation. It might help to explain what I think is the growing view of middle America.

I really don't write a lot of letters taking positions on anything, and I don't want to be critical.

I am just wondering whether the silliness of all of this couldn't finally produce something extraordinarily healthy for this country.

Thanks kindly.

Sincerely,



Charles A. Asher

cd

Enclosures

CHARLES A. ASHER
ATTORNEY AT LAW
205 FIRST BANK BUILDING
205 WEST JEFFERSON BOULEVARD
SOUTH BEND, INDIANA 46601
TELEPHONE (219) 233-9341
FACSIMILE (219) 233-9342

April 15, 1992

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

Attention: Public Information Office

Dear Members:

I am a sole practitioner with about 25 percent of my work concentrated in federal criminal defense. I am writing regarding what I see as an emergency presented by the Sentencing Guidelines. Although I draw on experiences and comments of judges, probation officers, prosecuting attorneys, and other defense attorneys, these opinions are mine alone.

I offer these thoughts with high regard for what obviously has been a tremendous commitment of time and energy on your part.

As you probably know, it was with considerable uneasiness that practitioners received the first draft of the Sentencing Guidelines that went into effect on November 1, 1987. It is with horror, however, that we are left to receive the dizzying number of amendments to the Guidelines, now totalling 434. Many of these separate amendments carry on for paragraphs and even pages of small print. Some of the amendments actually include separate amendments to dozens of separate Guidelines.

These amendments have been spread out over six separate effective dates. The 1987 West edition of the Guidelines was in about 300 pages. The 1991 edition covers over 800 pages. With each new edition, the West publisher now routinely, and correctly, warns that all prior editions of the Federal Sentencing Guidelines Manual "should be retained . . . in the event there is a need to refer to the text of a specific Guideline, Commentary, or Policy Statement at a particular point in time."

For our further direction, you suggest a doctrine of "selective retroactivity" for usually, but not always, applying the Guidelines in effect on the date of sentencing, not the date of the offense. (Even more mind-stimulating is the place where that doctrine is announced. It seems to be found in the answer to Question Number 71 of your list of "One Hundred Questions Most Frequently Asked

CHARLES A. ASHER

United States Sentencing Commission
April 15, 1992
Page 2

About the Sentencing Guidelines." With all due respect, this looks like a David Letterman Top Ten List run riot.)

Most of the separate Guidelines by this time have been amended. The most important of them seem to have been amended at least twice, often three or four times.

I wish to put aside for the moment substantive objections to the entire concept of the Guidelines. Surely you have heard them all, and obviously they are not a deterrent to this large-scale experiment in reflex penology.

I have a more limited suggestion, but one that I think is absolutely critical.

Stop. You must stop.

I am not recommending that you do anything or that you undo anything. You must simply stop.

I harbor no harsh thought about the members of the Commission or any of their support staff. Quite the opposite. I am personally struck that this pace of amendments could only be indulged by well-intentioned persons whose humility over past mistakes has regrettably caused them to embark on an endless mission to fix what very possibly is not fixable.

I am sure that you are mindful of the concerns for settledness in the sentencing law, thus that you would not have enacted 434 amendments unless you thought they were of genuine substantial importance in correcting serious earlier errors.

There are those more judgmental souls (people genetically disqualified to be good criminal defense attorneys) who would accuse you of runaway hubris.

But whether motivated by extreme humility or extreme hubris, much is said about how fine an idea the original Guidelines were if they have required hundreds of amendments, in thousands of important distinct parts, covering hundreds of pages of small print in a bare four years.

Indeed, if achieving predictability and avoiding disparity are the chief goals, it is especially hard to understand this pace of change.

I am not here complaining about the fact that we have departed from a system where defendants and their lawyers (and often prosecutors) went into sentencing hearings armed with realistic and sincere

CHARLES A. ASHER

United States Sentencing Commission
April 15, 1992
Page 3

programs to turn a person's life around, only to have embarked on a system that sees defendants, their lawyers, and their prosecutors enter sentencing hearings armed only with pocket calculators and bromo seltzers. Perhaps those criticisms are mistaken. Perhaps the fact that modern-day federal sentencing has virtually nothing to do with 95 percent of the significant information about the person being sentenced is appropriate, or at least it's the way Congress may have wanted it.

What I am talking about here is a crisis in the day-to-day adjudicative process. I am reminded of David Mellinkoff's observation in The Language of the Law of an insurance policyholder trying to figure out where he stands.

By the time he has found his way to the end of an insurance policy, the alert and unusual householder (layman or attorney) cannot know what he is covered for--because there is more in his policy than he can read and retain even if he understood every word as he read it. The reading has left him--nay, made him--ignorant.

Your hard work has made us ignorant.

Not all of us practicing federal criminal law are brilliant. Approximately half of us graduated in the bottom half of our law school classes.

I would venture that the majority of us practice without large litigation budgets, much if any research assistance, regular access to legislative history, or even computerized research. Regardless of our resources, we are practicing under a flood of case law and amendments to the statutory law that are also burying us. (The Guidelines directly contribute to these explosions as well as evidenced by Appendix I to West's 1991 Guidelines edition showing over 5,000 case law treatments of the Guidelines since 1987.)

And for us, sentencing is not the only consideration. There is often the matter of defending the charge. The same penological aggressiveness that has brought about the Guidelines, endless mandatory minimum sentencing, bills to punish by death killers of federal egg inspectors, and what can fairly be called a federal infatuation with incarceration can, if unopposed, take innocent victims. Some of our clients are indeed innocent, and many are at the very least seriously over-charged.

We are called upon often to study thousands of pages of exhibits in a single case, wrestle with niggardly rules of discovery that were

CHARLES A. ASHER

United States Sentencing Commission
April 15, 1992
Page 4

written with witness-killing defendants in mind but which are applied indiscriminately against even the most non-violent defendants, study rapidly changing statutory and case law, and, yes, even actually try cases.

My most respected colleagues spend hours and hours getting to know their clients, including a sketch of their lives, their educational and vocational skills, their mental and physical conditions (including drug or alcohol dependence or abuse), employment history, family ties, community ties, and even the areas of their lives where they have shown strength and success in contributing to society such as military, civic, charitable, or public service. In other words, a good attorney expends a great deal of time and effort learning about the matters that the Commission has determined "are not ordinarily relevant in determining whether a sentence should be outside the applicable Guideline range."

That same attorney, even when there is no defense to the material elements of the charge, seeks to make his participation in the case an effective intervention against the parts of a client's life that are not working either for the client or for the community. He is part expert at client confrontation, part friend, part lay counselor, and part a referral source to experts who can interrupt a defendant's mismanagement (only part of which is normally criminal mismanagement) of his life.

The reader of the excellent article by Judge Sally H. Gray and Dr. Timothy J. Kelly, Counseling the Alcoholic--An Opportunity to Make a Difference, "Res Gestae" (March, 1989), will find a rare blueprint for what the responsible attorney regularly spends enormous efforts trying to accomplish with his clients, and often with great success.

For all of the rhetorical flights in modern-day politics that would lead the public to believe that judges are spineless, prosecutors incompetent, and defendants versions of Willie Horton (whatever we are lead to believe Mr. Horton represents), as you know, most people succeed on probation and respond favorably to these efforts.

But back to the emergency. Because only about a quarter of my practice (or perhaps less) is devoted to federal criminal defense, I would normally anticipate that studying, interpreting, and advocating regarding the Sentencing Guidelines would be a very small part of my practice. About federal sentencing I now feel lost. No, I am lost. I experience my clients' sentencing hearings in federal court as something of a lottery where the result is announced to me by people who, although themselves professing to be lost, know a little bit more by attending seminars, retreats, and structured readings of manuals.

CHARLES A. ASHER

United States Sentencing Commission
April 15, 1992
Page 5

But among my fellow criminal defense lawyers, I am what is called an expert. My colleagues call me. They think that I know something and can tell them something to advocate for their clients, or failing that, at least more deftly observe for human rights violations.

More often than not, federal criminal defendants in our mid-sized city are represented by attorneys appointed under the Criminal Justice Act, attorneys who may have only one or two federal criminal cases a year. These attorneys, although well-intentioned, are heard to ask laughable questions like "But if they're only guidelines, why would the judge get reversed if he doesn't follow them?" Studying five versions in four years of what constitutes "more than minimal planning" or "relevant conduct" is never reached.

None of this is to detract from the incredible effort all of you have expended on your amendments. It is simply too great an effort for the mortal practitioner (by which I include judges, prosecutors, and probation officers who, in my experience, also cannot keep up) to handle.

In all sincerity, I pause from my work to tell you that your commitment to amendments is not working.

As you know, many responsible observers have doubted that this attempt to mathematize the criminal justice system is even possible. Can even the grinding of the teeth between the statutory wheels and the Guideline wheels ever cease? Just last month I had a sentencing in a criminal contempt case under 18 U.S.C. § 401. As you know, that statute authorizes a sentencing court to fine a defendant or imprison him, but not both. Under Guideline 5E1.2(a), the Court is required to impose a fine in all cases (except where a defendant establishes that he is not able to pay). Did you mean the Guidelines to require a fine and thus preclude consideration of any imprisonment? (Please promise me you won't enact an amendment to answer this.)

The people with whom I work (criminal defense colleagues and others) may not be geniuses but they are serious-minded people. I think that it is fair to say that the consensus among them is that there is more disparity and more inexplicable sentencing under the Guidelines than there ever was before, and that all the tinkering in the world is not going to change that. The disparate sentences often required by the mechanistic approach of the Guidelines very often leave us wondering, or muttering, whether we should believe "science" or our lying eyes.

CHARLES A. ASHER

United States Sentencing Commission
April 15, 1992
Page 6

Worst of all, there is no accountability. Defense lawyers tell their clients that the prosecutor names the charge that pretty much determines the penalty. Prosecutors say they are just bringing the charges and that the judges sentence. Judges say that their hands are tied by the Guidelines. No one even asks what the right sentence should be--or what a right sentence is.

We used to have people who asked just that, and we called them judges. Right or wrong, they had the courage and responsibility to look at the facts, hear the arguments, and actually decide that a particular sentence was the most allowable under the law.

I offer even that observation advisedly because it invites the opposite of what I am recommending. I recommend absolute, unqualified, exceptionless, aggressive inertia. The Guidelines should be left alone long enough so that reasonable people (yourselves included) can try to see what we have and what the effect is on the criminal justice system, crime, and the general respect for law in society.

The punishment-oriented model of the Sentencing Guidelines seems to be either far behind, or perhaps far ahead, of the learning curve elsewhere. I ask that you please each, if you have not already done so, find a copy of the Winter, 1992 issue of "Criminal Justice," the publication of the Section of Criminal Justice of the American Bar Association. The articles there, particularly Americans Behind Bars: Why More People are Locked Up Here Than in Any Other Nation, seem now to reflect not just the opinion of criminal defense lawyers but the opinion of prosecutors as well. More and more people seem now at least vaguely suspicious that imprisonment has no more helpful effect over crime than an attempt to make sentencing a science has over the justness of sentencing.

Instead of amending 250 Guidelines this year I suggest you study these questions and any connection you can see between them and the Guidelines.

Consider also that if this large-scale experiment called the Sentencing Guidelines is to be evaluated, some of the variables need to be isolated. There cannot be 100, or even ten, amendments a year. No responsible social scientist could stop laughing at the idea of a review of your work that never sits still and thus presents as a kind of man-made instance of the Heisenberg uncertainty principle. By the time you look at it, it's gone.

Perhaps if the Guidelines could be left alone for a reasonable period (which in my opinion would be a minimum of three years given all the necessary judicial construction), the entire idea would then be seen as brilliant. Perhaps each of the 434 amendments

CHARLES A. ASHER

United States Sentencing Commission
April 15, 1992
Page 7

would be regarded as having made the whole idea incrementally even more brilliant. Perhaps the punishment model of reacting with an intentionally reflexive sanction to a certain class of misconduct (however much it seems most of our clients were raised by such ego-dismantling models) would be shown to bear fruit.

My own suspicion is that we would find that successful crime control and successful drug control require abandoning the notion "more government is the answer"; that we have been asking all the wrong questions (e.g., Does a one-time small-time marijuana seller's "relevant conduct" include the quantities of marijuana sold by thrice-removed drug dealers he never met but whose larger dealings were objectively foreseeable, but not subjectively foreseen, by him? or, as the Eleventh Circuit actually addressed in a published opinion on March 20, 1992, does the Sentencing Commission's amendments to a Guideline commentary, as opposed to a Guideline itself, nullify earlier contrary judicial interpretations of the Guidelines?); that we have been asking virtually none of the right questions (e.g., Why are our children poisoning themselves?); and that the greatest service that the Commission could perform would be to report to the public that there never has been and never will be much of a penological solution to these problems, only a penological response.

Interestingly, a typical federal drug case in Indiana often involves dealing in "ditch weed"--marijuana plants descended from massive crops planted by the federal government a half century ago. With no disrespect for the good intentions that are driving all of today's "policy," it may also turn out to be much more problem than solution.

The most intoxicating, addictive, simple, and wrong notion of all may turn out to be that attempted federal regulation of drug supply is a substitute for teaching our children one-by-one to love and esteem themselves, and thus not to ingest poison. My personal opinion--based on hundreds of cases of clients who have abused drugs, many of whom today spread the contagion of recovery--is that the simplistic appeal to federal criminal regulation to solve this problem is ultimately a dangerous hoax that worsens the problem immeasurably.

But we can never know any of this--one way or the other--unless and until the blizzard of amendments stops. We can never know anything unless and until the Commission distinguishes itself as one of the rare examples of government regulation that paused long enough from its mad pace of internal workings to invite objective evaluation of its original purpose and its ensuing degree of success.

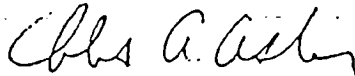
CHARLES A. ASHER

United States Sentencing Commission
April 15, 1992
Page 8

Thank you for considering these thoughts.

And remember, please stop.

Sincerely,



Charles A. Asher

cd

CHARLES A. ASHER
ATTORNEY AT LAW
400 TRIGON BUILDING
224 WEST JEFFERSON BOULEVARD
SOUTH BEND, INDIANA 46601-1824
TELEPHONE (219) 233-9341
FACSIMILE (219) 233-9342

March 17, 1994

Arnold S. Trebach, J.D., Ph.D.
President, Drug Policy Foundation
4455 Connecticut Avenue, N.W.
Suite B-500
Washington, D.C. 20008-2302

Dear Dr. Trebach:

With one extremely grave reservation, I recently renewed my support for the Drug Policy Foundation with a check and with the return of your recent questionnaire.

The Foundation is quite right that the criminal war on drugs should be abandoned as a dismal failure.

Now for the reservation. I think that the Foundation fails to appreciate that the criminal war on drugs was supposed to be a failure. A free society--not to mention a sober society--cannot in any measure entrust its sobriety to its government. The Foundation fails to appreciate this when it calls for a government treatment war on drugs.

The Foundation must get off this insane kick of calling for federal support for drug treatment programs.

I know that you mean well. My experience (as an attorney for 16 years representing many impaired clients, as a person who uses no drugs including alcohol or nicotine, and as a member of a family with several drug and alcohol issues), however, convinces me that this "new" appeal to government will be just as disastrous as the criminal war on drugs.

We have to overcome our own addictive thinking that government is the answer, or has the answer, to our problems. We need to start to realize that there is virtually no serious social problem in this country that our reliance on government did not in fact create.

Just as the federal criminal law enforcement assault on drugs pushed prices up to the point that more crime (and more serious crime) resulted, federal prevention and treatment efforts will create more addiction--and worse.

CHARLES A. ASHER

March 17, 1994

Page 2

Let me ask you to look at just three reasons that reliance on government has necessarily, and will necessarily, make matters worse.

I.

As in all other things, the government's effort at treatment would be a picture of inefficiency.

With all due respect, has the Foundation thought about the math involved? What are the addictions that will be covered? If alcohol and tobacco addictions are covered (and it is hard to find a principled reason that they should not be if others are--they injure and kill hundreds of times more people than federally "controlled substances"), your pool of eligible patients would number in the tens of millions.

What about sexual addictions? Gambling addictions? Over-eating? Codependency?

But, ignore most of these. Even taking the most arbitrary and narrow definition of what is an addiction, federally funded "treatment" would have to be available to perhaps 25,000,000 addicts. At \$35,000 per patient (a conservative sum, I would suggest), federal health care for addictions alone would approach \$1,000,000,000,000 (as in trillion) a year.

I saw Dr. Lee Brown, the nation's Drug Czar (shouldn't our terminology alone alert us to a threat or two?), on C-Span a couple of months ago speaking to the National Conference of Mayors. This nice gentleman was introduced with a statement of solemn appreciation for his attempts to coordinate the work of 53 federal agencies fighting drugs. Venturing into treatment should get the number up over 100 in no time.

How good a job does the Foundation believe government will really do in providing treatment? Some of the finest programs in the country--ones run with standards far surpassing what government will ever be able to observe--can claim success in only about 25% of their cases.

II.

Believe it or not, just as the federal criminal war on drugs has created more crime, a federal treatment program for drugs would create more drug abuse and addiction.

There are always going to be people in government anxious to claim that if they were only given enough money, power, and prestige, they would be able to make others get sober. These people need to go to Al Anon. It sounds funny, but it's the truth.

CHARLES A. ASHER

March 17, 1994

Page 3

Consider the model of the alcoholic family. Capable addictionologists (ones not looking for a federal hand-out themselves) know that the best way to treat an alcoholic family is to begin with the "least sick" people. Behind every drunk or otherwise addicted husband is a wife who is trying to "help" him. (The genders are often reversed.) The capable addictionologist will point out to the well-meaning wife that everything--everything--that she is doing is necessarily making matters worse.

The co-addicts even have slogans to learn. Things like "I didn't cause this, I can't fix this, all I can do by being involved is to make it worse." The addictionologist tells her to just stop all efforts on his behalf--stop hiding the booze, stop pleading, and stop yelling.

The entire lesson she must learn is "detach with love." And it is one tough lesson.

When the husband is left to assume responsibility for the consequences of his own behavior, lo and behold he goes to A.A. and becomes sober.

Government must also learn to stop hiding the drugs (interdicting), stop pleading (treating), and stop yelling (incarcerating).

People stay away from dangerous drugs (including the two drugs that are by far the most dangerous--alcohol and nicotine) by assuming responsibility for themselves, their own health, and their own children. The very notion that the government is going to be able to help people with these private choices is a horribly cruel hoax.

People with addictions get well in one place, and one place only. They get well in A.A. or one of its brother programs. The cost is zero. The emphasis is entirely upon two things--a real desire to stay sober and the fellowship of those who have achieved sobriety. Even for those able to come up with the \$15,000 to \$50,000 necessary to go through some fancy program in a "clean, well-lit place," if such a program works well, it lands the individual (where else?) in A.A.

In fact, I think that there is only one way to stop the great power of A.A.--government assistance.

In part because life is difficult, all of us (particularly addicts) are invariably prone to diminish our own efforts when we have been led to believe that the government is taking care of a problem.

In short, one of the reasons that government treatment efforts would necessarily fail is that their very existence puts off the day that impaired individuals are confronted with the stark reality that they are solely responsible for their sobriety.

March 17, 1994

Page 4

III.

**The non-financial costs of government
treatment would be overwhelming.**

We can have our government take responsibility for our sobriety, or we can have our freedom. We just can't have both.

From John Stuart Mill's interesting inclusion of the discussion of temperance laws in On Liberty to today's mad reality of an ever-burgeoning government, it should be plain that the attempt to transform a matter of personal responsibility into one of government responsibility would destroy constitutional limitations on government. There is no more personal decision than whether one is going to take an intoxicant into his body.

While the sovereign may punish a constable for being drunk on duty, it may not, if we are to value liberty at all, punish someone for being drunk. Or for eating pork. Or, as some like to do in Indiana, for picking from the thousands of acres of marijuana descended from crops planted by (who else?) the federal government 50 years ago in an earlier brilliant campaign.

If government treatment programs are enacted (or, in some cases, continued), they will fail miserably. And the inevitable failure of these programs to achieve less drug use will create a new bunch of hard-liners intent on "getting tough on drugs" with a new criminal war, and playing fast and loose with the Bill of Rights to get the job done.

The cycle will go on and on, but with even higher stakes and worse excesses.

I wonder if there isn't at least one additional cost that the Foundation should consider. Recovery programs are in large part spiritual. They recognize that the addict is suffering not merely physically, but spiritually as well. By my count, seven of the 12 steps of A.A. (and any of the other 12-Step programs) refer to God, a Higher Power, or prayer.

Has the Foundation given any thought to the constitutional and social implications of hundreds of billions of dollars of taxpayer money being used to subsidize spirituality?

Perhaps, just as constitutionally corruptly, the federal government could go about reinventing A.A., deleting the spiritual Steps, and spending hundreds of billions of dollars in service of the secularization of America.

If the Foundation thinks that this is an illusory threat, consider the recent comments of the Surgeon General Dr. Jocelyn Elders on

CHARLES A. ASHER

March 17, 1994

Page 5

the need for government to tap the resources and influence of churches to implement her medical plan for America. "We always talked about the separation of church and state. I want to forget about the separation. Let's try to integrate church and state so we can come together and begin to do things that make a difference to people in our community." New York Times, February 26, 1994, p. 7. (You may recall this as the "White Male Slave Owner" speech, and this should give the Foundation serious pause when considering, as it did in its recent Survey, making Dr. Elders a spokesperson for an agenda of less government.)

Let's get sober together. How about this for the First Step of a new recovery movement--"We admitted we were powerless over thinking of Big Brother as our savior, and our lives had become unmanageable."

Thanks for considering these thoughts. I assure you that I am not as nuts as I may sound. Outside the Beltway, I'm really a middle-of-the-road, ordinary kind of sober guy.

Sincerely,



Charles A. Asher

cd

KENNETH J. HUNTER
CHIEF POSTAL INSPECTOR

043-91



March 18, 1994

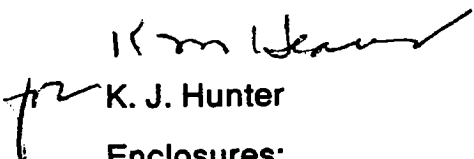
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Attention: Public Information

AMENDMENTS TO THE U.S. SENTENCING GUIDELINES

The Postal Service respectfully submits written comments on the 1994 sentence guideline amendments. Our comments are intended to explain and clarify the two amendments submitted by the Postal Service: Amendment 34 (multiple victim offenses) and Amendment 35 (volume mail theft offenses). In addition, we offer comment on Amendments 12(A), 12(B), and 15. As a final matter, we ask the Commission address an apparent inconsistency in the computation of loss in credit card thefts under §2B1.1.

Our narrative comment is extensive and includes as exhibits summaries of Inspection Service investigations of volume mail theft and multiple victim fraud crimes, memorandums of interview, victim impact statements, sentencing statistical data, and written and video news accounts of volume mail thefts. A listing of the exhibits follows our narrative comment.


K. J. Hunter

Enclosures:

1. Comment
2. Exhibits

U.S. POSTAL INSPECTION SERVICE
PUBLIC COMMENTS ON PROPOSED AMENDMENTS
TO THE U.S. SENTENCING GUIDELINES

The theft and fraud sentencing guidelines are driven primarily by the dollar loss tables. In many instances, a dollar loss does not adequately reflect the total harm of the crime. This is especially true where the property stolen has an intrinsic value or where the crime impacts on numerous victims. In addition, the harm related to loss depends on a victim's socioeconomic status. For example, a loss of \$200 to a victim near the poverty line is much more significant and harmful than the same loss to a victim of means. The current guidelines do not consider these important elements of the total criminal conduct.

For those crimes where the dollar loss is difficult to determine, the guidelines have commentary dealing with the nonmonetary or unique value of property. For example, §2B1.3, comment.(n.4), states that an upward departure may be warranted where the monetary value of harm may not reflect the extent of the harm. The commentary gives as an example the destruction of a telephone line with a minimal dollar loss which in turn results in disrupted service for thousands of subscribers.

The loss need not be determined with precision and the court need only make a reasonable estimate of the loss, based on the information available, §2F1.1, comment.(n.8), §2B1.1, comment. (n.3). A nonmonetary loss may authorize an upward departure where the loss table does fully capture the harmfulness and seriousness of the conduct, §2F1.1, comment.(n.10).

The two amendments submitted by the Postal Service are based on the principle of proportionality of harm. It is our opinion that the current guidelines do not provide for a proportional increase in the penalties for multiple victim offenses and for organized mail theft rings. In addition, the actual harm caused by the conduct may not be adequately reflected by a loss table based on pecuniary value. As proposed, our amendments are separate and distinct. The Commission may adopt the volume mail theft amendment (Amendment 35) without adopting the multiple victim amendment (Amendment 34).

Proposed Amendment 35, § 2B1.1(b)(8)

"If the offense involved an organized scheme to steal undelivered United States mail, and the offense level as determined is less than a level 14, increase to a level 14."

DESCRIPTION OF VOLUME MAIL THEFT

In the typical volume mail theft crime, the offenders target postal vehicles, letter carrier carts and satchels, collection and relay boxes, and apartment and residential mail boxes. A significant amount of mail is stolen by those involved in these organized schemes in order to obtain relatively few pieces of mail with monetary value such as checks, credit cards or other personal financial information. As an example, the average amount of mail taken during a vehicle attack is between 500 and 1000 pieces, which has an impact on hundreds of customers. The impact is even greater in collection box or relay box attacks, where 4000 to 5000 pieces of mail may be taken. Those items with value are kept and used while the remaining mail, which has no monetary value, is destroyed.

These volume mail theft crimes are not crimes of opportunity, but rather, organized schemes established for the sole purpose of stealing mail to obtain mail items with monetary value. Although these schemes include other crimes, such as forgery or fraud, the crux of the crime is the theft of large quantities of mail. These rings are comprised of individuals with specified roles in the overall scheme. They include thieves, forgers, false identification providers, fences, and the individuals who use or negotiate the checks or credit cards. A significant percentage of these crimes are committed to support drug habits. Recent intelligence also shows organized gangs are becoming involved in mail theft and use the proceeds to finance other criminal activities.

TRENDS

The volume mail theft problem is a nationwide problem, with the majority of these offenses occurring in urban areas. For example, during the past year, mail theft crimes in general decreased by 35 percent, while volume theft cases increased by over 9 percent. The increase in this category represents the most serious type of mail theft and is attributable to the criminal activities of mail theft rings.

IMPACT

When mail is stolen, it results in a significant disruption of an essential government function. In addition, these crimes destroy the public's confidence in the Postal Service as a company, which has the potential of making our customers seek alternative means of delivery. The "loss of confidence" factor is cited as grounds for an upward departure in §2F1.1, comment.(n.10).

In terms of victim impact, the theft of mail is an intrusion upon personal privacy. Further, the harm caused by the theft and destruction of large quantities of mail is disruptive both to consumers and businesses, because the mails are essential to the nation's commerce.

DETERRENCE, DEPARTURES AND REPEAT OFFENDERS

The Commission provided sentencing data which indicates 60 percent of all criminals sentenced for a mail theft related crime receive no imprisonment, 25 percent receive imprisonment of 1 to 12 months, and only 15 percent receive imprisonment of more than 12 months.

Since the majority of these volume theft offenders are sentenced to probation or receive minimal incarceration due to the low guideline range, there is no deterrent for the crime. Offenders explain the returns they obtain from the crime are worth the relatively low risk of incarceration, even if convicted. From our experience, recidivism is prevalent in these offenses, due to the low deterrence provided by the sentencing guidelines. Repeat offenders are generally the principals in these organized schemes to steal mail.

Further, this lack of a deterrent has attracted other offenders into the lucrative area of mail theft. Traditionally, many of the offenders had engaged in more violent criminal activities, such as armed robbery of banks and convenience stores. However, the sentence enhancements for crimes of violence and the use of weapons have caused these criminals to look for offenses with less risk. Mail theft offers the perfect alternative. Credit cards and checks stolen from the mail are quickly converted into cash or merchandise. Personal financial information can be used by the offenders to obtain credit cards or perpetrate some different type of financial fraud on consumers or businesses.

The shortcomings of the current guidelines are treated in a more practical manner by prosecutors, judges, and probation officers who creatively use other guidelines and

enhancements to increase the offense level. There is an inconsistency among the judicial districts, however, in the application of these guidelines and commentary. As a general rule, some districts consider the scope of the relevant conduct to include the estimated dollar loss, number of victims, and overall impact of the crime in making upward departures. In other districts, upward departures are rarely given for these types of offenses with the same offense characteristics.

As an example, the prosecutor in one district charges defendants in mail theft cases with bank fraud, in order to use the enhancements provided in the commentary regarding financial institutions. In another instance, the court considered the application of §2B1.1(b)(6), stating this guideline more appropriately fit the offender's conduct, based in large part on the "organized scheme" element, even though this guideline is applicable only to schemes to steal vehicles or vehicle parts.

Although theft of mail is a federal felony which is investigated by federal law enforcement officers and involves an instrumentality of the federal government, a significant percentage of these crimes are prosecuted in the state systems. In many instances, these cases are deferred by federal prosecutors because the state's penalties are higher and therefore more representative of the seriousness of the crime.

PREVENTIVE MEASURES

Because of the serious impact on its customers and operations, the Postal Service has aggressively implemented security measures to prevent these thefts from occurring. For example, modifications have been made to postal vehicles, and collection and relay box locking mechanisms have been reinforced. The public has been alerted by media accounts regarding the theft schemes and suggested precautions to follow to avoid being victimized.

The cost to the Postal Service to implement these preventative efforts has been substantial. As an example, in Queens, New York, the Postal Service experienced a period where one collection or relay box attack was committed each day. To remedy the box break-in problem, a modification was made to each collection and relay box in Queens at a cost of approximately \$400,000. When the thieves could no longer break into the boxes in Queens, they migrated to Brooklyn, and then Jamaica, New York. The Postal Service then modified those boxes at an approximate cost of \$250,000. In addition to the direct costs associated with the thefts, the Postal Service was required to expend an average of 16 workhours to process the customer complaints which resulted from each break-in.

Given time, most security systems can be compromised by criminals. If the system cannot be compromised, then the criminals seek alternative means to obtain the mail. In those cities where the security measures have been effective, we have seen an alarming increase in the number of armed robberies of our carriers. For example, in 1993, Los Angeles experienced 544 mail thefts from vehicles, which resulted in substantial losses. To combat the problem, some vehicles were modified with security equipment. When the thieves could not gain easy entry into the vehicles, they chose the alternative of armed robbery of the mail carriers. The number of armed robberies increased from 41 in 1992 to 91 in 1993. This trend continues to show a dramatic increase into 1994. Our Los Angeles Division reports that in the first four months of this fiscal year, 39 mail carriers have been robbed of mail or postal keys which provide access to collection and relay boxes.

ORGANIZED SCHEME

The key concept in our proposed amendment is the "organized scheme." These volume mail theft offenses satisfy the requirement of more than "minimal planning," §1B1.1(f), as repeated or multiple acts of theft which show both the intention and potential to do considerable harm. In addition, they constitute a jointly undertaken criminal activity, §1B1.3, comment.(n.3). These organized schemes are a common

plan with each participant engaging in a similar course of conduct in the series of mail thefts committed for criminal gain, §1B1.3, comment.(n.9).

COMPARISON TO §2B1.1(b)(6)

Proposed Amendment 35 is patterned after the guideline for the organized scheme to steal vehicles, §2B1.1(b)(6). The commentary to this guideline describes offense characteristics analogous to the organized scheme to steal mail. As previously described, these mail theft cases, like the organized thefts of vehicles, represent substantial criminal activity comprised of a series of multiple thefts and involve "more than minimal planning." Furthermore, the value of the mail stolen is difficult to ascertain, due to the intrinsic value of the majority of the mail stolen and its quick destruction in the course of the offense.

From sentencing data reviewed, the vehicle theft guideline has only been used in 95 cases over the past five years. We believe this is due to the extrinsic value of vehicles and corresponding high dollar loss which results from the theft of relatively few vehicles. For example, at a dollar loss of \$70,000, the resulting increase in the offense level reaches the floor offense level provided by the guideline. In comparison, a similar organized scheme offense characteristic would apply in the majority of our volume mail theft offenses. A significant dollar loss is involved in these crimes if all relevant conduct in the scheme can be considered. However, the total loss attributed to relevant conduct can only be proven at a substantial cost to the government; even if the total loss is proven, it still would not reflect the nonmonetary harm of the offense.

INADEQUACY OF §2B1.1(b)(4)

The current guideline applicable to mail theft, §2B1.1(b)(4), considers the unique character of undelivered mail by providing a two-level increase in the base offense level based on the statutory distinctions for mail theft offenses. This two-level increase establishes a floor offense level of 6, regardless of the dollar loss. As the commentary points out, this is attributed to the crime's interference with a governmental function and the difficulty in ascertaining the scope of the theft.

In volume mail theft offenses the actual harm caused by the relevant conduct is difficult to prove when measured exclusively in terms of a dollar loss and without consideration of the number of victims impacted or the intrinsic value of nonmonetary mail. Since the total harm is from factors not expressly considered by the guidelines, the resulting offense level is not commensurate with the seriousness of the offense. For these reasons, our amendment would add a specific offense characteristic to target these types of crimes as the most serious of mail theft offenses.

The volume theft amendment would establish an alternate means for determining loss based on the gravamen of the offense (e.g., mail theft rings engaged in organized schemes) rather than the dollar loss. Although the total dollar loss may be encompassed in relevant conduct, this can only be proven at a tremendous cost to the government by parading numerous victims before the court in multiple hearings on the sentencing issues. This is currently required to prove up the total loss because defendants are unwilling to stipulate or agree to other losses as relevant conduct indicative of the total harm.

The two-level enhancement currently provided by the guidelines is adequate for a simple mail theft crime as a crime of opportunity with little or no dollar loss. For the organized schemes to steal quantities of mail, however, the guidelines should provide for significantly higher floor offense level, based on the nature of the offense and increased harm.

Proposed Amendment 34, § 3A1.4:

If the offense affected more than one victim, increase the offense level as follows:

<u>Number of Victims</u>	<u>Increase in Level</u>
2-99	2
100-349	4
350-649	6
650 or more	8

The Postal Service believes the number of people affected by a crime is an important element in measuring the crime's societal harm and should be reflected in the sentencing. The current guidelines lack proportionality in the sentencing for offenses which result in multiple victims because they fail to provide for increased punishment for increased harm.

The fraud guideline, §2F1.1(b)(2) provides a specific offense characteristic and commentary on the number of victims: a two-level increase if the scheme to defraud involved more than one victim. The increase provided in this specific offense characteristic is not proportional and is an alternative to "more than minimal planning." For example, the guideline treats a fraud offense impacting two victims the same way it does a crime impacting 2,000 victims. In addition, the commentary found in §2F1.1, comment.(n.8), explains that the approximate number of victims and average loss to each victim are factors to be considered in determining the dollar loss.

Our proposed amendment provides an increase to the offense level based on the number of victims in the form of a "victim table." Since its publication in the Federal Register, we have received suggestions to provide more uniformity in the number of victims in each table range. In our proposed amendment, the first two-level increase corresponds to a maximum of 99 victims; the second increase corresponds to an additional 249 victims; the third increase corresponds to an additional 300 victims. This progression--99 to 249 to 300--has the higher offense level being driven by an increasing number of victims per range. It has been suggested the table provide for the same number of victims for each victim range, (e.g., 200 victims per range) and a corresponding two-level increase per range.

The Commission solicited public comment on the issue of multiple victims and alternative means to address this factor in the sentencing guidelines. As an alternative to our victim table as a Chapter Three adjustment, the victim table could be included as specific offense characteristic for offenses which generate a significant number of victims, such as §2B1.1 (Theft, Embezzlement) and §2F1.1 (Fraud, Forgery).

As another alternative, the Chapter Five guidelines could include a significant number of victims as specific grounds for an upward departure. As a final alternative, the Commission should assign the multiple victim issue as one of its priority study topics for the upcoming year. Should the Commission establish such a working group, the Postal Service will commit its resources to support this effort.

ADDITIONAL COMMENTS

Amendment 12(A)

We strongly disagree with the substitution of "sophisticated planning" for "more than minimal planning." We agree that a more sophisticated crime should result in a higher

offense level; however, this proposed amendment eliminates certain other elements currently contained in the "minimal planning" concept which we feel are equally important in the measurement of culpability and actual harm. For example, this amendment strikes the factor of "repeated acts" from consideration, which the current guideline states is "indicative of the intention and potential to do considerable harm." For these reasons, we oppose the proposed wording, but would support a guideline and commentary which would provide for an additional increase if the offense required complicated or sophisticated planning above those crimes involving "more than minimal planning." In addition, we would support a "sophisticated plan" concept which retains the factors of "repeated acts, a series of conduct or ongoing criminal activities," as factors currently satisfying the "sophisticated planning" requirement.

Amendment 12(B)

We agree with the increase in the base offense level for §2B1.1 to the extent it brings the loss table in conformance with that of §2F1.1. We strongly disagree, however, with the elimination of the mail theft offense characteristic, §2B1.1(b)(4). The basis for this two-level increase is the unique character of mail as the stolen property as stated in the commentary background. For a consistent application of this statutory distinction, a corresponding two-level increase above the base offense level should be provided in theft of mail offenses, regardless of the dollar loss amount. As an example, if the base offense level is increased for §2B1.1 to a 6, the specific offense characteristic for mail theft would provide a floor offense level of 8.

In the event the Commission adopts any change to the base offense level in §2B1.1, a specific offense characteristic with a corresponding two-level enhancement for the theft of undelivered mail should be maintained. Such an enhancement will establish a floor offense level for general mail theft offenses committed as crimes of opportunity as distinguished from the "organized schemes" to steal mail covered in our proposed Amendment 35.

Amendment 15

We agree with the consolidation of mail destruction guidelines under §2B1.3 with the mail theft offenses in §2B1.1. In addition, we agree with the consolidation of the destruction of mail guideline with the theft of mail in §2H3.3. As previously stated in our comment to Amendment 12(B), the base offense level in §2B1.1 should be increased if the mail is obstructed or destroyed.

Determining loss - credit card offenses, §2B1.1. Another issue of interest to the Postal Service relates to calculating the dollar loss in credit card thefts. For these theft offenses, §2B1.1, comment.(n.4), values the loss at the amount of any unauthorized charges made on the card but in no event less than \$100. In comparison, §2B1.1, comment.(n.2), provides that for checks and money orders stolen, the loss is the value of the instrument as if it had been negotiated. For consistency between these two provisions, the loss due to the theft of a credit card should be set at the credit limit of the card, as a more accurate measurement of the intended loss and harm to the consumer, merchant, and financial institution. Presently, there is an inconsistency among the judicial districts regarding valuation of loss for credit cards stolen but not used. In some instances, the value is considered the credit limit of the card, while in other instances, the loss is determined to be a maximum of \$100 per card as specified in the guideline. We ask the Commission clarify the commentary language to make the loss determination more consistent.

INDEX OF EXHIBITS

<u>EXHIBIT</u>	<u>CONTENT</u>
A	VOLUME MAIL THEFT BRIEFS
B	SENTENCING COMMISSION DATA
C	INSPECTION SERVICE VOLUME MAIL THEFT DATA
D	MEMORANDUMS OF INTERVIEW
E	VICTIM AFFIDAVITS
F	LETTER OF ENDORSEMENT - NORTHERN DISTRICT OF TEXAS
G	NEWSPAPER ARTICLES ON VOLUME MAIL THEFT
H	MAIL FRAUD CASE BRIEFS (MULTIPLE VICTIM CASES)
I	TESTIMONY OF K. M. HEARST, DEPUTY CHIEF INSPECTOR
J	INDEX OF VIDEO CLIPS
K	VIDEO

UNITED STATES POSTAL SERVICE

P. O. BOX 224985 DALLAS, TX 75222-4985

DATE: February 23, 1994

OUR REF:

SUBJECT: Sentencing guidelines amendments

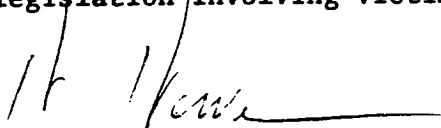
TO:

Robert E. Vincent
Postal Inspector
Office of Criminal Investigations
475 L'Enfant Plaza W., S.W., Rm. 3327
Washington, DC 20260-2160

Reference is made to my previous letter dated February 11, 1994, concerning sentencing guidelines amendments.

I am attaching a more recent judgment in a Dallas criminal case which was prosecuted in the Fort Worth Division by the Northern District of Texas. Defendant Leland Stewart Anderson, ISN 735557, case No. 216-1116205-ECMT(2) was sentenced on January 24, 1994. The sentencing judge departed upwards from the sentencing guidelines. His reasons are on the last page of the judgment.

As information, the victim, Dr. Cheryl K. Anderson (unrelated to defendant), Southwestern Medical School, 5323 Harry Hines Blvd., Dallas, TX 75235-9031, advised this Service she would gladly cooperate in any legislation involving victims.


H. Herrera
Postal Inspector

Attachment

cc: Bill Cunningham
Assistant Inspector in Charge
Fort Worth, TX 76161-2929

United States District CourtNORTHERN DISTRICT OF TEXAS
Fort Worth Division**ORIGINAL**

UNITED STATES OF AMERICA

v.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

Case Number: 4:93-CR-075-Y (1)

LELAND STEWART ANDERSON

Bill Lane, Defendant's Attorney

THE DEFENDANT pleaded guilty to count 3 of the Indictment. Accordingly, the defendant is adjudged guilty of such count, which involves the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 USC §1708	Unlawful Possession of Stolen Mail, Class D Felony	03-13-93	3

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Counts 1 and 2 are dismissed on the motion of the United States.

It is ordered that the defendant shall pay a special assessment of \$50.00, for count 3 of the Indictment, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within thirty (30) days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 519-82-6756
Defendant's Date of Birth: April 10, 1956

January 24, 1994
Date of Imposition of Sentence

Defendant's Mailing Address:

1419 Monterrey Blvd., #129
Euless, Texas 76040

T R Means
TERRY R. MEANS
U.S. DISTRICT JUDGE

Defendant's Residence Address:

same
same

February 1, 1994
DATE

U. S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS FILE FEB - 2 1994 NANCY DOHERTY, CLERK By: <i>[Signature]</i> Deputy
--

[160]

Defendant: LELAND STEWART ANDERSON
Case Number: 4:93-CR-075-Y (1)

Judgment -- Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 24 months on count 3 of the Indictment and ordered to pay a restitution in the amount of \$15,996.71.

The Court makes the following recommendations to the Bureau of Prisons: the defendant be incarcerated at a facility located in the Los Angeles County, California area or a facility close to his home.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a
certified copy of this judgment.

United States Marshal

BY

Deputy Marshal

Defendant: LELAND STEWART ANDERSON
Case Number: 4:93-CR-075-Y (1)

Judgment -- Page 3 of 4

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years on count 1 of the Indictment.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this Court (set forth below). This judgment imposes a restitution obligation and, it shall be a condition of supervised release that the defendant pay such restitution as set out below in the terms of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.

The defendant shall not possess a firearm or destructive device.

The defendant shall participate in a mental health treatment program as approved and directed by the probation officer.

The defendant shall pay any remaining balance of the restitution in the total amount of \$15,996.71, payable to U.S. District Clerk at the rate of at least \$450.00 per month, beginning 60 days after the defendant's release from confinement.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. The defendant shall not leave the judicial district without the permission of the Court or probation officer;
2. The defendant shall report to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five (5) days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer within seventy-two (72) hours of any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: LELAND STEWART ANDERSON
Case Number: 4:93-CR-075-Y (1)

Judgment -- Page 4 of 5

RESTITUTION

The defendant shall make restitution to the victims in the following amount:

<u>Name of Payee</u>	<u>Amount of Restitution</u>
Dr. Cheryl Anderson	\$1,570.00
American Express Travel Related Services Co., Inc.	\$6,278.71
Pleasant Hawaiian Holidays	\$6,548.00
Grady's Liquor Store	\$1,600.00

Payments of restitution are to be made to U. S. District Clerk. Restitution shall be in installments according to the following schedule of payments: the defendant shall pay any remaining balance of the restitution in the total amount of \$15,996.71, payable to U.S. District Clerk at the rate of at least \$450.00 per month, beginning 60 days after the defendant's release from confinement.

FINE

No Fine Imposed

STATEMENT OF REASONS**Guideline Range Determined by the Court:**

Total Offense Level: 9

Criminal History Category: II

Imprisonment Range: 6 to 12 months

Supervised Release Range: 2 to 3 years

Fine Range: \$ 1,000 to \$ 10,000 (plus cost of imprisonment/supervision)

Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: \$15,996.71

[163]

Defendant: LELAND STEWART ANDERSON
Case Number: 4:93-CR-075-Y (1)

The sentence departs from the guideline range for the following reasons: the defendant's arrest history dates back to 1975 and includes nineteen arrests or charges. He has absconded bond on at least ten charges and has absconded sentencing on a 1981 Embezzlement conviction. Further, he absconded supervision on a 1985 probated sentence in Randall County, Texas. U.S.S.G. §4A1.3(d) and (e) provide for an upward departure for defendants who were either pending trial or sentencing on another charge at the time of the offense or there is prior similar conduct not resulting in a criminal conviction. Both of these issues apply in this case and are cited as reasons for upward departure. Further, the Court finds that Mr. Stewart's criminal history most closely resembles a Criminal History Category V, a conservative estimate. There is no doubt Mr. Stewart's Criminal History Category would be a VI if he were convicted and sentenced on half of his pending cases. An upward departure is further warranted to protect the community from this defendant.

UNITED STATES POSTAL SERVICE

P. O. Box 224985, Dallas, TX 75222-4985

DATE: February 11, 1994

OUR REF:

SUBJECT: Sentencing Guidelines Amendments

TO: Robert E. Vincent
Postal Inspector
Office of Criminal Investigations
475 L'Enfant Plaza W., S.W., Rm. 3327
Washington, DC 20260-2160

Reference is made to your recent visit to the Dallas Domicile in reference to sentencing guidelines amendments.

Per your request, I am herewith forwarding additional specific data concerning sentences in volume loss/multiple victim cases which were prosecuted in the Dallas Division of the Northern District of Texas.

In the following three cases, the sentencing judge stayed within sentencing guidelines.

1. Defendant Glenda Kay Blevins, Case No. 202-1099743-ECMT(1), ISN 00715965, MO - Numerous thefts of mail from apartment house panel mailboxes. Date of sentencing - 11/13/92. Sentence, six months CAG, to be followed by two years supervised release. CR-3-92-361D.
2. Defendant Charles Wayne Hubbs, Case No. 202-1079728-ECMT(1), ISN 00707955, MO - Numerous thefts of mail from apartment house panel mailboxes. Date of sentencing - 03/01/93. Sentence, three years probation. CR-3-92-426X.
3. Defendant Kenneth Ray Yarbrough, Case No. 214-1112474-ECMT(1), ISN 00721564, MO - Numerous thefts of mail from apartment house panel mailboxes. Date of sentencing - 07/20/93. Sentence, 18 months CAG, to be followed with three years supervised release. 93-CR-247D.

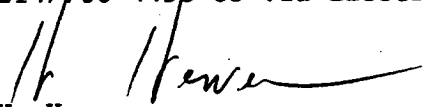
In the following cases, the sentencing judge departed upward from the sentencing guidelines. A copy of each sentence is attached. The reasons for the upward departures vary, and are listed on the last page of each judgment.

1. Defendant Michael Allen Hekimain, Case No. 211-1060409-ECMT(1), ISN 00082732, MO - Possession of numerous credit cards stolen from the mail via a postal employee. Date of sentencing - 07/26/91. Sentence, five years CAG, to be followed with three years supervised release. CR-3-91-091R.

2. Defendant Jeffrey Lynn Humphrey, Case No. 202-1077642-ECMT(1), ISN 0008222, MO - Recidivist offender; numerous thefts of mail from apartment house panel mailboxes. Date of sentencing - 04/06/92. Sentence, five years CAG, to be followed with three years supervised release. CR-3-91-395R.
3. Defendant Wayne Patrick Landrum Case No. 224-1116080-ECMT(2), ISN 00737939, MO - Broke into a postal jeep and stole mail from within. Date of sentencing - 08/13/93. Sentence, 24 months CAG. CR-3-93-181D.

I am also forwarding a judgment concerning an unusually high upward departure. Defendant A. I. Irosogie, Case No. 214-1108504-ECMT(1), ISN 00726663, MO - Theft of credit cards from the mail. Date of sentencing - 05/24/93. Sentence, 12 years 6 months CAG. CR3-92-0511X.

Should you require any additional information, feel free to contact me at 214/760-4458 or via Electronic Mail, IS1849.


H. Herrera
Postal Inspector

cc: W. G. Cunningham
AINC, Fort Worth Division

FILE

JUL 31 1991

United States District Court

NORTHERN District of TEXAS AT DALLAS

NANCY DOHERTY, CLERK

By UNITED STATES OF AMERICA
Deputy

MICHAEL A. HEKIMAIN

JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)

Case Number: CR-3-91-091-R (1)

(Name of Defendant)

James W. Mills, III

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the one-count Indictment
☐ was found guilty on count(s) _____ after a
plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 1708	Possession of stolen credit card	12-7-90	1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____
and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☒ It is ordered that the defendant shall pay a special assessment of \$ 50.00 for count(s) 1
which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 449-25-1133

Defendant's Date of Birth: 12/25/54

Defendant's Mailing Address:

7777 Glen America, #134
Dallas, Texas 75225

Defendant's Residence Address:

same

July 26, 1991

Date of Imposition of Sentence

Jerry Bushmeyer

Signature of Judicial Officer

JERRY BUSHMEYER

UNITED STATES DISTRICT JUDGE

Name & Title of Judicial Officer

Certified a true copy of an indictment

JUL 31 1991

Date

Andette Lydick

[167]

Defendant: **BEKIMAIN, MICHAEL A.**
Case Number: **CR-3-91-091-R (1)**

Judgment—Page 2 of 5**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty (60) months

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be incarcerated at the Federal Correctional Institute at Seagoville, Texas.

- ☐ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for this district.

☐ at _____ a.m.
☐ at _____ p.m. on _____
☐ as notified by the United States marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

☒ before 2 p.m. on August 7, 1991.
☐ as notified by the United States marshal.
☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____

_____, with a certified copy of this judgment.

United States Marshal

By _____

Deputy Marshal

[168]

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) Years

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

The defendant shall make restitution in the amount of \$3,696.76 payable to the U.S. District Clerk for disbursement to the victims listed in the presentence report at the rate of \$125.00 per month, beginning 30 days after release from custody.

The defendant shall refrain from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the probation officer makes a determination that the defendant is in compliance with the payment schedule.

The defendant shall provide to the probation officer any requested financial information.

The defendant shall participate in group counseling programs as directed by the probation office. The defendant shall submit to urine surveillance to determine if the defendant has become involved in the use of illegal drugs.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: **HEKIMAIN, MICHAEL A.**
Case Number: **CR-3-91-091-R (1)**

Judgment—Page 4 of 5**RESTITUTION AND FORFEITURE****RESTITUTION**

☒ The defendant shall make restitution to the following persons in the following amounts:

Name of Payee**Amount of Restitution**

Clerk of U. S. District Court
Northern District of Texas
1100 Commerce St., Room 14A20
Dallas, Texas 75242

\$3,696.76

For Disbursement To:

First Data Resources
Omaha, Nebraska
Attn: Gene Parmenter
Re: Visa Account 4233-2720-2008-2877 (Pentagon Federal Credit Union)

Payments of restitution are to be made to:

- ☐ the United States Attorney for transfer to the payee(s).
☒ the payee(s).

Restitution shall be paid:

- ☐ in full immediately.
☐ in full not later than _____.
☐ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

☒ in installments according to the following schedule of payments:

\$125.00 per month, beginning 30 days after release from custody.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

☐ The defendant is ordered to forfeit the following property to the United States:

[170]

Defendant: **HEKIMAIN, MICHAEL A.**
Case Number: **CR-3-91-091-R (1)**

Judgment—Page **5** of **5**

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 5

Criminal History Category: VI

Imprisonment Range: 9 to 15 months

Supervised Release Range: 2 to 3 years

Fine Range: \$ 250.00 to \$ 8,893.00

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: \$ 3,696.76

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☒ for the following reason(s):

The defendant has one of the longest criminal history records the Court has ever seen.

The defendant has an extensive history of credit card abuse.

The defendant's criminal history category is not reflected adequately.

United States District Court

NORTHERN District of TEXAS AT DALLAS

UNITED STATES OF AMERICA

V.

JEFFREY LYNN HUMPHREY

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)

Case Number: CR3-91-395-R (1)

L. Ray Pearce

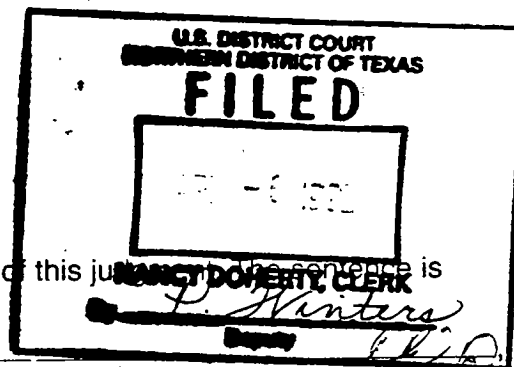
Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to ~~counts~~ the one-count information after a
☐ was found guilty on count(s) _____
 plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 1708	Possession of stolen mail	5-31-91	1



The defendant is sentenced as provided in pages 2 through 5 of this judgment and sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☒ It is ordered that the defendant shall pay a special assessment of \$ 50.00, for count(s) 1, which shall be due ☒ immediately ☐ as follows:

No fine is assessed.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 464-21-9380

Defendant's Date of Birth: 5/22/58

Defendant's Mailing Address:

Route 3, Box 436D

Paris, Texas 75460

Defendant's Residence Address:

SAME

April 3, 1992

Date of Imposition of Sentence

Jerry Buchmeyer
 Signature of Judicial Officer

JERRY BUCHMEYER, UNITED STATES DISTRICT JUDGE

Name & Title of Judicial Officer

April 6, 1992
 Date

Defendant: JEFFREY LYNN HUMPHREY
 Case Number: CR3-91-395-R (1)

Judgment—Page 2 of 5

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty (60) months to run concurrently with the state sentence he is serving.

☒ The court makes the following recommendations to the Bureau of Prisons:

Institution with drug treatment facility

☒ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for this district,

☐ at _____ a.m.
☐ at _____ p.m. on _____
☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
☐ before 2 p.m. on _____
☐ as notified by the United States marshal.
☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____
 _____, with a certified copy of this judgment.

 United States Marshal

By _____
 Deputy Marshal

[173]

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

The defendant shall make restitution in the amount of \$850, payable to the U.S. District Clerk for disbursement to Northpark National Bank, 1300 Northpark Center, Dallas, Texas 75225 at a rate to be determined by the probation officer.

The defendant shall refrain from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the probation officer makes a determination that the defendant is in compliance with the payment schedule.

The defendant shall provide to the probation officer any requested financial information.

The defendant shall participate in a program approved by the U.S. Probation Office for treatment of narcotic addiction or drug or alcohol dependency which will include testing for the detection of substance use or abuse.

The defendant shall participate in group counseling programs as directed by the probation office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: **JEFFREY LYNN HUMPHREY**
Case Number: **CR3-91-395-R (1)**

RESTITUTION AND FORFEITURE

RESTITUTION

☒ The defendant shall make restitution to the following persons in the following amounts:

Name of Payee

Amount of Restitution

As set forth in conditions of supervised release.

Payments of restitution are to be made to:

- ☐ the United States Attorney for transfer to the payee(s).
- ☐ the payee(s).

Restitution shall be paid:

- ☐ in full immediately.
- ☐ in full not later than _____.
- ☐ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
- ☐ in installments according to the following schedule of payments:

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

- ☐ The defendant is ordered to forfeit the following property to the United States:

Defendant: JEFFREY LYNN HUMPHREY
Case Number: CR3-91-395-R (1)

Judgment—Page 5 of 5

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 11

Criminal History Category: VI

Imprisonment Range: 27 to 33 months

Supervised Release Range: 2 to 3 years

Fine Range: \$ 2,000 to \$ 20,000

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: \$ 850. Northpark National Bank

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☒ for the following reason(s): guidelines do not adequately take into account the defendant's significant prior history and likelihood of recidivism

United States District Court

NORTHERN

District of TEXAS AT DALLAS

UNITED STATES OF AMERICA

V.

WAYNE PATRICK LANDRUM

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 3:93-CR-181-D (01)

FRANKLYN D. MICKELSEN

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of 3 Count Indictment
☐ was found guilty on count(s) _____ after a
 plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:1708	Theft of U.S. Mail	03/15/93	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

☒ Count(s) 2 and 3 ~~(is)~~ (are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of \$ 50.00 for count(s) 1, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 463-60-9517Defendant's Date of Birth: October 28, 1942

Defendant's Mailing Address:

13525 GoodwaterDallas, TX 75234

Defendant's Residence Address:

Certified a true copy of an instrument

filed in my office on 8-13-93NANCY DOHERTY, Clerk, U.S. District
Court, Northern District of Texas

August 13, 1993

Date of Imposition of Sentence

Sidney A. Fitzwater

Signature of Judicial Officer

SIDNEY A. FITZWATER, UNITED STATES DISTRICT

Name & Title of Judicial Officer

JUDGE

August 13, 1993

Date

[150]

Defendant: WAYNE PATRICK LANDRUM (01)
Case Number: 3:93-CR-181-D

Judgment—Page 2 of 4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Twenty-four (24) months

☒ The court makes the following recommendations to the Bureau of Prisons:

Defendant be assigned to an institution where he ^{can} participate in the comprehensive drug treatment program.

- ☒ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for this district.

☐ at _____ a.m.
☐ _____ p.m. on _____
☐ as notified by the United States marshal.

- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
☐ before 2 p.m. on _____
☐ as notified by the United States marshal.
☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____
_____, with a certified copy of this judgment.

United States Marshal

By _____

Deputy Marshal

[151]

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of _____
Three (3) years

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- ☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
- ☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.
- ☒ The defendant shall not possess a firearm or destructive device.

The defendant shall participate in a program approved by the U.S. Probation Office for treatment of narcotic or drug or alcohol dependency which will include testing for the detection of substance use or abuse. It is ordered that the defendant contribute to the costs of services rendered in an amount to be determined by the probation officer, based on ability to pay or availability of third-party payment.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: WAYNE PATRICK LANDRUM (01)
Case Number: 3:93-CR-181-D

Judgment - Page 4 of 4

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 4

Criminal History Category: VI

Imprisonment Range: 6 to 12 months

Supervised Release Range: 2 to 3 years

Fine Range: \$ 250 to \$ 5,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: \$ N/A

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range (upward)

☐ upon motion of the government, as a result of defendant's substantial assistance.

☒ for the following reason(s):

- 1) Based on 4A1.3, to adequately represent the defendant's criminal history, the Court departs to Level 9.
- 2) To adequately address the defendant's drug problem and in light of the fact that the Bureau of Prisons substance abuse program is 18 months in duration, a sentence outside the guideline range is warranted.

United States District Court

NORTHERN DISTRICT OF TEXAS
Dallas Division

UNITED STATES OF AMERICA

v.

ARCHIE ISIBORE EMMANUEL ROSOGIE

THE DEFENDANT:

- ☒ pleaded guilty to count(s) 1, 5 and 8.
☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses.

Title & Section	Nature of Offense	Date Offense Concluded	Deputy	Count Number(s)
18 U.S.C. § 1708	Possession of Stolen Mail	November 11, 1992		1
8 U.S.C. § 1326	Unlawfully Remaining in the United States after Deportation	November 11, 1992		5
18 U.S.C. § 1542	False Statement on a Passport Application	January 9, 1991		8

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
Count(s) 2, 3, 4, 6, 7, 9, 10, 11 are dismissed on the motion of the United States.
☒ It is ordered that the defendant shall pay a special assessment of \$ 150.00, for count(s) 1, 5, and 8, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within thirty (30) days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: Unknown
Defendant's Date of Birth: 10-10-63

Defendant's Mailing Address:

2307 Redbrook
Arlington, TX 76061

Defendant's Residence Address:

Same as above.

May 24, 1993
Date of Imposition of Sentence

Joe Kendall
Signature of Judicial Officer

JOE KENDALL, UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

May 28, 1993
Date

Certified a true copy of an instrument
on file in my office on 6-1-93
NANCY DOHERTY, Clerk, U.S. District
Court, Northern District of Texas
By SPENCK Deputy

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 150 months.

- ☐ The court makes the following recommendations to the Bureau of Prisons:
- ☒ The defendant is remanded to the custody of the United States marshal.
- ☐ The defendant shall surrender to the United States marshal for this district,
- ☐ at ___ am./pm. on ____.
- ☐ as notified by the United States marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
- ☐ before 2 p.m. on ____.
- ☐ as notified by the United States marshal.
- ☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on 8-12-93 to FLE FLE at Ft Worth, CO, with a certified copy of this judgment.

Tom L. Wooten, WARDEN
~~United States Marshal~~

BY [Signature]
~~Deputy Marshal~~

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
OCT 29 1993
NANCY DOHERTY, CLERK
By _____ Deputy

Defendant: ARCHIE ISIBORE EMMANUEL ROSOGIE
 Case Number: 3:92-CR-0511-X (01)

Judgment - Page 3 of 5

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 30 months.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- ☒ The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.
- ☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.
- ☒ The defendant shall not possess a firearm or destructive device.
- X The defendant shall provide to the probation officer any requested financial information.
- X The defendant shall not illegally reenter the United States, if deported.

The defendant shall submit to urine surveillance to determine if the defendant has become involved in the use of illegal drugs.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five (5) days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer within seventy-two (72) hours of any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

[156]

RESTITUTION AND FORFEITURE

RESTITUTION

- ☒ The defendant shall make restitution for the following persons in the following amount:

<u>Name of Payee</u>	<u>Amount of Restitution</u>
Household Credit Services P.O. Box 80055 Salinas, CA 93912-055 Attn: Fraud Department Card No. 5437-0004-0415-7549	\$6,992.59
Household Credit Services P.O. Box 80055 Salinas, CA 93912-055 Attn: Fraud Department Card No. 5437-0004-0392-9773	\$6,900.00
Discover Card P.O. Box 29024 Phoenix, AZ 85038-9024 Attn: Cletus Bottrell	\$ 535.40
Visa 2223 Dodge Orlan, NE 68102	\$ 12.96

Payments of restitution are to be made to:

- ☒ the U. S. Clerk for transfer to the payee(s).
☐ the payee(s).

Restitution shall be paid:

- ☐ in full immediately.
☐ in full not later than ____.
☒ in equal monthly installments over a period of 30 months.
☐ in installments according to the following schedule of payments:

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 13

Criminal History Category: VI

Imprisonment Range: 33 to 41 months

Supervised Release Range: 2 to 3 years

Fine Range: \$ 3,000 to \$ 30,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: \$ 14,440.95

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed twenty-four (24) months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds twenty-four (24) months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☒ for the following reasons:

The Court grants a one-level downward departure based on 5k1.1 motion for substantial assistance; upward departure based on criminal history which under represents recidivism and type of crimes in criminal history reflects likelihood of recidivism. Criminal history understates seriousness of crime committed. Risk of recidivism is high. Total offense level is 26. Criminal history category is VI. November 1, 1992, amendment under USSG 4A1.3 directs the sentencing judge to go down the sentencing grid to establish the appropriate sentence.

UNITED STATES POSTAL SERVICE

DATE: February 24, 1994
OUR REF: SAL:bjl
SUBJECT: EXTERNAL CRIME BRIEFS

TO: Bob Vincent
Postal Inspector
Washington, D.C.

BRIEF

Case Nos. 201-1042011-ECMT(1), 201-1085848-ECMT(1), 201-1131292-ECMT(1)

Gang Activity of "The Circle", Phoenix, AZ

Beginning in January, 1990 the U.S. Postal Inspection Service, Phoenix, AZ began an investigation into the activities of a "check washing" gang operating in Phoenix, AZ. The group had its origin in "dumpster diving" to obtain discarded old checks and printer's check stock. They developed a system of soaking (washing) checks to remove ball-point ink without damaging the printer's ink. They then began breaking into apartment complex mailboxes, Neighborhood Delivery Collection Box Units, and Collection Boxes to obtain more current checks. They would obtain incoming boxes of checks, credit cards, and numerous forms of identification.

The gang, at its height, were breaking into 3-4 units per night. The organization was controlled by methamphetamine distributors, who belonged to the Aryan Brotherhood, a white supremacist group. It had seven "inner circles". Each circle had a leader, an enforcer, and a recruiter. Five of the circles were concentrating on check washing while the other two concentrated on counterfeiting checks. There have been four homicides associated to "The Circle".

Members of the circle were recruited from the drug culture or from the homeless population. On occasion a person digging through trash would be approached and given money. They were instructed to get cleaned up and meet again the next day for additional money. These people would then be sent into a bank to cash "washed checks" that had been made payable to them. Hundred of citizens experience bounced checks, overdraft fees, and bad credit reports as a result of this scheme.

During the past three years bank officials estimate they have lost in excess of \$6 million to check washing and counterfeit checks in the Phoenix metro area. Approximately eighty (80) people have been arrested in this case to date, including "The Circle" leader and the leaders of the seven "inner circles". Of the approximately 50 Inspection Service arrests, 5 have been handled Federally with the greatest sentence being three years and the others received probation. All the other cases have been handled by the State of Arizona with the average sentence being seven years hard time. The leader of the group received a 25 year sentence in Superior Court for the State of Arizona.

Steve A. Landis
Postal Inspector
ISN 2109
Phoenix Division

(Video of news coverage to follow)

UNITED STATES POSTAL SERVICE

DATE: February 24, 1994
OUR REF: DH:bjl
SUBJECT: EXTERNAL CRIME BRIEFS

TO: Bob Vincent
Postal Inspector
Washington, D.C.

BRIEF

Case No. 201-1121089-ECMT(1)

Vehicle Breakins

The Phoenix Division began investigating a series of 10 U.S. Postal Service vehicle break-ins between May 15, 1993 and July 2, 1993. In each case the method of operation was similar. The letter carrier arrived at the delivery area, parked and locked the vehicle on a city street. While the carrier delivered the mail on foot, and was away from the vehicle, a male suspect would approach the vehicle and throw a large rock through the vehicle's window. The suspect would then remove all the mail from the Postal vehicle. The suspect would place the mail into a waiting vehicle, occupied by at least one other person.

From a vehicle breakin on June 18, 1993, Inspectors were able to lift a latent palmprint. This palmprint led to the identification of the suspect. Inspectors began surveilling a residence, believed to be frequented by the subject.

On July 2, 1993, Phoenix Postal Inspectors apprehended three suspects who had in their possession, mail stolen from a USPS vehicle breakin which occurred about one hour prior to their arrest.

Suspect No. 1, who had an extensive criminal history plead to one count of Possession of Stolen Mail (18 USC 1708) and received 10 months in prison.

Suspect No. 2, who was on Federal Parole for mail fraud, and also had an extensive criminal history went to trial and was convicted of Possession of Stolen Mail (18 USC 1708) and subsequently was sentenced to 12 months in prison.

Suspect No. 3, has a minor criminal history and has plead guilty and is awaiting sentencing.

Judge Earl Carrol, Senior Presiding Judge, U.S. District Court, District of Arizona, was very upset at the sentencing of both suspects No. 1 and No. 2. Judge Carrol informed both defendants the statute calls for a maximum of 5 years imprisonment, however, according to the Federal Sentencing guidelines, the maximum sentence he could impose on Suspect No. 1 was 10 months, which he did, and the maximum sentence he could impose on suspect No. 2 was 12 months, which he did. Judge Carrol advised both defendants, if he were able to impose the maximum 5 years sentence as called for in the statute, he would have.

D. Hilburn
Postal Inspector
ISN 4707
Phoenix Division

Beginning March 31, and continuing through April 23, 1993, the Postal Service reported thirteen (13) incidents where U.S. Mail had been stolen from U.S. Mail Storage boxes in the Flushing area of Queens, NY. In all of these thefts, no damage or forced entry to the storage boxes was noted.

On April 15, 1993, an Inspection Service confidential informant was introduced to an individual Christopher Myers at Myers' residence, 14-30 155th Street, Whitestone, N.Y.. During this meeting, recorded and monitored by Postal Inspectors, Christopher Myers agreed to produce a counterfeit New York State driver's license that would contain the photograph of the confidential informant. While in the process of producing this counterfeit identification, the informant witnessed Christopher Myers in possession of a postal "Arrow" key, which Myers admitted to using to steal U.S. Mail from storage boxes, and numerous stolen checks and credit cards.

On April 20, 1993, the confidential informant introduced an undercover Postal Inspector, posing as a owner of a collusive check cashing establishment, to Christopher Myers. During this meeting, Myers sold to the undercover six (6) stolen checks, including four (4) U.S. Treasury Checks and one (1) New York State Unemployment check. All six (6) of the checks bear dates and have addressees which were effected during thefts from U.S. Mail storage boxes located in Flushing Queens earlier in April.

On April 28, 1993, the undercover Postal Inspector again meet with Christopher Myers and purchases from Myers nine (9) additional checks. A review of the addressees listed on these checks indicated that they were from two (2) storage boxes where mail was stolen on April 23, 1993 in Flushing Queens.

On April 29, 1993, a federal search warrant was executed at Myers' residence by Postal Inspectors and U.S. Secret Service Agents. Christopher Myers was present during the execution of the search and was placed under arrest. Found incident to the search of Myers' residence where the following items:

- A U.S. Mail postal "Arrow" key
- Four (4) sacks of U.S. Mail from two storage box thefts occurring on April 23, 1993.
- One compact paper shredder with one bag of shredded mail.
- Numerous counterfeit New York State driver's licenses
- Four (4) handguns and ten (10) rifles and shotguns

On July 15, 1993, Myers was indicted in the Eastern District of New York, Brooklyn, N.Y. on one (1) count each of Theft of Mail (18USC 1708), Possession of a stolen key used by the U.S. Postal Service (18USC 1704), Unauthorized use of an access device (18USC 1029), and Interstate transportation of firearms (18USC 922). On October 15, 1993, at the insistence of the Assistant U.S. Attorney, Myers entered a plea of guilty to the one firearms count due to the higher exposure under the sentencing guidelines (8 to 14 months vs. 0 to 6 months). On January 07, 1994, Myers' sentencing was postponed when U.S. District Court Judge Reena Raggi questioned whether the plea to the firearms count was proper in light of the mail theft investigation and the defense's request for a reduction in the sentencing guideline under the "sportsman's" provision for firearm offenses. On February 25, 1994, after the defense withdrew their guideline reduction request, Myers was sentenced to twelve (12) months incarceration and three (3) years supervised probation by Judge Raggi.

UNITED STATES POSTAL SERVICE

POSTAL INSPECTORS

BROOKLYN GMF, 1050 FORBELL ST, BKLYN, NY 11256-9901

DATE: February 23, 1994

OUR REF: See Below

SUBJECT: Sentencing Guidelines

TO: Insp. L. J. Kennedy

Listed below are three (3) cases in which prosecution was completed in U.S. District Court EDNY. Any further questions please contact me.

Case No. 216-1087076 ECMT(2)

This case was initially referred to me by the Internal Crimes Inspectors, after an arrest of a non-postal employee. Residents in 1200 Neck Road, Brooklyn, NY 11229 were experiencing non-receipt of credit cards and fraudulent requests for credit cards in their name. Subsequent to the investigation it was revealed that the Defendant, Emanuel Fischler had also obtained three (3) mail drops in various names using phoney corporations and assuming the identity of numerous persons including two deceased persons. Mr. Fischler was responsible for in excess of twenty (20) fraudulent applications for credit cards and the theft of at least fifteen (15) other credit cards. the total loss to various Credit Card Companies and banks is in excess of \$69,000. Mr. Fischler has pled guilty in Federal court. Since his plea of guilty, Mr. Fischler has agreed to cooperate in an investigation involving H.U.D. Housing and NYC Rent Stabilization Fraud. Defendant sentenced to three years probation and restitution.

Case No. 203-1092398 ECMT(1)

This case initiated by complaints to me by Chemical Bank. The defendant Danillo Marte was responsible for depositing and withdrawing over \$143,000.00 in stolen checks into his bank account. The investigation revealed that all of the checks deposited were stolen from relay boxes and jeep attacks in Brooklyn and Queens, NY. Mr. Marte agreed to attempt to set up the persons responsible for bringing him the stolen checks. This met with negative results. Mr. Marte has pled guilty in Federal Court and was sentenced to five months in prison, five months home detention and five years probation.

Case No. 206-1114520 ECMT(2)

This case was initiated on a customer complaint from Brooklyn, NY 11223. The subject Vladimir Kourbatski, a Russian, was involved with others in the organized theft of checks from the mail and the depositing and attempted withdrawal of the money from banks in New York City. Mr. Kourbatski and

others would open fraudulent bank accounts with Citibank and the Dime Savings Bank. I was aware of this as it was happening. Mr. Kourbatski was arrested as he attempted to withdraw \$9,600 from the Dime Savings Bank in Brooklyn. He was not able to withdraw the \$69,000 from the Citibank account. Mr. Kourbatski went to trial in the U.S. District Court, EDNY was convicted and sentenced to eleven months prison and three months probation and will be deported after finishing sentence.

R. T. Wolff

R. T. Wolff
Postal Inspector
(718) 348-3727

/gc

FROM: INSP. W. L. STABILE

VOLUME MAIL THEFT SENTENCING PROJECT

CASE NO. 202-1105484 ECMT(1) Between April 1992 and October 1992, defendant Kamour-Deem Laval defrauded Citibank by fraudulently opening approximately eight bank accounts using false names and fraudulent identification documents. He would deposit stolen, forged and fraudulently endorsed checks and subsequently withdraw these monies through the use of automated teller machines. Numerous treasury checks stolen from postal relay boxes or carrier carts were some of the negotiable items deposited into these accounts. There were no leads which led us to believe that the defendant actively participated in the actual theft of these checks. It appears he was just one member of a gang of mail thieves who would steal checks from relay boxes. His role in the gang would be to open bank accounts in other peoples' names and deposit the checks before withdrawing the monies. Due to the lack of cooperation from the defendant we were unable to determine who the actual relay box thieves were. It was determined through cross referencing checks and accounts that the total loss to various financial institutions exceeded \$1,000,000.00. Because we could not determine the extent of the defendants knowledge pertaining to the scheme we could not hold him accountable for losses in excess of those he participated in. The actual loss directly connected to the defendant was \$360,916.13. The defendant was sentenced April 16, 1993 in Federal Court in the Eastern District of New York to fifteen months in prison. Further investigation led us to the arrest of another individual connected to the gang case. Defendant Isiako Ganiyu was arraigned in Federal Court on March 9, 1993 but prosecution is pending. It has been determined that he was a co-conspirator with Laval in the opening of these fraudulent bank accounts. No evidence has determined whether Ganiyu was involved in the actual relay box attacks.

END:1

214-1104637-ECMT

A loose knit group of Dominicans residing in the Corona area of Queens have been responsible for several hundred volume mail thefts throughout the NY area since 1990. Different "crews" were identified going out and stealing mail. The individuals responsible for the thefts had many things in common including modus operandi, fences, and hangouts. The different crews knew each other and shared information such as the best area to steal mail or if an area was "hot" and should be avoided. The following are individuals arrested during the course of this investigation.

Cecilio Adames - Paulino was arrested after the Inspection Service received information that he and another Dominican had stolen a large quantity of mail. He was arrested in front of his residence in possession of several thousand pieces of mail stolen earlier from 2 relay boxes. Twenty-three US Treasury checks and four credit cards were found in his pocket.

Adames- Paulino admitted being a member of a "crew" that stole mail on over 50 occasions from relay boxes and jeeps throughout NYC. His cooperation did not go beyond an oral admission. He pled guilty and received a 7 month prison sentence.

Jose Sanchez was also a member of a "crew" that stole mail from relay boxes on numerous occasions. He was arrested in December, 1992, after his vehicle was described at a relay theft. He admitted involvement in that theft and about 15 others in which thousands of pieces of mail were stolen. Sanchez was arrested again on 5/21/93 after selling a stolen non receipt credit card to an undercover agent. He was arrested again on 5/23/93 after he was identified at a relay box theft. Sanchez pled guilty on 11/4/93 and received a sentence of 30 day home-confinement and 3 years probation.

U S P O S T A L I N S P E C T I O N S E R V I C E
E L E C T R O N I C M E S S A G E

Date: 22-Feb-1994 05:52pm EST
From: RALPH A NARDO
IS4299
Office: NEW YORK DIVISION
Phone: (718)655-6800/6824

TO: LEONARD J KENNEDY (IS2831)
CC: ARTHUR A LYNCH (IS3360)
Subject: SENTENCING GUIDELINES

AS PER YOUR REQUEST HERE IS A RECENT SENTENCING INVOLVING AN INDIVIDUAL WITH MULTIPLE FEDERAL ARRESTS FOR VOLUME ATTACKS:

CASE NOS. 212-1109005-ECMT(1)
201-1118338-ECMT(1)

LATCHMAN SINGH WAS ARRESTED IN SDNY ON 12/23/92 AND 5/11/93 AND CHARGED WITH VIOLATION OF 18 USC 1708 ON BOTH OCCASIONS. SINGH PLEAD GUILTY TO THE FIRST ARREST ON 3/22/93, IN WHICH IN EXCESS OF \$6,000 OF CREDIT CARD LOSSES WERE ATTRIBUTABLE. THE SECOND VIOLATION WAS FOR A RELAY BOX ATTACK WHICH OCCURRED ON 4/10/94 IN WHICH IN EXCESS OF \$28,000 OF TREASURY CHECKS WERE RECOVERED WHICH HAD NOT YET BEEN NEGOTIATED. THIS WAS LESS THAN THREE(3) WEEKS AFTER SINGH PLEAD GUILTY TO THE FIRST VIOLATION. AT NO TIME DID SINGH PROVIDE ANY COOPERATION TO THE GOVERNMENT. SINGH PLEAD GUILTY TO THE SECOND VIOLATION ON 10/1/93. THERE WAS STRONG EVIDENCE TO PROVE THAT SINGH WAS INVOLVED IN SEVERAL VOLUME ATTACKS IN LOWER WESTCHESTER COUNTY AND THE BRONX. HE IS SUSPECTED TO BE INVOLVED IN APPROXIMATELY 30 RELAY BOX ATTACKS.

ON 2/15/94 SINGH WAS SENTENCED IN SDNY UNDER DOCKET NOS. 93-CR-186 AND 93-CR-607 TO THE FOLLOWING:

3 MONTHS PRISON
3 MONTHS HOME DETENTION
3 YEARS SUPERVISED RELEASE

AS WE SPEAK I HAVE BEEN INFORMED THAT SINGH WAS ARRESTED ON STATE CHARGES FOR POSSESSION OF A CREDIT CARD STOLEN FROM THE MAIL ON 2/17/94. SDNY AUSA JOHN DESMARIS HAS INDICATED HE WILL ASK THE SENTENCING JUDGE FOR AN IMMEDIATE REMAND. SINGH WAS SCHEDULED TO SURRENDER 3/18/94 AND HIS OFFICE WOULD SEEK FEDERAL PROSECUTION.

MORE TO FOLLOW.....

OFFICE OF CRIMINAL

CASE BRIEF - INSPECTOR GENERAL REPORT

TYPE OF BRIEF: Preliminary
CASE NUMBER : 201-1071541-ECMT(1); 201-1072296-ECMT(1)
CITY, STATE : Seattle, WA
SUBJECT :

Arrest of gang leaders, James Michael Morelli and Steven Wayne Blair for the theft of outgoing checks from collection boxes through use of counterfeit Postal Service Arrow keys.

SUMMARY:

Beginning in early May 1991, the Seattle Division of the Postal Inspection Service began receiving complaints from customers and area banks, indicating that outgoing checks deposited in collection boxes throughout the greater Seattle area were being stolen, washed, and negotiated after entry of new payees and amounts. As of August 27, 1991, 111 washed checks had been recovered, 94 of which were successfully negotiated for losses to area banks of at least \$66,382.52. In cashing the checks the subjects utilized 29 stolen Washington State Driver's Licenses as identification.

Investigation disclosed that at least two loosely knit gangs were involved in the theft of the checks from collection boxes through use of counterfeit U.S. Postal Service Arrow keys and that often the collection boxes being attacked were located directly in front of postal stations and branches. It was determined the stolen checks were being washed in a solution of denatured alcohol and acetone which removed the ink entries on the checks and that the checks themselves were often business checks originally written in payment for utility and other bills.

Through bank surveillance photos and Inspection Service Crime Laboratory analysis of over 229 washed and other forged checks, James Michael Morelli, dob: 02-15-65, and Steven Wayne Blair, dob: 11-12-52, were identified as being responsible for at least 55 of the 94 washed checks which had been negotiated accounting for \$43,322.96 of the total losses and accounting for 10 of the 29 identifications used.

On July 16, 1991, acting on information provided by the Inspection Service and a confidential informant, Mountlake Terrace, WA Police Detectives arrested James Michael Morelli on an outstanding warrant from King County, WA, issued following his escape from the King County Court House on May 1, 1990, after he had been sentenced to 33 months imprisonment for the offense of trafficking in the first degree. In subsequent questioning, Morelli admitted to the use of a counterfeit Arrow key to gain entry to over 50 collection boxes from which he stole outgoing checks. A search of the

vehicle Morelli was driving incident to his arrest resulted in the recovery of a counterfeit Postal Arrow key and numerous washed checks in the process of drying.

On July 22, 1991, Steven Wayne Blair was arrested by Postal Inspectors on probable cause as he was released from the Renton, WA City Jail. He had been held there since July 20, 1991, following his arrest by officers of the Renton Police Department on investigation of being in possession of stolen property. A search of Blair's residence on July 20, 1991, by Renton Police, Seattle Police and Postal Inspectors resulted in the recovery of three counterfeit Arrow keys, mail stolen from three relay boxes on July 17 and 18, 1991, and numerous checks stolen from the mail which were in the process of being washed.

On July 23, 1991, Blair appeared before United States Magistrate at Seattle, WA, and was charged by complaint with one count of being in possession of a counterfeit Postal Arrow key, Title 18, USC, Section 1704, and four counts of being in possession of stolen mail, Title 18, USC, Section 1708. Blair failed to appear for a probable cause hearing scheduled for August 12, 1991, and a federal warrant has been issued for his arrest. To date, four additional individuals associated with the two gangs have been taken into state custody on unrelated charges and information and evidence relative to their involvement in this scheme is being provided to local prosecutors.

VISUAL/GRAPHIC: NONE X SENT UNDER SEPARATE COVER

Press Releases

CASE INSPECTOR : S. R. Pilkey

PHONE NO.: (206) 442-6321

DOCUMENT NAME : Case Brief-Seattle, WA

OFFICE OF CRIMINAL

CASE BRIEF - INSPECTOR GENERAL REPORT

TYPE OF BRIEF: Final
CASE NUMBER : 201-1071541-ECMT(1); 201-1072296-ECMT(1)
CITY, STATE : Seattle, WA
SUBJECT :

Sentencing of gang members.

SUMMARY:

On January 15, 1993, the last of seven defendants in the subject cases was sentenced in the King County Superior Court following a guilty plea to three counts of forgery and one count of possession of stolen property relating to the theft of checks from the U. S. Mails.

In previous actions, Steven Wayne Blair appeared in Federal District Court at Seattle, WA, on April 24, 1992, and was sentenced to eight months imprisonment to be followed by three years supervised release following his conviction on seven felony counts of possessing counterfeit Postal Service keys, stolen mail, and bail jumping. On September 17, 1991, James Michael Morellie, was sentenced to twenty-two months imprisonment in Snohomish County Superior Court after pleading guilty to three counts of forgery involving checks stolen from the mails.

The other five defendants in the subject cases were sentenced in King County Superior Court as follows:

201-1071541-ECMT(1)

Tron Joseph Luketa, fourteen months imprisonment, three years probation, on November 22, 1991.

John Kenneth Speaks, twenty-four months imprisonment, one year probation, on November 8, 1991.

Rosalie Joy Hardenbrook, three months imprisonment, one year probation, on November 7, 1991.

201-1072296-ECMT(1)

John Darrel McKenrick, fourteen months imprisonment, one year probation, on January 24, 1992.

Diane Elizabeth Foust, fourteen months imprisonment, one year probation on January 15, 1993.

The above defendants were involved in the theft of mail from the U. S.

Postal Service collection boxes. Individuals' personal checks would be "washed" and new payees and amounts entered on the checks. During the course of the investigation, 111 such washed checks were recovered, 94 of which had been successfully negotiated for losses to area banks of over \$66,382. Twenty-nine stolen Washington State driver's licenses were used to cash the checks which were often altered by overlaying the photo of the true license holder with a photograph of one of the defendants.

VISUAL/GRAPHIC: X NONE SENT UNDER SEPARATE COVER

CASE INSPECTOR : S. R. Pilkey

PHONE NO. : (206) 442-6321 ^

DOCUMENT NAME : BRIEF/BLAIR/920814

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
(202) 273-4500
FAX (202) 273-4529



February 9, 1994

K.M. Hearst
Deputy Chief Inspector
Office of Postal Inspector/Criminal Investigations
475 L'Enfant Plaza West, SW
Washington, DC 20260-2160

Dear Deputy Chief Inspector Hearst:

Enclosed please find the statistical information you requested on guideline defendants sentenced for violations of Postal statutes.

Table 1 describes the number of cases convicted between 1989 and 1993 under each of the statutes listed in your request. Note that a small number of cases was convicted under two or more of these statutes. Table 2 lists the number of cases convicted per year between 1989 and 1993. Table 3 provides the distribution of final offense levels assigned under the guidelines to the total of 3,679 cases.

Table 4 identifies the number of cases from the total of 3,679 that involved more than minimal planning (n=920), or the taking of undelivered mail (n=1,056). Table 5 presents the frequency of primary guidelines applied to the 3,679 cases, with §2B1.1 being the most frequent, followed by §2B1.2 and §2F1.1. Table 6 provides sentence information for the 3,679 cases. 2,149 defendants (or 60%) received no sentence of incarceration. For the remaining 40 percent, the mean prison term was 13.8 months, median 10 months.

Finally, Table 7 references information about cases sentenced under §§2B1.1 and 2F1.1 regardless of the statute of conviction, and provides the number and percentage of cases between 1989 and 1993 to which 2B1.1(b)(6) or 2F1.1(b)(2) was applied.

We hope you will find this information useful. If you have any questions, please feel free to call me at: (202)273-4530.

Sincerely,

A handwritten signature in dark ink, appearing to read "Susan Katzenelson".
Susan Katzenelson
Director of Policy Analysis

Enclosures

**Cases Sentenced Under the Guidelines 1989-1993 Involving One or More of the
Following Statutes of Conviction:**

TYPSTAT	Frequency	Percent	Cumulative Frequency	Cumulative Percent
0	3513	95.5	3513	95.5
1702	166	4.5	3679	100.0

TYPSTAT	Frequency	Percent	Cumulative Frequency	Cumulative Percent
0	3193	86.8	3193	86.8
1703	486	13.2	3679	100.0

TYPSTAT	Frequency	Percent	Cumulative Frequency	Cumulative Percent
0	3629	98.6	3629	98.6
1707	50	1.4	3679	100.0

TYPSTAT	Frequency	Percent	Cumulative Frequency	Cumulative Percent
0	1602	43.5	1602	43.5
1708	2077	56.5	3679	100.0

TYPSTAT	Frequency	Percent	Cumulative Frequency	Cumulative Percent
0	2700	73.4	2700	73.4
1709	979	26.6	3679	100.0

Fiscal Year Sentenced

FY	Frequency	Percent	Cumulative Frequency	Cumulative Percent
89	478	13.0	478	13.0
90	804	21.9	1282	34.8
91	736	20.0	2018	54.9
92	768	20.9	2786	75.7
93	893	24.3	3679	100.0

Table 3

Final Offense Level

FOL	Frequency	Percent	Cumulative Frequency	Cumulative Percent
2	27	0.7	27	0.7
3	51	1.4	78	2.1
4	956	26.0	1034	28.1
5	196	5.3	1230	33.4
6	548	14.9	1778	48.3
7	237	6.4	2015	54.8
8	264	7.2	2279	61.9
9	162	4.4	2441	66.3
10	146	4.0	2587	70.3
11	93	2.5	2680	72.8
12	71	1.9	2751	74.8
13	55	1.5	2806	76.3
14	33	0.9	2839	77.2
15	17	0.5	2856	77.6
16	12	0.3	2868	78.0
17	5	0.1	2873	78.1
18	2	0.1	2875	78.1
20	2	0.1	2877	78.2
21	3	0.1	2880	78.3
22	3	0.1	2883	78.4
23	3	0.1	2886	78.4
24	1	0.0	2887	78.5
25	2	0.1	2889	78.5
28	1	0.0	2890	78.6
29	1	0.0	2891	78.6
37	1	0.0	2892	78.6
43	1	0.0	2893	78.6
Missing	786	21.4	3679	100.0

Table 4

More than Minimal Planning Applied

MINPLAN	Frequency	Percent	Cumulative Frequency	Cumulative Percent
Unknown	1132	30.8	1132	30.8
Missing	73	2.0	1205	32.8
No	1554	42.2	2759	75.0
Yes	920	25.0	3679	100.0

Undelivered Mail Taken

UNDELIVR	Frequency	Percent	Cumulative Frequency	Cumulative Percent
Unknown	1132	30.8	1132	30.8
Missing	73	2.0	1205	32.8
No	1418	38.5	2623	71.3
Yes	1056	28.7	3679	100.0

Primary Guideline Applied

GDLINEHI	Frequency	Percent	Cumulative Frequency	Cumulative Percent
2A1.1	1	0.0	1	0.0
2A2.3	1	0.0	2	0.1
2A2.4	1	0.0	3	0.1
2B1.1	2426	65.9	2429	66.0
2B1.2	573	15.6	3002	81.6
2B1.3	136	3.7	3138	85.3
2B2.2	14	0.4	3152	85.7
2B3.1	10	0.3	3162	85.9
2C1.1	5	0.1	3167	86.1
2D1.3	1	0.0	3168	86.1
2F1.1	358	9.7	3526	95.8
2G2.2	1	0.0	3527	95.9
2H3.3	53	1.4	3580	97.3
2J1.6	2	0.1	3582	97.4
2K2.1	4	0.1	3586	97.5
2K2.2	1	0.0	3587	97.5
2L1.1	1	0.0	3588	97.5
2L1.2	1	0.0	3589	97.6
2P1.1	2	0.1	3591	97.6
2S1.1	2	0.1	3593	97.7
2X1.1	2	0.1	3595	97.7
Unknown	11	0.3	3606	98.0
Missing	73	2.0	3679	100.0

Table 6

Length of Imprisonment

TOTPRISN	Frequency	Percent	Cumulative Frequency	Cumulative Percent
0	2149	59.6	2149	59.6
1	31	0.9	2180	60.4
2	56	1.6	2236	62.0
3	83	2.3	2319	64.3
4	118	3.3	2437	67.6
5	48	1.3	2485	68.9
6	226	6.3	2711	75.2
7	37	1.0	2748	76.2
8	75	2.1	2823	78.3
9	41	1.1	2864	79.4
10	69	1.9	2933	81.3
11	5	0.1	2938	81.5
12	158	4.4	3096	85.8
13	14	0.4	3110	86.2
14	30	0.8	3140	87.1
15	63	1.7	3203	88.8
16	34	0.9	3237	89.7
17	1	0.0	3238	89.8
18	91	2.5	3329	92.3
19	5	0.1	3334	92.4
20	10	0.3	3344	92.7
21	42	1.2	3386	93.9
22	3	0.1	3389	94.0
23	2	0.1	3391	94.0
24	52	1.4	3443	95.5
25	1	0.0	3444	95.5
26	1	0.0	3445	95.5
27	24	0.7	3469	96.2
28	1	0.0	3470	96.2
29	2	0.1	3472	96.3
30	28	0.8	3500	97.0
33	19	0.5	3519	97.6
34	1	0.0	3520	97.6
35	1	0.0	3521	97.6
36	14	0.4	3535	98.0
37	7	0.2	3542	98.2
38	2	0.1	3544	98.3
39	3	0.1	3547	98.3
40	4	0.1	3551	98.4
41	9	0.2	3560	98.7
42	2	0.1	3562	98.8
46	8	0.2	3570	99.0
48	3	0.1	3573	99.1
49	1	0.0	3574	99.1
51	4	0.1	3578	99.2
52	1	0.0	3579	99.2
57	2	0.1	3581	99.3
60	10	0.3	3591	99.6
64	1	0.0	3592	99.6

TOTPRISN	Frequency	Percent	Cumulative Frequency	Cumulative Percent
70	1	0.0	3593	99.6
71	1	0.0	3594	99.6
72	2	0.1	3596	99.7
84	2	0.1	3598	99.8
87	2	0.1	3600	99.8
94	1	0.0	3601	99.8
96	1	0.0	3602	99.9
120	1	0.0	3603	99.9
150	1	0.0	3604	99.9
216	1	0.0	3605	99.9
240	1	0.0	3606	100.0
Life	1	0.0	3607	100.0

Frequency Missing = 72

Of the forty percent sentenced to a term of imprisonment:
 mean sentence= 13.8 months
 median sentence= 10.0 months

Application of guideline 2B1.1 regardless of statute of conviction:

- 15,176 (of 162,080 cases with complete information from 1989-93)
- 5 of the 15,176 cases involved the application of adjustment 2B1.1(b)(6).

Application of guideline 2F1.1 regardless of statute of conviction:

- 21,330 (of 162,080 cases with complete information from 1989-93)
- 14,919 of the 21,330 cases involved the application of adjustment 2F1.1(b)(2).

ISDBIS--H24420.CULPRIT.ADHOC421--
 U. S. POSTAL INSPECTION SERVICE
 VOLUME MAIL THEFTS BY DIVISION
 ----- FISCAL YEAR - 1993 -----

DIVISION	221 COLLECTION BOX	222 COOP MAILING RACK	223 RELAY BOX	224 & 225 VEHICLE ATTACK	226 CARRIER CART/SATCHEL	227 NDCBU/APT ARROW LOCK	228 P.O. BOX	TOTAL
ATLANTA	1		14	19		27	2	63
BOSTON	5		30	17		3	1	56
BUFFALO	2			1	2		1	6
CHARLOTTE	1			4				5
CHICAGO	15	3	6	73	87	61		245
CINCINNATI	16			4				20
CLEVELAND	2			28				30
DENVER	3			1		1	1	6
DETROIT	3			12	1			16
FT. WORTH	77			4		140	3	224
HOUSTON	1			14		40	10	65
KANSAS CITY	10			8				18
LOS ANGELES	42			544	17	324	11	938
MEMPHIS	2			8		3		13
MIAMI	3			59	2	1	1	66
NEW ORLEANS	3			16	1		1	21
NEW YORK	9	2	520	216	387	1		1,135
NEWARK	10		6	14	21	1		52
PHILADELPHIA	4		1	41	5			51
PHOENIX	37			28		191		256
PITTSBURGH				1			2	3
SAN DIEGO	60			16		425		501
SAN FRANCISCO	24	1	32	84	5	8		154
SAN JUAN	1			2				3

REPORT NO. 01

ISDBIS--H24420.CULPRIT.ADHOC421--
U. S. POSTAL INSPECTION SERVICE
VOLUME MAIL THEFTS BY DIVISION
----- FISCAL YEAR - 1993 -----

11/15/93 PAGE 2

DIVISION	221 COLLECTION BOX	222 COOP MAILING RACK	223 RELAY BOX	224 & 225 VEHICLE ATTACK	226 CARRIER CART/SATCHEL	227 NDCBU/APT ARROW LOCK	228 P.O. BOX	TOTAL
SEATTLE	136		21	4		8		169
ST. LOUIS	6			4		1	4	15
ST. PAUL	2			1				3
TAMPA	1						2	3
WASHINGTON			4	49	2			55
TOTAL:	476	6	634	1,272	530	1,235	39	4,192

MEMORANDUM OF INTERVIEW

Person Interviewed: Catalina Tejada
3281 Winter St.
Los Angeles, CA

Date of Interview: January 21, 1994

Place of Interview: Pasadena, CA

Subject: Theft of mail

Interviewed By: R. E. Vincent
Postal Inspector

Catalina Tejada is a postal customer who had mail stolen in December, 1993.

On December 15, 1993, the postal vehicle that was carrying the mail to the addressees on the 3200 block of Winter Street was broken into. The vehicle was forcibly entered by thieves and the mail addressed to Ms. Tejada's block was stolen. Included in her loss was her biweekly welfare check and some other miscellaneous correspondence.

Ms. Tejada and her two small children live her mother and father. Her welfare check is her only means of support for her and her children.

She was advised by the Postal Service her mail was stolen on the 15th. After hearing this, her main concern was replacing the welfare check. She made an appointment to see her welfare worker so as to replace her check. The earliest appointment she could get was seven days later.

After visiting her welfare worker around December 22, 1993, she stated she had to wait two more weeks to receive, via the mail, her "pink slip" which would allow her to get a replacement welfare check. The day she received the pink slip she went to the welfare agency. She arrived around 1:00pm, only to find out the agency closes at 12:00pm. The next day she arrived at 11:45am. However, she was told the workers at the agency would not see anyone who arrived after 11:00am. She went to the agency a third time the next day. This time she arrived at 8:00am. To arrive this early required her to not take her children to school. They missed the entire day of school, as she had no other means to get them there.

While at the welfare agency she had to fill out affidavits of forgery, as well as complete handwriting exemplars and be interviewed by social workers. After being at the agency for six hours she received her \$304.00 welfare check.

Ms. Tejada stated because her check had been stolen from the mail and she was unable to get a replacement until the middle of January, 1994, she was unable to pay all of her December rent in a timely manner; she had to buy groceries on credit; the store where she bought her children's clothes canceled her account since she could not pay her bill on time; she had to borrow money from her neighbors until her next check came (two weeks later); she could not even buy a small Christmas present for her children.

She advised her children suffered the most from the mail theft. This was due to the drastic change in their lifestyle that occurred over the ensuing weeks.

At the conclusion of the interview Ms. Tejada provided a sworn, handwritten affidavit.


R. E. Vincent
Postal Inspector

MEMORANDUM OF INTERVIEW

Person Interviewed: Diann Butterworth
Investigator
Corporate Security
Sanwa Bank
1977 Saturn Street
Monterey Park, CA 91754
(213)727-3889

Date of Interview: January 21, 1994

Place of Interview: Pasadena, CA

Subject: Theft of mail

Interviewed By: R. E. Vincent
Postal Inspector

Diann Butterworth is an investigator for Sanwa Bank in Los Angeles, CA. She was interviewed regarding her dealings with the investigation of negotiable instruments which are stolen from the U. S. Mails.

Diann stated one investigation she is currently working on with Postal Inspector Sam Gonzalez involves a \$1.3 million loss to Sanwa Bank. Sanwa Bank's normal yearly loss due to bad checks is \$3 million.

During the past year HR Check Cashing in Los Angeles, who banks with Sanwa Bank, took in approximately 1000 checks which were stolen from the mail. HR Check Cashing has gone bankrupt because of the huge dollar loss associated with these checks. This is why Sanwa Bank will suffer the \$1.3 million loss this year. 730 of these stolen checks have cleared the system. The checks were primarily Treasury checks (Federal Income Tax returns), with some state tax refunds, social security and railroad annuity checks.

All of the stolen checks came from postal vehicle break-ins. The break-ins encompassed the entire Los Angeles basin, with a few in Orange County.

35 suspects have been identified in passing the stolen checks. Sanwa Bank would like to see recovery of their loss in this case, but realizes that will probably not happen. They would also like to see the suspects off the streets so they cannot perpetrate the same crime again. Ms. Butterworth stated it is her experience it is this type of loose gang that causes the greatest harm to the banks.


R. E. Vincent
Postal Inspector

MEMORANDUM OF INTERVIEW

Person Interviewed: Julie Davis
5930 Arapahoe Road, Apt. 2085
Dallas, TX 75247
(214)363-8744 (wk) - SCA Promotions

Date of Interview: January 27, 1994

Place of Interview: Dallas, TX

Subject: Theft of personal mail from apartment house letter box

Interviewed By: R. E. Vincent
Postal Inspector

Julie Davis was interviewed regarding the theft of her and her husbands mail from the letter box located at the apartment complex where they live.

Ms. Davis stated on or about November 8 or 9, 1993 the letter box at her apartment complex was pried open and a box of 150 blank checks was taken, along with a rent check she was due from Colorado. She knew at that time her rent check was taken, but was unaware the blank checks were missing.

Within a day or so of the break-in she contacted her realtor in Colorado to have the rent check replaced. Then, on November 18 she and her husband went on vacation to Jamaica. When they returned, Thanksgiving day, she had numerous non-sufficient funds (NSF) notices in her mail from her bank. This was the first time she realized her blank checks had been stolen. Six of the stolen checks had actually been paid by her bank.

The Friday after Thanksgiving she notified her bank of the theft. She also tried to notify the local police department, but they would not take a report. They claimed she was not a victim, but rather the bank was.

After some time, she was able to convince she was a victim; she had \$17.00 worth of blank checks stolen. This was the amount she paid the bank to have the checks printed. The police report number is "Theft/975755-B".

It was not long after this she began to receive notices from merchants that they had accepted a one of her checks which was returned from the bank as NSF. For each notification she requested a copy of the check from the respective merchant. For those merchants who did not send the copy of the check, she would notify them via certified mail of the circumstances relating to the theft of her checks.

Once a week Julie would go to her bank and complete affidavits of forgery. She then would send the original of each affidavit to the merchant via certified mail. This process took about two hours each Friday and Saturday. To date, 29 of her checks have been cashed.

Her loss amounts to \$60.00 or so. This is comprised of the original cost for the checks, the cost for replacement checks (new account number), certified mail charges and photocopy charges. Her bank only suffered \$100.00 in loss, as she did not have much money in her account when the checks came through. Most of the checks were returned to the merchants as NSF.

Because of the NSF checks, one merchant filed a complaint with the local Justice of the Peace. A misdemeanor arrest warrant was then issued for her husband. Her husband had to take time off of work to appear before the Justice to explain the circumstances of the NSF check. She advised this case is still pending. Ms. Davis stated her frustration in that when her husband is exonerated, the District Attorney has advised her he will still show a record for a misdemeanor arrest. This will occur even if the charges are dropped.

Ms. Davis advised the money loss is not an issue to her. The crime of theft of mail is very annoying, as she has spent countless hours trying to clear up her back records.

At the conclusion of the interview Ms. Davis provided a sworn, handwritten affidavit detailing the above circumstances.


R. E. Vincent
Postal Inspector

STATE OF CALIFORNIA)
COUNTY Los Angeles)SS

I, CATALINA TETEWA, first being duly sworn, depose and make the following statement:

In DECEMBER 15 1993 my County
check was stolen from the mail
vehicle. I WAS AFFECT IN SO MANY
WAYS. I had to call my social worker,
go in person sign an affidavit, wait
a week to receive a pink form, went
3 times to downtown L.A. to pick
up my check. On the third times I
waited six hours before I received
my check. My children's clothing
store closed my credit, I almost
got evicted my my home, & my
children got no Christmas gift
because of the theft of my
check.

C.T.

I have read this statement and it is true.

1st Catalina Tetewa 1/21/94 1:20 P.M.
Signed Date Time

Subscribed and sworn to before me, a Postal Inspector, on the 21st day
of January 1991^{4th}, at Rosadena, CA.

1st [Signature]
Witness/Postal Inspector

1st [Signature]
Postal Inspector

STATE OF CALIFORNIA)
)SS
COUNTY Los Angeles)

I, Catalina Tejada, first being duly sworn, depose and make the following statement:

In December 15, 1993 my county check was stolen from the mail vehicle. I was affect in so many ways. I had to call my social worker go in person sign an affidavit with a week to receive a pink form. Went 3 times to down town L.A. to pick up my check. On the third times I waited six hours before I received my check. My children's clothing store closed my credit. I almost got evicted my my home & my children got no Christmas gift because of the theft of my check.

I have read this statement and it is true.

<u>/s/ Catalina Tejada</u>	<u>1/21/94</u>	<u>1:20 P.M.</u>
Signed	Date	Time

Subscribed and sworn to before me, a Postal Inspector, on the 21st day of January 1994, at Pasadena, CA.

<u>/s/ S. Gonzalez</u>	<u>/s/ R. E. Vincent</u>
Witness/Postal Inspector	Postal Inspector

STATE OF TEXAS

COUNTY OF Dallas

SS

I, Julie D. Davis, make this voluntary statement to
Robert Vincent who has identified himself as a

Postal Inspector.

On November 7 & 9 of 1993 someone broke into our
locked mail box and stole a box of checks. For
the next seven days the person wrote 29
faked checks on our account. We didn't discover
the problem until we got home from vacation
to find a stack of returned check notices.
Calling the police and DA's office did
nothing... they refused to take a statement
because we hadn't been harmed. After
closing the account and opening a new
one, my husband and I have spent
the last ^{2 months} dealing ^{with} with check collection
companies, the bank, the Dallas County Sheriff
office and the postal inspector. Besides the
monetary loss and expense of each faked
check, my husband and I have spent over
100 hours trying to rectify all the problem
it's caused. The most infuriating thing of it
all is

STATE OF TEXAS

COUNTY OF _____

SS

I, _____, make this voluntary statement to
_____ who has identified himself as a
Postal Inspector.

Page 2 of 2

*all is the Class C Misdemeanor now on
my husbands record because one of the
checks was turned over to the police.
In all of this, the only person to help
us try to catch the person ~~has~~ has been
David McDermott at the Postal Inspector's
office. The only reason we're even close
to catching him is because David has
pursued the case and put me in touch
with another victim.*

Julia Davis Davis

Sworn to and Subscribed to me this 27th day of January, 1924
at Dallas, TX.

R. E. Lines
Postal Inspector

STATE of TEXAS)
)SS
COUNTY of Dallas)

I, Julie D. Davis, make this voluntary statement to
Robert Vincent who has identified himself as a Postal
Inspector.

On November 8 or 9 of 1993 someone broke into our locked mail box and stole a box of checks. For the next seven days the person wrote 29 forged checks on our account. We didn't discover the problem until we got home from vacation to find a stack of returned check notices. Calling the police and DA's office did nothing ... they refused to take a statement because we hadn't been harmed. After closing the account and opening a new one, my husband and I have spent the last 2 months dealing with check collection companies, the bank, the Dallas County Sheriff's office and the postal inspector. Besides the monetary loss and expense of each forged check, my husband and I have spend over 100 hours trying to rectify all the problem it's caused. The most infuriating thing of all is the Class C Misdemeanor now on my husbands record because one of the checks was turned over to the police. In all of this, the only person to help us try to catch the person has been David McDermot at the Postal Inspector's office. The only reason we're even close to catching him is because David has pursued the case and put me in touch with another victim.

Julie Davus Davis

Sworn to and subscribed to me this 27th day of January,
1994 at Dallas, TX.

R. E. Vincent
Postal Inspector



U.S. Department of Justice

United States Attorney
Northern District of Texas, Dallas Division

1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699

214-767-0951
Fax 214 767-8764

February 2, 1994

Mike Hearst
Deputy Chief Inspector
United States Postal Inspection Service
Office of Criminal Investigations
475 L'Enfant Plaza West, SW, Room 3335
Washington, DC 20260-2160

Dear Mr. Hearst,

I am writing to endorse proposed amendments 34(A) and 35 of the United States Sentencing Guidelines. As I understand it, the United States Postal Service has submitted these proposed amendments regarding guidelines calculations for postal offenses. Proposed amendment 34(A) calls for an increase in the offense level based on the number of victims involved. Proposed amendment 35 calls for an increase in the base level if the offense involved an organized scheme to deliver mail. Both amendments are appropriate and should be adopted.

I have prosecuted numerous postal cases in the three years I have been assigned to this office. The impact on the victims in these cases is significant and long lasting. The guidelines simply do not adequately address this impact as they are currently configured. The theft of personal mail involves the violation of a victim's most private matters. It violates the public's trust in the postal system. As is frequently the case, postal violations may include the theft of credit cards or personal monetary instruments. These thefts can cause irreparable damage to credit records and financial status. These harms are simply not adequately addressed in the currently guideline scheme.

I urge you to pursue these amendments with the sentencing commission. I believe that they represent a fair and just approach to the sentencing of postal offenders.

Yours truly,

PAUL E. COGGINS
United States Attorney

Michael R. Snipes

Michael R. Snipes
Assistant United States Attorney

PUGET SOUND NEWSWATCH

U.S. District Court, Seattle

In custody: Four Seattle-area residents allegedly responsible for the theft of hundreds of checks out of mailboxes were facing federal criminal charges.

Tuesday's arrest of John Heckendorn, 24, of Issaquah was the latest in a series of arrests stemming from a yearlong investigation by the U.S. Postal Inspection Service.

Three others also have been charged: Cynthia Minnick, 40, of Auburn; Hugh McDonald, 48, of Seattle; and Nina Jordan, 41, of Renton. The four face charges of possession of stolen mail and bank fraud.

Postal inspectors say the four took letters from mail collection boxes in the Seattle area and from rural mailboxes from Olympia to Stanwood, chemically removed the handwriting from checks and made them payable to others.

— Jolayne Houtz

SEATTLE DIVISION

DATE: 2-24-94

PUBLICATION: Seattle Times

CITY & ST: Seattle, WA

CASE INSPECTOR: STAN PILKEY

LOCAL

Algona ■ Auburn ■ Black Diamond ■ Covington ■ Enumclaw ■ Fairwood ■ Kent ■ Maple Valley ■ Newport Hills ■ Pacific ■ Renton ■ Tukwila

Four stole thousands in checks from mail boxes

By IRENE SVETE
Valley Daily News

Federal authorities claim four South King County residents are responsible for the theft of hundreds of checks from rural mailboxes up and down the Interstate 5 corridor.

John D. Heckendorn, 23, of Issaquah was arrested Tuesday by U.S. Marshals and postal inspectors, said James Bordenet of the U.S. Postal Inspection Service.

The arrest came less than a week after a federal grand jury indicted Cynthia Minnick, 40, and Hugh S. McDonald, 48, of Auburn on charges of bank fraud and possession of stolen mail.

In a third case, the grand jury indicted Nina K. Jordan, 41, of Renton on the same charges. Bordenet, a postal inspector, said it appears only Minnick and McDonald were working together.

Although most of the mail was stolen from blue mail collection boxes in Seattle and rural

boxes, several apartment boxes also were struck, Bordenet said.

"Basically, they went where the mail was," he said.

The case followed an 11-month investigation into losses that amounted to hundreds of thousands of dollars but probably less than \$500,000, Bordenet said.

Heckendorn was arrested without incident at the Bridge Motel in Seattle. Over 100 checks, believed stolen from Seattle collection boxes, were recovered, he said.

A U.S. District Court magistrate Tuesday ordered Heckendorn held without bail.

According to federal court papers, the checks were chemically "washed" to remove all handwriting, then made payable to various individuals from whom identification had been either stolen or faked.

Authorities claim the suspects then used the

identification to cash the altered checks at banks in Seattle and Tacoma.

If convicted of possession of stolen mail, the four face up to five years in prison and a fine of \$250,000. A bank fraud conviction carries a sentence of up to 30 years in prison.

Gerald A. Miera, inspector in charge, said the postal inspection service is working with the Seattle post office to modify collection boxes so they are less vulnerable.

Postal authorities advise residents not to put their outgoing letters in rural mailboxes.

"I wouldn't say this 10 years ago, but that's just the way it is," Bordenet said. "That red flag for the carrier is a red flag for the thief."

Postal inspectors also caution residents to note the pick-up times posted on the collection boxes and not make deposits after the last collection. They also suggest using the mail slots in the post office lobby, if that service is available.

SEATTLE DIVISION

DATE: 2-24-94

PUBLICATION: Valley News

CITY & ST: Kent WA
CASE INSPECTOR: Stan Pilkey
Linda Russo

Key suspect in mail-theft, bank-fraud ring held

BY MARY F. POLS

Seattle Times staff reporter

A man described as a major player in a series of mail thefts and bank frauds in Seattle was arrested yesterday and brought before a federal magistrate.

John Heckendorn, 24, of Seattle was one of several people taken into custody yesterday. He appeared in federal court to hear a complaint of bank fraud and possession of stolen mail filed against him.

Postal Inspector Jim Bordenet said the U.S. attorney's office would

ask for Heckendorn to be held without bail at a hearing scheduled today. "We believe he poses a flight risk and is a threat to the community," said Bordenet.

Heckendorn was suspected in several cases in which checks were chemically "washed" and altered to be made out to one of five aliases he allegedly had used.

He was believed to be part of a loosely affiliated ring of mail thieves who operated mostly in the Capitol Hill area, beginning in 1992. In the scheme, mail was taken from public

collection boxes and the large olive-brown boxes where postal employees put mail for delivery.

Counterfeit keys gave the group access to the postal boxes. In some cases, the thieves entered apartment buildings to clean out mailboxes inside.

Credit cards, boxes of blank checks and signed checks in outgoing mail were their primary targets.

More than a dozen arrests were made last year in the fraud scheme. Among those arrested was a woman who had lived with Heckendorn.

Postal inspectors went to her after Seattle Telco Federal Credit Union employees identified Heckendorn from photographs as the man who had tried to cash a forged check there last April.

She told inspectors Heckendorn had been her partner in the scheme.

Heckendorn allegedly used two local men's names as aliases after obtaining their driver's licenses, lost or stolen last year.

The two stolen checks listed in the complaint against Heckendorn

had been mailed from post-office boxes at the Magnolia and West Seattle stations.

But Bordenet characterized the crimes as reaching "all over metropolitan Seattle."

He said the post office is taking further precautions to make collection boxes harder to break into. Extra padlocks were put on boxes in North Seattle and on Capitol Hill.

Anyone convicted of stealing or possessing stolen mail faces up to five years in prison and a \$250,000 fine for each count.

SEATTLE DIVISION

DATE: 2-23-94

PUBLICATION: Times

CITY & ST: Seattle, WA

CASE INSPECTOR: Stan P. L. Key

Linda Russo

Local/Region

Seattle man faces federal charges in stolen-check case

By Mike Merritt
P-I Reporter

A 24-year-old Seattle resident was charged yesterday with bank fraud and mail theft after an 11-month investigation by postal inspectors of stolen checks.

John D. Heckendorn was charged in a federal complaint with altering checks he allegedly had stolen from U.S. mail collection boxes. Heckendorn chemically "washed" the checks, then wrote in new amounts and made the checks payable to one of his numerous aliases, the complaint said.

Court records said Heckendorn stole more than \$250, but that amount "is just the tip of the iceberg," said Jim Bordenet, a postal inspector. Other people believed involved in the scheme were arrested yesterday, but Bordenet could provide no further details.

Heckendorn is in custody, and he will appear today before a U.S. magistrate for a detention hearing. Heckendorn was convicted of burglary in 1991 and forgery in 1993, according to King County Superior Court records.

In an affidavit, Postal Inspector Stanley Pilkey said that on Feb. 4, 1993, Heckendorn cashed a \$250 check he had stolen from a mailbox at the West Seattle post office and "washed," using a stolen driver's license for identification.

On April 5, 1993, Heckendorn tried to cash a \$600 check at a Seattle credit union, again using a stolen driver's license. Tellers were suspicious, however, and they refused to cash the check, the affidavit said.

Three days later, Heckendorn tried to cash a "washed" check at a Seattle savings-and-loan branch, according to the affidavit. He was later arrested by Seattle police and convicted of forgery.

According to Pilkey's affidavit, a former girlfriend confirmed the scheme in a statement to authorities. She identified one check she had falsified and made payable to one of Heckendorn's aliases.

An examination of Heckendorn's handwriting confirmed that he had altered at least one of the stolen checks.

SEATTLE DIVISION

DATE: 2-23-94

PUBLICATION: Post-Intelligencer

CITY & ST: Seattle, WA

CASE INSPECTOR: Stan Pilkey



NEWS RELEASE

OFFICE OF THE INSPECTOR IN CHARGE
UNITED STATES POSTAL INSPECTION SERVICE
P.O. Box 400
SEATTLE, WA 98111-4000
206/442-6300

FOR IMMEDIATE RELEASE
SEA NO. 94-06
DATE: FEBRUARY 23, 1994

FOR FURTHER INFORMATION CALL:

JAMES D. BORDENET
POSTAL INSPECTOR
TELEPHONE: (206) 442-6134

CHECK WASHERS ARRESTED

So your creditors didn't believe you when you told them the check was in the mail? Well, they probably should have, according to Postal Inspector in Charge Gerald A. Miera. Today, the Postal Inspection Service, Seattle Division, announced the results of a year-long series of investigations which resulted in arrests of four persons in connection with the theft of hundreds of check letters from the mail. According to court documents, most of the stolen mail was taken from U. S. Postal Service blue collection boxes throughout the Greater Seattle area and from rural mailboxes all the way from Olympia to Stanwood, WA.

In the first case, U. S. Marshals arrested CYNTHIA K. MINNICK, born December 26, 1953 of Auburn, Washington, and HUGH S. MCDONALD, born September 25, 1945, of Seattle, on February 8, 1994 at Auburn. Their arrests were based on a criminal complaint filed on December 29, 1993 in Federal District Court at Seattle charging them with possession of stolen mail.

In a separate case, U. S. Marshals arrested NINA K. JORDAN, born June 16, 1952, of Renton, Washington, on February 15, 1994. This arrest was based on a January 21, 1994 criminal complaint charging her with possession of stolen mail and bank fraud.

The most recent arrest was made by Postal Inspectors and U. S. Marshals on February 22, 1994. They arrested JOHN D. HECKENDORN, born January 18, 1970, of Issaquah, Washington, at the Bridge Hotel in Seattle. Heckendorn's arrest was based on the filing of a January 21, 1994 criminal complaint charging him with possession of stolen mail and bank fraud. Heckendorn appeared in Federal Court on the afternoon of February 22. During this initial appearance, information was provided that incident to his arrest, over 100 check letters believed stolen from Seattle area collection boxes were recovered.

According to the criminal complaints filed against these defendants, letters containing checks were stolen from either Postal Service collection boxes or rural mailboxes. The checks were chemically "washed" to remove all handwriting. They were then made payable to various individuals from

whom the defendants had either stolen or obtained identification documents, such as drivers' licenses. The documents were altered to display photographs of the defendants, who then used them in cashing or attempting to cash these altered checks at Seattle and Tacoma area banks.

The collection boxes referred to in the criminal complaints are the blue street boxes utilized by the public to place letters which will be picked up by the U. S. Postal Service for processing and delivery. Other check letters were allegedly stolen from individual rural mailboxes. Inspector in Charge Miera stated that the Postal Inspection Service is working with the Seattle Post Office to modify collection boxes so they are less vulnerable to criminal attack. Miera cautioned that customers should also note the last scheduled pick-up time which is posted on all collection boxes; that it is a good practice not to deposit mail after the last pick-up for that day.

Inspector in Charge Miera also cautioned the public not to place their outgoing letters in rural mailboxes. "Unfortunately, the red flag customers raise to alert our employees that outgoing mail is in the box is also a red flag for the thief. A prudent crime prevention practice is to deposit those letters inside a post office or mail them from your work place."

Inspector in Charge Miera noted that key information which assisted Postal Inspectors in these cases came from concerned citizens who observed, and reported, suspicious activity around collection boxes. "We appreciate the public's help in identifying postal thieves. We are offering a reward of up to \$10,000 for information which leads to the arrest and conviction of anyone stealing mail," Inspector in Charge Miera said. Persons can contact the Seattle Postal Inspectors' Office at 442-6300. All information will be kept in confidence.

Following the earlier arrests, on February 16, 1994, a Federal Grand Jury at Seattle returned Indictments against MINNICK, McDONALD, and JORDAN. These indictments charge them with one count each of bank fraud and possession of stolen mail, and are related to the violations detailed in earlier criminal complaints. MINNICK, McDONALD, and JOHN HECKENDORN remain in Federal custody. On February 17, JORDAN was released to home detention with electronic monitoring.

The penalty upon conviction for possession of stolen mail is up to five years and/or a \$250,000 fine. The penalty upon conviction for bank fraud is up to \$1 million and/or thirty years imprisonment. The charges contained in the indictments and criminal complaints in these cases are accusations and the defendants are presumed innocent until proven guilty by a jury at trial.



C O M M U N I T Y N E W S

Feb./March 1994

A Community Council Publication

Vol. 8 No. 2

Post office mailboxes raided by thieves looking for cash

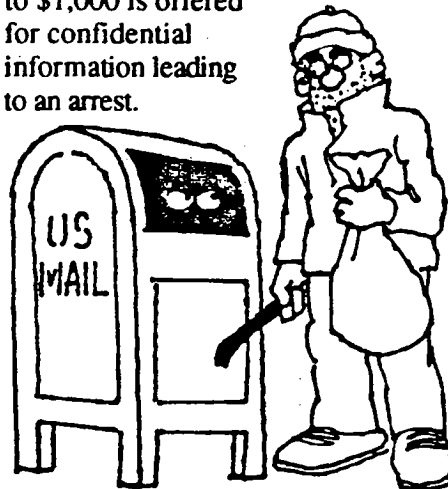
Postal inspectors are investigating thefts from the mail collection boxes outside the Wedgwood post office. The thefts apparently started in mid-January and occurred between 5 p.m. Saturday and 6 a.m. Monday. Suspects have been identified and arrests are expected soon.

Postal Inspector Jim Bordenet said he believes the thefts are "drug-driven" and the thieves are looking for cash, credit cards or checks that can be washed, rewritten and cashed. The thieves apparently used a counterfeit key to open the collection boxes.

Reports also have been received concerning mail stolen from home mailboxes in the Wedgwood area. Bordenet said most mail theft is from home mailboxes and it has increased significantly since 1987.

To guard against future thefts, the post office plans to provide an indoor mail slot that is available at all times. Drop your mail in the indoor slot or mail it from your business. Never leave mail at your home mailbox for your carrier to pick up, and don't leave incoming mail sitting in your mailbox.

Please report any suspicious activity around any mailboxes by calling 911 and the postal inspectors at 442-6300. A reward of up to \$1,000 is offered for confidential information leading to an arrest.



SEATTLE DIVISION

DATE: 2-20-94

PUBLICATION: Wedgwood News

CITY & ST: Seattle, WA

CASE INSPECTOR: Stan Pilkey
Linda Russo

Thieves picking up mail at Tacoma boxes

No arrests yet, but several warrants issued

By Paul Chavez

The News Tribune

Grandkids say they never got that \$10 you sent them for Christmas?

Maybe they didn't.

Thieves believed armed with counterfeit keys have made their own rounds, stealing mail dropped in some Tacoma collection boxes, U.S. postal officials said this week.

A collection box in front of the Proctor Station, 3801 N. 27th St., was emptied Dec. 26, and a mailbox at North 30th and Stevens streets was hit Dec. 30.

"We've gotten reports of thefts from several parts of Tacoma," said Jim Bordenet, a U.S. postal inspector in Seattle. "Mostly in the North End and east of Interstate 5."

Postal inspectors investigating the Tacoma thefts have issued warrants for several suspects, Bordenet said. No arrests, however, have been made yet, he said.

"It appears the thefts are tied to a loose-knit association," he said. "People coming and going."

Investigators said they don't know how much mail the ring has stolen. It's hard to

keep track, officials said, since the thefts aren't reported for a while. People don't learn their mail has been stolen until well after the fact, investigators said.

Lisa Starkey, who lives in Tacoma's North End, said she dropped four bill payments into the collection box at the Proctor Station on Dec. 26.

"About two weeks ago, I got a late notice for my City Light bill," said Starkey, 31.

Shortly after the utility notice, Starkey said, her credit card company sent her a late notice.

"I called the post office and said, 'Hey, is there something going on I should know about?'"

The Proctor station manager told her about the stolen mail. "I was just livid," Starkey said. "I always drop my mail in those kinds of boxes. I just walked out of there shaking."

The thefts meant Starkey had to negotiate late fees, cancel payment on her checks and change her unlisted telephone number.

"It's just a big hassle," she said. "I'm a private person and now somebody knows everything about me. You'd think the post office would be a safe place to drop your mail."

Think again, postal officials said. "You've got today's environment," Bordenet said.

denet said. "Nothing's sacrosanct. We've got to alert people. This is reality."

Bordenet said people should mail from either work or at a post office.

"Go in and put it in the chute in areas that have experienced problems with collection boxes," Bordenet said.

And if you do use a collection box, check the pick-up schedule printed on the box.

"I wouldn't use a box where it wouldn't be picked up for a while," Bordenet said. "Mail only within a short time frame of the next scheduled pick-up."

For its part, the Postal Service plans to

Please see Mail, B3

add second locks to some Tacoma boxes, Bordenet said. The locks, which require a different type of key, have been added to some Seattle boxes.

Investigators suspect counterfeit keys that can open mailboxes have been used in the thefts.

"We've had problems in the past with counterfeit keys," Bordenet said. "It's not that easy to get them, but it's not that difficult."

A Federal Way man who forged checks he stole from mailboxes was sentenced in 1992 to 20 months in prison. His girlfriend, who participated in the Puget Sound-area scam, was sentenced to eight months.

The couple took checks taken from the large blue and green street-side boxes and altered them with a chemical wash. They then tried to cash the checks using false identifications.

That sounds similar to what happened recently to Kirby Vlasak of Tacoma.

Vlasak said her husband dropped mail at 6:40 a.m. at the collection box at North 30th and Stevens streets on Dec. 30.

"A little after 4 o'clock on the same day, my bank called and said they had a suspicious check," Vlasak said. "The amount and pay to person had been changed."

Bankers told Vlasak the check had been through a chemical wash. A person's name had replaced the telephone company, and \$79.72 had been changed to \$300.

The episode shattered Vlasak's trust in the collection box.

"That's where we've been taking it as long as we've had the house, and we've been there 10 years," Vlasak said. "I bring it down to work, and I hand it to the mailman. Now I know who's got it."

Mail

Continued from B1

SEATTLE DIVISION

DATE: 1-22-94

PUBLICATION: News Tribune

CITY & ST: Tacoma

CASE INSPECTOR: Bysault/

Pikey

Don't leave W48 your mail in the mailbox

Whether postal inspector, detective, bank official or victim, the advice for Lakewood is pretty simple.

Don't use your rural-type mail box.

"That red flag is a red flag for the thief," said postal inspector Jim Bordenet.

For incoming mail, Bordenet suggested that people have a trusted neighbor pick up the mail. For outgoing, he suggests people drop their mail off at the post office, rent a post office box or get several neighbors together to purchase a locked neighborhood collection box.

"We're going to get a Post Office box," said recent mail theft victim Carrie Lindsay.

And if you do notice suspicious activity, try to get a physical description and license plate and report the incident to local police and the postal inspector's office.

The nearest postal inspectors office can be reached by calling (206) 442-6300. The Postal Inspection Service has an ongoing reward program, with rewards payable for up to \$1,000 for information leading to arrest and conviction of anyone stealing mail.

To report check forgeries with the Pierce County Sheriff's office, call 591-7530.

SEATTLE DIVISION

DATE: 11-5-93

PUBLICATION: Valley News

CITY & ST: Tacoma, WA

CASE INSPECTOR: Stan Pilkey

Thieves steal mail, forge checks

W48
By Daven Rosener
Editor

That little flag on your mailbox is not helping your mail man.

It's alerting mail thieves of ready-to-steal mail — mail that often includes personal checks.

Ask Lakewood resident Carrie Lindsay.

A ready-for-the-mail stack of bills was recently stolen. The thief altered her checks, making them payable to someone else and payable for a new, higher amount of money.

"I did all my bills — had them all stacked up and put them in my mailbox," she said. Everything was fine until her bank called three days later telling her one of her checks had been altered.

One check, written for \$5.61, had been altered to \$150, payable to someone she didn't know.

Lindsay was a victim of a relatively new form of fraud where forgers chemically wash the ink off checks, writing in new "payee" names and new amounts.

So far, Lindsay and at least 25 other Lakewood residents have had checks stolen and chemically washed this year.

"It's when they see the red flag on the mail box that they spring into action," said Pierce County Sheriff Detective Rob Floberg. He suspects there are four rings of check washers operating in Pierce and neighboring counties.

"Some of the erasures have been done so well, even if it is a forgery, you look at it real close and can't even see the old ink," Floberg said.

Typically, check washers keep the new amount to under \$400. "They try to keep it under a greedy amount because it at-

tracts attention," he said.

Roughly 90 percent of the payee names are stolen IDs. The other 10 percent "are either so dumb they use their own name, or they want drugs so bad they don't care if they get caught for the forgery," Floberg said. Floberg, along with bank loss investigators, U.S. Postal inspectors, and even the FBI are after check washers.

"They love mortgage checks, because they know they're fairly good sized," said a Seafirst loss investigator.

And often times, victims don't know about the theft of checks from their mailboxes until much later. Victims realize something is wrong when they find out the bill they mailed is overdue, or when their checks start bouncing.

Who pays the price for check washing crimes?

Whoever cashes it. That means the banks. But more often, it means the retail merchant, said Jason Moulton, FBI white collar crime supervisor for the

state of Washington.

According to Moulton, roughly \$14 million was lost in bank fraud of one form or another in 1992.

Beyond not using the mailbox in front of your home for outgoing bills and mail, bank loss investigators suggest that people keep up with balancing their

checkbooks against their statements.

And once you find out your personal check has been altered, "you need to get down to the bank and close the account," said recent victim Carrie Lindsay.

From what she has learned, her stolen checks somehow

mixed with checks stolen from individuals in Spanaway and South Tacoma.

And one of Lindsay's for missing checks is still missing.

"It turns your life upside down," she said, after closing her checking account, opening new one and replacing all of her bank cards.

SEATTLE DIVISION

DATE: 11-4-93

PUBLICATION: Lakewood Journal

CITY & ST: Tacoma, WA

CASE INSPECTOR: Stan Pilkey

Mail theft on the rise in ^{W-48} South King County

Mail theft is on the rise again in our area. Residents should be on alert, as checks are being removed from mailboxes, washed, and re-written for hundreds of dollars more than the original amount, and are being cashed. Most victims don't realize it has happened to them until it's too late ... their checking accounts are over drawn.

Most mail thefts occur on isolated roads. Many suspects know the scheduled time of the carriers and watch for them.

Here is some advice on how people can safeguard their own mail:

- Form a neighborhood watch to protect the mail.

- Remove mail as soon as it is delivered.

- If planning to be out of town, have a neighbor pick up the mail, or it can be held at a local post office for up to 30 days.

Outgoing mail should be put

in the mailbox just before the carrier is scheduled to arrive. It should never sit in the box overnight. The raised red flag carries a double meaning to vandals.

The best and safest place for outgoing mail is a letter slot in the lobby of a post office. Second to that is a collection box.

It is a federal offense to tamper with the U.S. mail. However, it is best not to confront the suspect(s) yourself. Obtain a description of the vehicle and the suspect(s) if possible and the license number of the vehicle. Then call the postal inspector's office at 442-6300. This is a 24-hour number.

SEATTLE DIVISION

DATE: 9-10-93

PUBLICATION: Voice of the Valley

CITY & ST: Federal Way, WA

CASE INSPECTOR: Dave Breault

Check washers hitting postal drop boxes

W-48

NORMANDY PARK—Police are warning citizens to be careful with their mail.

At least three times in the past month, thieves have stolen letters from blue collection boxes and cashed checks swiped from envelopes.

Two of the thefts occurred at the mailbox next to Warren's Drugs, 19919 First Ave. S. The other was at a mailbox next to Manhattan Pharmacy, 17833 First Ave. S.

The culprits apparently have a key, because neither box was forced open or damaged.

Their modus operandi is to wash out the "payable to" and "amount" sections on checks, then fill in inflated totals and cash them.

"People don't know it until they get their statements and find that instead of a \$25 check to Texaco, it's \$390," said Don Weikart, the city crime-prevention officer.

Weikart said 10 to 12 altered checks have been cashed so far, all in the neighborhood of \$400. Most were cashed in Pierce County.

"Apparently the check wash-

ing is very good," Weikart said. "It's going to be very hard to catch these guys unless someone gets a description or a cop happens to get lucky and stumble across something going on."

Jim Bordenet, a U.S. postal inspector spokesperson, said crimes such as this tend to be drug-related.

"The drug problem is endemic. It unfortunately is a sign of the times we live in," he said.

Bordenet said the thieves also are likely to steal mail from home boxes with red flags up indicating outgoing letters.

Weikart recommends that citizens either hand letters directly to their mail carriers, watch their mailbox until a carrier stops by, or else deposit mail inside post-office branches.

If anyone thinks their checks have been swiped, they should contact the Postal Inspectors Office at 442-6300 and report that someone has manipulated their checking account.

Said Bordenet: "They'll get all different kinds of indicators...that somebody's stolen their mail."

SEATTLE DIVISION

DATE: 8-9-93

PUBLICATION: HighLine Times

CITY & ST: Des Moines, WA

CASE INSPECTOR: S.R. Pilkey

The Courts

U.S. District Court, Seattle

Sentenced: Two Renton residents for their part in a scheme to use counterfeit keys to steal checks and credit cards from private mailboxes and Postal Service boxes on Capitol Hill in Seattle.

Federal Court Judge Barbara Rothstein sentenced William Bridwell, 28, to 21 months in prison and Kelly Whitaker, 27, to 37 months for the thefts last fall. The judge also ordered the two to pay \$31,000 in restitution.

Authorities arrested 13 people last spring in connection with the thefts. The thieves stole credit cards, outgoing mail containing signed checks and packages of blank checks sent to bank customers by check-printing firms.

SEATTLE DIVISION

DATE: 7-78-93

PUBLICATION: Times

CITY & ST: Seattle, WA

CASE INSPECTOR: B. Vranizan

Police crack down on 'check-washing' scam

W-48
by Andrew McKean

Thanks to an alert bank teller and Issaquah Police are on the verge of cracking a check-theft and forgery operation.

Though the prime suspect is still at large, police have his driver's license, a forged check and a bulging case file in hand. They hope to arrest the man, a 28-year-old Kent resident, in a matter of days.

Police and postal inspectors have been working the case since May 21, when the suspect walked into Issaquah's Seafirst Bank and tried to cash an altered check.

But the crime began several days earlier, when mail belonging to Mirromont resident Ken Evans was stolen from the mailbox at the end of his driveway.

Three signed checks that Evans enclosed as payment for bills were removed and the rest of the mail

was discarded. At least one check was "washed" in an acid solution that dissolved the signature, amount and payee information while retaining the pre-printed information.

'This wasn't the smartest criminal around.'

— Forgery victim

The suspect then wrote the check to himself, forged Evans' signature, and tried to cash it.

The scam might have worked if the suspect hadn't broken two cardinal rules of forgery: first, he made the check out to himself; second, the amount he wanted in cash—\$931—was sure to raise suspicions.

"This wasn't the smartest criminal around," said Evans.

It might also have worked if Seafirst teller Judy Root hadn't just finished a training session about how to spot altered checks.

Issaquah Police said that Root immediately suspected that the slightly faded check was forged. She asked for the suspect's identification, and then alerted the branch manager, who turned on security cameras and called Issaquah Police.

The suspect, who apparently grew nervous over the wait, fled the bank without retrieving his drivers license. He hopped in a waiting blue Mercedes just as Issaquah Police officers arrived at the opposite side of the bank.

"It was one of those cases where you have to pick one side of the bank or the other," said Issaquah Officer Bob Porter, who has been investigating the case. "Luckily for the bad guy, we picked the wrong side."

As a result, the suspect got away, but the bank was able to record the Mercedes' license number, even by an accomplice. Commissioner of the bank's videotape and witness descriptions, the police say they know who they're after. Search warrants and arrests are forthcoming, said Porter.

According to Issaquah and King County Police and U.S. Postal Service inspectors, the Seafirst check-washing scam seems to be an isolated incident locally, though the Kent man is a suspect in forgeries elsewhere in the county.

Inspector Gerald Miera noted that the crime was a favorite activity of metropolitan Seattle gangs earlier this year. Last year, stolen checks valued at \$80,000 were forged in Seattle.

Miera and Officer Porter said the activity is growing in popularity on

the Eastside, though it's still a anomaly to area police.

The crime is relevant to anyone who sends or receives mail in a rural mailbox.

The inspector said that the forge apparently cruise neighborhood looking for mailboxes with red flags, signaling outgoing mail. Once they obtain the checks, the wash is easily accomplished with ingredients available at grocery or drug stores.

Porter said that residents shouldn't let mail linger in their letter boxes.

"The prevention, obviously, is remove your mail from your mailbox as soon as you get home," said. "And if you're paying a bill, take it to the local post office postal drop box."

If you're the victim of a check theft or forgery, call local police the post office immediately.

SEATTLE DIVISION

DATE: July 17, 1993

PUBLICATION: Valley News

CITY & ST: Issaquah, WA

CASE INSPECTOR: Dave Breaux

Magnolia News

225 W. Galer
Seattle, Washington 98119

March 24, 1993

This paper is delivered to your home on a voluntary pay basis of \$1.00 per month. You may cancel any time.

50¢ single copy

vol. 74
no. 12

Two arrests made in mail-theft case; others suspected

By Russ Zabel

Two people were arrested March 5 in connection with thefts of mail from Postal Service relay and collection boxes on Capitol Hill. But thefts of mail have also plagued Queen Anne and Magnolia.

More reports of mail thefts are still coming in, but according to police reports and reader calls, letters were stolen from a collection box on Sixth Ave. West and West Galer St. in January, and checks that had been mailed from there were altered and cashed. Mail was also stolen from a collection box on West Lynn St. in Magnolia Village February 28.

The two people arrested in the case — 28-year-old William C. Bridwell and 27-year-old Kelly L. Whitaker — allegedly used forged keys to take mail from not only collection and relay boxes, but also from apartment house mailboxes. Outgoing checks from collection and relay boxes were allegedly taken and altered by the pair, and incoming checks and credit cards were allegedly stolen by the two from apartment house mailboxes.

According to a March 5 news release from the Post Office, 159 stolen checks were successfully negotiated for a total loss in excess of \$30,000 to area banks. There is no mention of credit card losses.

Postal Inspector in Charge Gerald Miera, in announcing the arrests of the two suspects, indicated they probably were not acting alone. "We believe other persons are involved in this scheme," he said. The Postal Inspection Service is the law-enforcement arm of the Postal Service.

Postal Inspector James Bordenet confirmed Miera's statement. "We are actively looking at several other (suspects)," he said. Bordenet also stressed that information in the case came from the public, although some information only substantiated facts already known by the Postal Service.

Bordenet said the Postal Service still needs the public's help. "We want to make sure that people who

have lost checks report to us," he said. Bordenet said they also need original documents and the names of the banks where altered checks were cashed.

The number to call is 442-6300, said Bordenet, adding that a \$1,000 reward is being offered to anyone who has information that will lead to the arrest and conviction of anyone stealing the mail. The penalty for mail theft is up to five years in jail and/or a \$250,000 fine for each count, according to the Post Office press release.

In the meantime, Bordenet suggests people either mail letters inside their local Post Office or have them picked up at work by mail carriers.

SEATTLE DIVISION

DATE: 3-24-93

PUBLICATION: Magnolia News

CITY & ST: Seattle, WA

CASE INSPECTOR: Breen

[210]

Altered check possibly stolen from post office collection box

By Tim St. Clair

STAFF WRITER

A Beach Drive woman got a call from a Seafirst Bank in Kent March 6. Two men were at the drive-up window trying to cash a \$350 check on her account.

The men got nervous and drove off while the teller was calling the woman to confirm the transaction. The check, which turned out to be one the woman wrote a month before to pay her \$60 phone bill, was confiscated by the bank.

The check likely was stolen from one of the collection boxes at the West Seattle Post Office.

U.S. Postal Inspectors don't know if the incident is related to the arrests March 5 of a man and woman from Renton for investigation of mail theft.

The pair allegedly had keys to mail boxes on Capitol Hill and might have been working with others.

According to the U.S. Postal Inspection Service, the pair is

suspected of chemically washing all handwriting off the stolen checks and rewriting them to a new payee with a new, and usually larger, amount.

The service suspects the pair stole 159 checks and cashed them for more than \$30,000.

More arrests are anticipated as investigators pursue other mail thieves active in the Seattle area, said Postal Inspector Jim Bordenet.

The victim said she didn't notice that the drive-up collection box at the West Seattle Post Office was full before she dropped her payment envelope into it. Then she didn't know which envelope was hers and she felt uncomfortable pulling mail out of the collection box. So she left it where it was, she said.

"Those boxes are very busy," said Louise Stafford, station manager. "Even though we pull them five times a day."

Sometimes people push

packages into the collection boxes that clog them up, Stafford said. Both she and Bordenet recommend mailing inside the post office whenever the outdoor collection boxes appear to be full.

Bordenet also recommends people not raise the flags on their mailboxes at home to alert the letter carrier of mail to be picked up.

"That red flag is a red flag for thieves," Bordenet said. "It can attract everything from juvenile vandalism to professional check thieves."

A stolen check provides a person's name, bank, bank account number, address and phone number, the postal inspector said.

The U.S. Postal Inspection Service is offering a reward of up to \$1,000 for information that leads to the arrest and conviction of anyone stealing mail. Call 442-6300.

SEATTLE DIVISION

DATE: 3-17-93

PUBLICATION: West Seattle Herald

CITY & ST: Seattle, WA

CASE INSPECTOR: Breault

Two charged in Capitol Hill mail-theft scam

Plot involved using stolen bank checks

By Angelo Bruscas
P-I Reporter

Two people have been arrested and charged in federal court in connection with a mail-theft and stolen-check scam that targeted the Capitol Hill area, U.S. Postal Inspection Service and U.S. Attorney's office authorities said.

In a seven-count criminal complaint filed Feb. 24 in U.S. District Court in Seattle, William C. Bridwell, 28, and Kelly L. Whitaker, 27, both of Renton, were charged with obtaining counterfeit keys to Postal Service street collection boxes in the Capitol Hill area.

According to the complaint, Bridwell and Whitaker also used counterfeit keys to enter apartments and condominiums in the Capitol Hill and Broadway areas, and to get into residents' mailboxes inside the buildings.

The scheme involved stealing credit cards and boxes of blank checks sent by check-printing companies to residents. Outgoing checks left by customers for pickup by the Postal Service also were stolen, the complaint said.

The checks were chemically washed of all handwriting, rewritten to a new payee with a new amount and then cashed at banks throughout the greater Seattle area, said Postal Inspector in Charge Gerald A. Miera.

The stolen checks on one ac-

count were made payable to a second victim and then deposited into that victim's account with a portion of the deposit being taken as cash back, a Postal Service press release said.

"We believe other persons are involved in this scheme, and we ask the public's continued help in bringing them to justice," Miera said.

The Postal Inspection Service is offering a reward of up to \$1,000 for information leading to the arrest and conviction of anyone

stealing mail. People with information should call the Seattle Postal Inspectors at 206-442-6300. Bridwell and Whitaker appeared yesterday before U.S. Magistrate Judge David E. Wilson. Bridwell was released on his own recognizance. Whitaker was released after her mother posted \$80,000 personal property as surety bond.

If convicted, they each face a maximum penalty of up to five years in prison and a \$250,000 fine for each count.

SEATTLE DIVISION

DATE: 3-9-93

PUBLICATION: Post-Intelligencer

CITY & ST: Seattle, WA

CASE INSPECTOR: Gerald A. Miera

Vranigan

Stelzer

SEATTLE DIVISION
 DATE: 3-9-93
 PUBLICATION: Seattle Times
 CITY & ST:
 CASE INSPECTOR: BREAU
 Vranizan
 Stelzer

□ D 2 The Seattle Times Tuesday, March 9, 1993

Renton pair charged in Capitol Hill mail-theft scheme

Counterfeit keys used to open boxes, steal checks

by Sally Macdonald
 Times staff reporter

Two Renton residents have been charged in federal court in connection with a theft of mail from private residences and Postal Service boxes on Capitol Hill in Seattle.

William Bridwell, 28, and Kelly Whitaker, 27, were arraigned yesterday after a months-long investigation into a scheme that involved using counterfeit keys to steal checks and credit cards. Eleven other people were arrested earlier

on state charges, said James Bordenet, a Postal Service inspector and spokesman for the Seattle office.

Bridwell was released on his own recognizance, and Whitaker was released after her mother posted \$80,000 bail.

A hearing has been set for March 29 before U.S. Magistrate David E. Wilson.

Bordenet said there may be more arrests.

Bridwell and Whitaker "are not the top people but they are main players. It's still developing," he

said. The thefts occurred between September and December, and the first arrests were made in October. The latest arrests were announced yesterday.

According to a statement by U.S. Attorney Mike McKay and Postal Inspector in Charge Gerald A. Miera, members of the mail-theft ring used counterfeit keys to open large collection mailboxes used by the public and the olive-brown boxes used by postal employees to stash mail for delivery. Counterfeit keys also were used

to enter apartment buildings and condominiums and open the banks of mailboxes inside.

The thieves stole credit cards, outgoing mail containing signed checks and boxes of blank checks sent to bank customers by check-printing firms.

In some cases, the ring members used a chemical to alter checks and re-write them to a new payee with a new amount.

In other cases blank checks from one victim were made payable to another victim.

The checks then were deposited into the second account with a portion of the deposit being taken as cash back.

Miera said 159 stolen checks were negotiated in that way, costing area banks more than \$30,000. Capitol Hill residents complained last fall that the public collection boxes and the relay boxes used by carriers were easy targets because of their simple locks and a key common to all the boxes in the Seattle area.

In January, the Postal Service put extra padlocks on boxes on Capitol Hill and in North Seattle.

Those charged earlier in thefts are Crystal Ann Baker, 24, and Kim Tamay Thomas, 23, both of Kent, and Garret Lance Evans, 28; Kenneth Allen Lowe, 28; Anthony Bert McDonald, 24; Rosalie Joy

Hardenbrook, 31; Arthur Allen Shockley, 57; Lexi Kayleen Brunette, 35; Anthony Wayne Knapp, 28; Norman Joseph Forrest, 23, and Stephan Copeland, 21, all of Seattle.

Anyone convicted of stealing or possessing stolen mail faces up to five years in prison and a \$250,000 fine for each count.

Miera said Capitol Hill residents helped investigators by reporting suspicious activity around the boxes.

"We believe other persons are involved in this scheme, and we ask the public's continued help in bringing them to justice," Miera said.

[213]

148 Missing mail taken from Queen Anne drop box

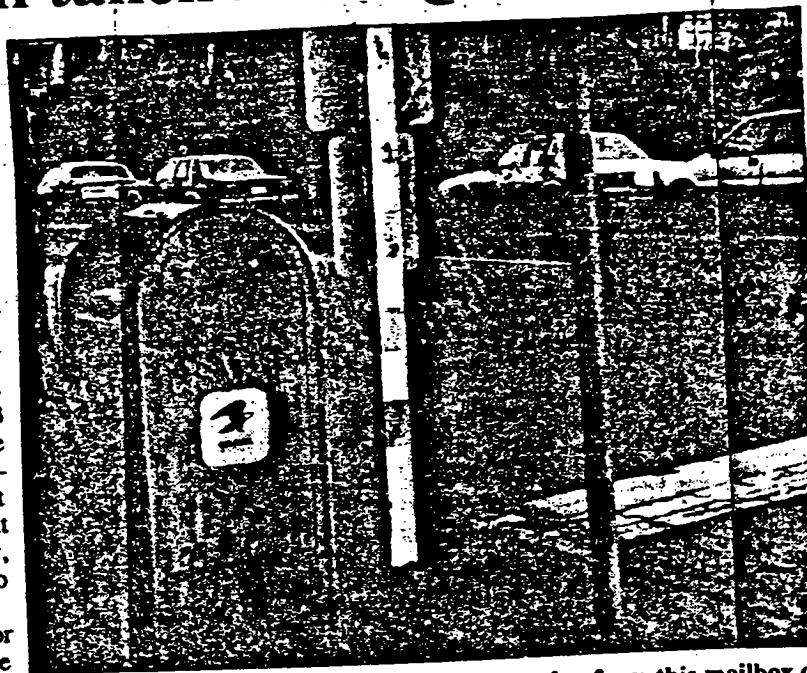
by Russ Zabel

Capitol Hill isn't the only neighborhood that is having a problem with thefts from mailboxes. According to two police reports, outgoing mail was taken from a mailbox on the corner of 6th Ave. West and West Galer St. the first few days of January.

In one case, a woman dropped a letter in that mailbox that contained a check for \$18.88 for four jars of jam from an Oregon firm. But she got a call from her bank January 3 informing her that a man — whose name is listed in the police report — was trying to cash that check. But the check had been altered so that it was made out to a different party, and the amount had been changed to \$425 as payment for some tires.

The bank didn't cash the check for the man, and the woman told police she didn't even know anyone by the name listed, and she certainly hadn't written him a check for tires.

In a second case involving the mailbox, on January 4, a postal carrier asked a woman who lives in the 600 block of West Galer whether she had seen anyone tampering with the box. She said she hadn't, but



An unknown amount of mail was recently stolen from this mailbox on the corner of West Galer St. and 6th Ave. West. (Photo by Russ Zabel)

then asked the carrier to check and see if five letters she had mailed were in the bunch he had just picked up. They weren't. The letters were bill payments to US West, Visa, BP Oil, Discover and Frederick and Nelson.

It is unknown how mail was taken from the box on West Galer St., but police have discovered that keys were used in the thefts from Capitol

Hill mailboxes — which contained mail to be delivered. According to published reports, 11 people have been arrested so far for the Capitol Hill thefts.

Jim Bordenet, a postal inspector and public information officer for the Post Office, said that they are finding the thefts are drug-driven. "Mail is an attractive target, unfortunately," said Bordenet.

He said postal inspectors will be checking into the matter. Bordenet also said the Post Office is offering rewards of up to \$1,000 for the arrest and conviction of anyone stealing mail. The number to call with such information is 442-6300, and the caller's identity will be kept confidential, he said.

Bordenet also suggested that if anyone sees anything suspicious to call the police at 911. In most cases, postal workers picking up mail will be in uniform. There are instances, however, when postal workers will be wearing street clothes, but they will be using Post Office vehicles.

In the meantime, Bordenet suggested that people take their outgoing mail to the post office or have it picked up where they work.

SEATTLE DIVISION

DATE: 1-13-93

PUBLICATION: Queen Anne News

CITY & ST: Seattle, WA

CASE INSPECTOR: Dave Breault

Inside Seattle

Rash of mail thefts on Capitol Hill

Thieves used
counterfeit keys
to open boxes

Sally Macdonald
is staff reporter

At least 11 people have been charged and 10 others are being investigated in connection with a rash of mail thefts throughout the city since October.

Postal inspectors say in most cases counterfeit keys were used to open the olive green boxes used to stash mail until carriers pick it up for delivery. In a few cases, thieves looking for cash, checks or debit cards pried open locked relay boxes or banks of mail boxes in apartments.

Residents of Capitol Hill, which has been particularly hard-hit by mail thieves, say the boxes are easy pickings because they have simple locks and a key that is common to all the boxes in the little area.

Postal inspectors have since put locks on all the Capitol Hill relay boxes and are adding them to boxes all over Seattle's north end.

"This is particularly frustrating because the postal service was informed a year ago that this was a growing problem," said Robert Bowlin, a Capitol Hill resident who hid the relay box behind his condominium complex was hit five times since October. "Somebody got a key and just copied it. These crooks have access to all our mail."

Thefts from the relay boxes are a growing problem, said James Bordenet, a postal inspector and spokesman for the Seattle office. In the last reporting year ending Sept. 30, 91 people were arrested in this area for mail theft, mostly from private mail boxes or street-corner collection boxes.

If arrests continue at the same rate, this year's total will be much higher, Bordenet said.

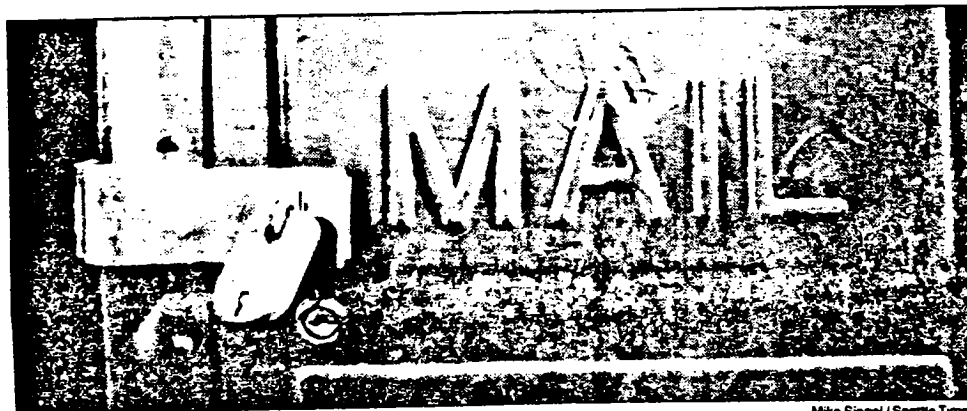
Bordenet said those charged in the thefts since Oct. 15 are Crystal Baker, 24, and Kim Tarnay Thomas, 23, both of Kent, and arrest Lance Evans, 28; Kenneth Allen Lowe, 28; Anthony Bert Macdonald, 24; Rosalie Joy Harbison, 31; Arthur Allen Shockley, 57; Lexi Kayleen Brunette, 35; Anthony Wayne Knapp, 28; Norman Joseph Forrest, 23, and Stephan T. Copeland, 21, all of Seattle.

The suspects have been arrested on state charges resulting from an investigation by the postal service and local law enforcement agencies, Bordenet said. Federal mail theft charges may be filed in the future.

Bordenet said none of the suspects are connected to the postal service. But they may be part of a ring. "We believe there is some element of organization, although there may be some freelancers," Bown said he and his neighbors called the Bremerton branch



Letter carrier Kelvin Phillips closes one of the relay boxes he uses on his mail route on Capitol Hill.



To help eliminate theft, an extra lock has been added on postal relay boxes.

post office last October when they first noticed there'd been no regular mail delivery.

Later, after the mail was stolen again, a merchant in the area reported seeing a blond woman drive up to the box, open it with a key and empty the mail into her car. The theft took only seconds.

According to Bordenet, mail thieves usually are looking for "cash or anything they can turn into cash." Blank checks from the bank or credit cards are particular-

ly desirable.

'Lots of credit cards'

Why has Capitol Hill been such a target?

"It's an affluent area, with mail that's attractive to them, lots of credit cards," said Bordenet.

Bowlin criticized the postal service for not acting sooner on the neighbors' complaints.

But Bordenet said the 24 investigators in the Seattle office went

to work on the case right away and have put secondary locks on most of the boxes on Capitol Hill.

Banks or businesses are the ultimate victims of checks or credit cards sent through the mail, Bordenet said. "But it's a terrible hassle for the resident, too. It takes several weeks for them to find out anything's wrong. And of course they feel awful that someone's stolen all their mail."

"You have no way of knowing what's really missing," Bowlin

said. "We've had people tell us they wrote a letter or something and we had no way of knowing."

Tips for residents

There's not much residents can do to protect themselves from a thief with a key, Bordenet said.

But he did give some tips:

■ Apartment or condominium residents should put their mail boxes in locked areas.

■ People with rural-type mailboxes should never put mail in them to be picked up. "That red flag telling the carrier there's mail in there is just a red flag to the thief, too. And that's the best mail of all, checks with your signature on them, mail that can tell them a lot about you," Bordenet said. "Take your mail to the post office or a collection box."

■ Never mail cash.

Bordenet said the boxes are usually opened by uniformed carriers, although occasionally a temporary carrier might be dressed in civilian clothing. They usually drive marked cars or trucks.

The postal service has a standing \$1,000 reward for information leading to the arrest and conviction of mail thieves, Bordenet said. Anyone who has information should call 442-6300. Callers' identities are kept confidential.

Mike Siegel / Seattle Times

Mike Siegel / Seattle Times

Mail thieves deliver headaches

By Wendy Culverwell

Christmas check or credit card you've been expecting to appear in your mailbox hasn't arrived, get nervous.

Federal Way, along with Key and Auburn, is in the midst of a mail-theft rash and thieves are after anything they can spend.

That includes credit cards and checks and cash stashed in holiday greeting cards. Account numbers from statements and bills can be misused too.

The Auburn Post Office, which oversees the two postal stations in Federal Way, has collected thousands of ripped-open pieces of mail. The thieves grab mail from residential boxes, rip it open and then discard the remains along roadsides or in other mailboxes.

On a table in the Auburn stationmaster's office, hundreds of pieces are spread on display.

"We see theft every year, but this is by far the worst I've ever seen," said Mike Hooves, manager of the Auburn office.

Some of the ripped-open pieces contain bills. Others contain bank statements and mailings from doctors, which sometimes contain refund checks. Even Christmas cards get opened. Thieves know they may find cash inside.

Linda Eastman, delivery supervisor for the Auburn area, said the rash of thefts started about eight weeks ago. The Auburn West Hill, Star Lake and Twin Lakes areas have been particularly hard-hit.

Inspector Jim Bordenet, public information officer for the U.S. Postal Service in Seattle, asks for the public's help in catching the thieves. He suspects two kinds of circles are at work — professionals looking for credit cards and kids looking for cash.

HE DECLINED to disclose how he can tell the two apart.

So far, the thieves have targeted mail in residential mail boxes. Anyone who sees suspicious activity near mail boxes is asked to report descriptions and license plate numbers to police. After that, Bordenet says that you call the postal inspector's office, 442-6300.

Postal patrons should also take steps to protect themselves



John Froschauer/staff

Linda Eastman, delivery supervisor for the Auburn area, sifts through mail that has been taken from patrons' boxes, opened and dumped. A wave of mail theft is hitting Auburn and surrounding communities, including Federal Way.

as long as the thieves are active, Bordenet said.

"Minimize opportunities for the thieves to steal," he said.

That means collecting your mail as soon as it arrives. If you're not home during the day, ask a trusted neighbor to bring in your mail for you.

IF YOU'RE going away, the

than from an unsecured residential mail box.

Tampering with the U.S. Mail is, of course, a felony offense. For each piece tampered with, the maximum penalty is a \$2,000 fine and/or five years in prison.

Eastman advises customers to be especially wary about an-

SEATTLE DIVISION
DATE: 12-19-92
PUBLICATION: F. WAY NEW
CITY & ST: Federal Way, W
CASE INSPECTOR:
DAVE BEAULT

Capitol Hill

Mail thieves hit Capitol Hill

■ Officials report at least 10 thefts from relay boxes.

■ By Rebecca Jones
News Editor

Neither snow nor sleet nor dead of night may keep postal workers from making their appointed rounds, but some thieves with counterfeit keys are preventing them from getting the mail to some Capitol Hill residents.

According to Postal Inspector Jim Bordenet, the U.S. Postal Service is looking at a number of suspects who have counterfeit keys to the large, olive green relay boxes — the local depositories where carriers pick up their mail for delivery. Capitol Hill has seen a dramatic increase in the number of these thefts, with at least 10 incidents occurring in the last two months.

"The reality is that the vast majority of these thefts are drug-related," he said. "We know some of the players and we know they're involved in drugs."

The thieves are generally looking for "negotiable" items or items they can make negotiable, Bordenet said. The list includes things such as cash, checks, credit cards, financial statements, automatic teller machine cards or valuables that can be sold for cash. It is a particularly distressing phenomenon, especially with the holidays just around the corner.

Bob Bowlin, who lives in a condominium in the 300 block of Melrose Avenue East, said his building has been hit three times since Nov. 9.

"Within a week (after the first

incident), it happened again," he said.

The most recent theft of the condominium's mail occurred on Dec. 5. Bowlin said he is frustrated because it appears that the Postal Service doesn't seem to care.

"What is particularly galling is that the postal authorities are simply indifferent to the problem," he said. "They seem to be taking this very nonchalantly."

Although Bowlin has received a sympathetic ear at the field office, he believes the Postal Service should have acted quicker and should be doing more to secure the relay boxes.

"They've endangered, or put at risk, the security of people and of the mail," he said.

However, Bordenet said, inspectors have taken additional security steps to curb what he deemed a severe problem. Solving these kinds of cases takes a combination of things, he said. Most of it involves good, hard police work, but some of it comes down to luck and timing.

"We have to find these people (suspects) to talk to them," he said. "And it's not like they're out there identifying themselves."

Bordenet said the Postal Service is asking for the public's help and is offering a reward of up to \$1,000 for information leading to the arrest and conviction of the thieves.

Mail theft is a federal offense that carries a maximum penalty of

five years in jail and a \$5,000 fine for each letter. Thieves could also be subject to prosecution under state and local laws for offenses such as fraud and possession of stolen property.

How to protect yourself

Postal Inspector Jim Bordenet said it's hard for residents to protect themselves against relay box thefts. However, there are a couple of common-sense precautions that can minimize the chances that someone will tamper with your mail.

- Never mail cash. Despite years of warnings against this activity, Bordenet said many people still send money through the mail.

- Don't use your mailbox for outgoing mail, especially the rural-style "red flag" type.

"Unfortunately, it winds up being a red flag to thieves," he explained.

Even the trusty blue mailboxes on the corner aren't as safe as taking your mail directly to the post office or mailing it from your workplace, he said.

"I don't want to alarm people, but things have come to that point," he said. "There are thieves that are looking to steal mail."

SATURDAY, DECEMBER 12, 1992

NORTHWEST

THE SEATTLE TIMES A

Post office: Capitol Hill theft, fraud cases nearly solved

by Kate Shatzkin
Times staff reporter

The Postal Service says it is close to solving a string of mail thefts in which numerous checks, credit cards and holiday messages were taken from Capitol Hill mailboxes in recent months.

Incoming mail for hundreds of residents of the Broadway Post Office district has been stolen, and banks and merchants have lost \$20,000 to fraudulent transactions as a result of the thefts, said Jim Bordenet, spokesman for Postal Service inspectors in

Seattle.

Since the beginning of October, 15 adults in the Seattle area have been arrested for investigation of forgery and check fraud believed to be connected to mail theft, Bordenet said. Some of those people are suspects in the Broadway thefts.

The mail has been stolen from relay boxes, so named because carriers use them to store large volumes of mail as they make deliveries in a neighborhood. Thieves have been able to fashion keys to some of the boxes to get inside. There they stole payroll and blank checks and credit-card numbers

to finance drug purchases, Bordenet said.

The practice is on the rise in Seattle and around the country. Last year, the Postal Service broke up a ring of suspects who were using checks stolen from outgoing blue mailboxes from Mountlake Terrace to Tacoma.

Some residents complain the Postal Service has been slow to act in the recent cases, and not always efficiently.

For example, postal inspectors installed a second lock on one relay box in Capitol Hill to prevent recurring thefts. But, Bordenet confirmed, last Saturday a carrier forgot a

key to the second lock and left mail another nearby relay box — which was that day.

Bordenet said inspectors now have employed "extra security measures" to protect relay boxes in the Broadway district, which he would not describe.

The Postal Service is offering a reward up to \$1,000 for information leading to arrest and conviction of suspects in Capitol Hill thefts.

Information can be relayed at any time by calling 442-6300, and will be kept confidential.

SEATTLE DIVISION

DATE: 12-12-92

PUBLICATION: Seattle Times

CITY & ST: Seattle, WA

CASE INSPECTOR: D. Breaux

(218)

NEWS OF RECORD

Thieves heist thousands of pieces of mail

By CHERYL MURFIN
Valley Daily News

AUBURN - That \$20 you planned to send your grandchild for Christmas? Not a good idea, say local post office officials.

Mail raiders hit South King County over Thanksgiving weekend, stealing thousands of pieces of mail from boxes in Auburn, Federal Way, Pacific and Algonia.

"This is the worst we've seen," Mike Hoover, postmaster for the victimized cities, said. "I've been around 21 years and I've never seen it this bad."

On Tuesday hundreds of pieces of soggy, soiled mail were still sitting on Hoover's desk. The mail was found strewn across lawns and streets, after envelopes were opened and rifled through.

The bandits were apparently looking for checks, credit cards or hard

and tossed on the ground, teens are the likely culprits.

"Cash is the key," Hoover said. "They are walking past mail boxes to and from school, looking for it in Christmas cards."

The post office suggests residents take several precautionary measures.

- Never put hard currency in the mail.

- Put out-going mail, especially Christmas cards, in a locked mail box or send them from work.

- Retrieve mail from the box as soon as it is delivered. If you are home late, have a trusted neighbor pick it up for you.

- Report stolen mail immediately to police and the post office.

Mail theft is a felony, Bordenet warned. Thieves face fines up to \$2,000 per piece of stolen mail and or five years in jail per piece.

"It's a federal crime, it's wrong

and it's disruptive to neighbors and the post office," he said. "With one stolen credit card you could have losses of thousands of dollars." One recent series of check thefts in Seattle resulted in a \$50,000 loss for banks, he said.

"Guess who pays for it? We do," Bordenet said. "Each time our yearly credit card rate goes up, we pay for it."

"Parents need to get the message out to their young children and older children," Hoover said. "We will prosecute."

The postal service is offering a \$1,000 reward for information that leads to the arrest of mail thieves.

"We're asking for public help to stop this," Bordenet said. "If someone sees a license plate or anything they should call the police."

To report information, call postal investigators at 442-6300.

'This is the worst we've seen. I've been around 21 years and I've never seen it this bad.'

Mike Hoover, postmaster

currency, Hoover said.

"All the bank statements were opened, all the Christmas cards were thoroughly gone through," he said.

U.S. Postal Inspector Jim Bordenet said the thefts were likely done by both professional thieves and teenage vandals.

"Professionals will usually check through things more carefully, maybe take them somewhere and go through them," Bordenet said. Where mail was simply ripped open

SEATTLE DIVISION

DATE: 12-2-92

PUBLICATION: Valley Daily News

CITY & ST: Auburn, WA

CASE INSPECTOR: Division P10

Thieves target your checks

By Marc Stiles
STAFF WRITER

Des Moines resident Sandy Mott was snared in a web of crime that was spun just outside her home last month.

On Sept. 19, Mott wrote \$150 worth of checks to creditors and sent them — or so she thought — from her residential mailbox.

Six days later a First Interstate Bank employee notified her that someone had swiped the checks, which were cashed at a Federal Way branch after being chemically altered.

Although they have no current statistics, postal inspectors and King County police say there has been a marked increase of mail thefts that result in washed checks.

Crooks equipped with counterfeit keys are even breaking into U.S. Postal Service collection and relay boxes. "We hate to admit it," postal inspector Steve Schneringer said, "but it's true."

No mail has been stolen from collection boxes in Burien or Des Moines, added another inspector, Jim Bordenet. That typically happens in more urban areas.

"There's an increase (in mail thefts) all over this region," said Sgt. Steve Davis of the county's Fraud Unit. He added incidents have been reported from Snohomish to Pierce counties.

Some arrests have been made, but the crimes continue throughout the Puget Sound region.

"It's really everywhere," said Detective Laura Hoffenacker of the county's Fraud Unit. "It depends on what area these people are working, and they move around a lot."

Bordenet said there has been a series of recent thefts of outgoing mail in the Des Moines area.

Mott reported that a neighbor had checks totaling \$4,000 stolen from her mailbox. The victim, who was unavailable for comment, lives four blocks away from Mott's

residence near Parkside Elementary School.

With the public's help, authorities say they can stop mail thefts.

"We are warning people not to use their mail boxes, especially their rural mailboxes, as a receptacle for outgoing mail," Bordenet said. "That red flag is a red flag for thieves."

Incoming mail should be retrieved from the box as soon as possible. If there will be a delay, have a neighbor or friend get the mail, Bordenet advised.

Anyone who sees a mail theft in progress should call 9-1-1. Citizens with less timely information can telephone the postal inspector's Seattle office at 442-6300.

County police are urging merchants to use caution when cashing checks. Cashiers should be suspicious if the check seems brittle, has more than one color of ink or inconsistent penmanship.

Marguerite Lynde, a public relations officer for First Interstate Bank, cautioned people not to write checks with felt-tip pens because the ink is easier to remove. She added people should check their account statements each month.

"The bank absorbs the loss so it's something we are taking real seriously," Lynde said.

Even though Mott didn't have to pay for her thief's debit-writing spree, she lost plenty of time straightening out her financial affairs.

The crime continues to affect her life, Mott said, since now she is now compelled "to closely watch my mailbox."

SEATTLE DIVISION

DATE: 11-1-92

PUBLICATION: Highline Times

CITY & ST: Burien, WA

CASE INSPECTOR: Brian Vranizan /
David Stelzer

(220)

November 1, 1992

Vol. 49 No. 132

The Highline Times

SUNDAY

50 cents

WEST SOUND

THE SUN ■ SERVING WEST SOUND ■ MONDAY, OCTOBER 5, 1992 ■ A5

KITSAP COUNTY

Theft of checks in mail nets prison term

SEATTLE — Two people have been sentenced to prison for stealing tens of thousands of dollars worth of checks from the mail in five counties, including Kitsap.

Earl L. McCoy, 31, of White Salmon, and Belinda S. Ruffcorn, 29, of Seattle, pleaded guilty in late July to bank fraud charges.

On Friday in U.S. District Court, McCoy was sentenced to 2½ years in prison followed by five years supervised release. He was also ordered to make \$15,185 restitution.

Ruffcorn was sentenced to 16 months in prison followed by five years supervised release. She was ordered to make restitution of \$10,206.

A federal grand jury on June 3 indicted the two on a total of 50 counts of possession of stolen mail and bank fraud charges. The thefts occurred in 1990 and 1991 in King, Pierce, Snohomish, Thurston and Kitsap counties.

The two were accused of stealing bulk mailing packets of blank checks sent by check printing companies to residences from Everett to Olympia. They also stole letters containing completed checks that people had placed in mailboxes for pickup by the U.S. Postal Service, the charges alleged.

U.S. marshals arrested McCoy and Ruffcorn on June 23 at a motel near Seattle-Tacoma International Airport. Additional checks recently stolen from residences in Bremerton and Olympia were found in the couple's car, authorities said.

James Bordenet of the Postal Inspection Service said many of the checks were cashed in other jurisdictions so it's impossible to sort out the loss for Kitsap County alone, but area banks lost a total of \$32,000 from the fraud.

Pierce McIntosh, inspector in charge, said the pair would make the blank checks payable to themselves and forge the name of account holders. They would also alter checks that had been signed to include themselves as alternate payees, McIntosh said.

Bordenet said 20 years ago it was safe to mail letters from individual homes, "but it's just not safe anymore because of people like this. Letters should be mailed in post offices and letter collections boxes for the citizen's own protection."

SEATTLE DIVISION

DATE: 10-5-92

PUBLICATION: Bremerton Sun

CITY & ST: Bremerton, WA

CASE INSPECTOR: Stan Pilkey

2 sentenced for stealing checks from mail

The Associated Press

Two people have been sentenced to prison for stealing tens of thousands of dollars' worth of checks from the mail.

Earl L. McCoy, 31, of White Salmon and Belinda S. Ruffcorn, 29, of Seattle pleaded guilty in late July to bank fraud charges.

Friday in U.S. District Court in Seattle, McCoy was sentenced to 2½ years in prison, followed by five years supervised release. He also was ordered to make \$15,185 restitution.

Ruffcorn was sentenced to 16

months in prison followed by five years supervised release. She was ordered to make restitution of \$10,206.

A federal grand jury had indicted the two June 3 on a total of 50 counts of possession of stolen mail and bank fraud charges. The thefts occurred in 1990 and 1991 in King, Pierce, Snohomish, Thurston and Kitsap counties.

The two were accused of stealing bulk-mail packets of blank checks sent by check printing companies to residences from Everett to Olympia. They also stole letters containing completed checks that

people had placed in mailboxes for pickup by the U.S. Postal Service, the charges alleged.

U.S. marshals arrested McCoy and Ruffcorn on June 23 at a motel near Seattle-Tacoma International Airport. Additional checks recently stolen from residences in Bremerton and Olympia were found in the couple's car, authorities said.

Pierce McIntosh, Postal Service inspector in charge, said the pair would make the blank checks payable to themselves and forge the names of account holders. They also would alter checks that had been signed to include themselves as alternate payees, McIntosh said.

James Bordenet of the Postal Service Inspection Service said area banks lost a total of \$32,000 from the fraud.

SEATTLE DIVISION

DATE: 10-4-92

PUBLICATION: News Tribune

CITY & ST: Tacoma, WA

CASE INSPECTOR: Stan Pilkey

[222]

B 2 Sunday, October 4, 1992

Northwest

BRIEFLY

Two sentenced for stealing checks in mail

■ SEATTLE

Two people have been sentenced to prison for stealing tens of thousands of dollars' worth of checks from the mail.

Earl L. McCoy, 31, of White Salmon, Klickitat County, and Belinda S. Ruffcorn, 29, of Seattle pleaded guilty in late July to bank-fraud charges.

On Friday in U.S. District Court, McCoy was sentenced to 2½ years in prison followed by five years supervised release. He was also ordered to pay \$15,185 restitution.

Ruffcorn was sentenced to 16 months in prison, followed by five years supervised release. She was ordered to pay \$10,206 restitution.

A federal grand jury on June 3 indicted the two on 50 counts of possession of stolen mail and bank-fraud charges. The thefts occurred in 1990 and 1991 in King, Pierce, Snohomish, Thurston and Kitsap counties. The two were arrested June 23 at a motel near Seattle-Tacoma International Airport.

They were accused of stealing packets of blank checks sent by check-printing companies to residences from Everett to Olympia. They also stole letters containing completed checks that people had placed in mailboxes for pickup, the charges alleged.

James Bordenet of the Postal Service Inspection Service said area banks lost a total of \$32,000 from the fraud.

SEATTLE DIVISION
DATE: 10-4-92
PUBLICATION: Seattle Times
CITY & ST: Seattle, WA
CASE INSPECTOR: STAN PILKEY

(223)

BRIEF

CASE NO. 466-1032191-FC(1)

SUBJECTS: FRANK A. TRAINOR
JEFFREY R. SPAKOWSKI
REGGIE P. STEINMARK

POSTAL INSPECTORS CONDUCTED A JOINT INVESTIGATION WITH INTERNAL REVENUE AGENTS RELATED TO MULTICORP, INC., AKA W.S. DISTRIBUTORS AND WIRELESS SECURITY SYSTEMS. REGGIE P. STEINMARK AND JEFFREY R. SPAKOWSKI WERE TELEPHONE SOLICITORS FOR THE NOW DEFUNCT MULTICORP IN 1989. FRANK A. TRAINOR WAS AN INDEPENDENT BUSINESS OWNER WHO ILLEGALLY PROCESSED CREDIT CARD TRANSACTION FOR MULTICORP BECAUSE THE FIRM DID NOT HAVE ACCOUNTS TO DO SO ITSELF. AS PART OF THE SCHEME, PEOPLE ACROSS THE COUNTRY WERE MAILED POST CARDS NOTIFYING THEM THAT THEY HAD WON ONE OF FIVE PRIZES AND URGING THEM TO CALL A TOLL-FREE TELEPHONE NUMBER FOR MULTICORP IN FORT WORTH, TEXAS. RESPONDENTS TO THE POST CARD SOLICITATION WERE INFORMED THEY HAD TO PURCHASE A WATER PURIFICATION UNIT OR HOME SECURITY SYSTEM AT PRICES RANGING FROM \$387.00 TO \$487.00, OR PAY A \$12.95 FEE BEFORE BECOMING ELIGIBLE TO RECEIVE A PRIZE. PURCHASERS WERE ENCOURAGED TO PAY BY CREDIT CARD. FACTORS WERE USED BY MULTICORP OWNERS TO LAUNDER CREDIT CARD CHARGES THROUGH MERCHANT ACCOUNTS THAT HAD BEEN OBTAINED UNDER FRAUDULENT PRETENSES. A FEDERAL GRAND JURY CHARGED THE SUBJECTS WITH MAIL, WIRE, AND BANK FRAUD; MONEY LAUNDERING; AND CONSPIRACY.

DUE TO THIS TELEMARKETING SCHEME, OVER 50,000 INDIVIDUALS WERE DEFRAUDED OF \$9 MILLION BETWEEN APRIL, 1989 AND FEBRUARY, 1990.

THE SUBJECTS WERE CONVICTED WITH GUILTY VERDICTS ON JANUARY 20, 1993, AND RECEIVED SENTENCES AS FOLLOWS:

FRANK A. TRAINOR, JR. - EIGHT YEARS AND ONE MONTH CUSTODY, THREE YEARS PROBATION, \$150 SPECIAL ASSESSMENT FOR GUILTY VERDICT ON ONE COUNT OF CONSPIRACY, BANK FRAUD, AND MONEY LAUNDERING

REGGIE P. STEINMARK - FIVE YEARS CUSTODY, THREE YEARS PROBATION, \$400 SPECIAL ASSESSMENT FOR GUILTY VERDICT ON ONE COUNT OF CONSPIRACY, BANK FRAUD, AND MONEY LAUNDERING

JEFFREY R. SPAKOWSKI - THREE YEARS AND TEN MONTHS CUSTODY, THREE YEARS PROBATION, \$450 SPECIAL ASSESSMENT FOR GUILTY VERDICT ON ONE COUNT CONSPIRACY AND EIGHT COUNTS WIRE FRAUD

BRIEF

CASE NO. 539-1049844-FC(1)

SUBJECT: JOHN ARCHER

THE POSTAL INSPECTION SERVICE INVESTIGATED A TELEMARKETING SCHEME THAT INVOLVED SOLICITING CUSTOMERS THROUGH THE MAILS. ON DECEMBER 20, 1991, JOHN ARCHER SURRENDERED TO U.S. MARSHALS IN CLEVELAND OHIO. A WARRANT FOR JOHN ARCHER HAD PREVIOUSLY BEEN ISSUED ON NOVEMBER 22, 1991, BASED ON A COMPLAINT FILED CHARGING ARCHER WITH CONSPIRACY TO COMMIT FRAUD BY MAIL, WIRE FRAUD AND CAUSING THE UNAUTHORIZED USE OF ACCESS DEVICES (CREDIT CARDS) IN A SCHEME TO DEFRAUD CONSUMERS AND FEDERALLY INSURED FINANCIAL INSTITUTIONS. JOHN ARCHER OWNED AND OPERATED UNITED MARKETING GROUP, INC., INDEPENDENCE, OH. UNITED MARKETING GROUP, INC., WAS A FRAUDULENT TELEMARKETING ROOM THAT SOLICITED CUSTOMERS VIA THE U.S. MAILS AND BY TELEPHONE OFFERING FOUR PRIZES. CUSTOMERS WERE REQUIRED TO PURCHASE A "BAHAMA VACATION PACKAGE" FOR \$329.00 TO \$379.00 IN ORDER TO RECEIVE ONE OF THE FOUR PRIZES. VARIOUS MISREPRESENTATIONS WERE MADE TO CUSTOMERS CONCERNING THE VACATION PACKAGES.

JOHN ARCHER AND HIS CO-CONSPIRATORS OPERATING UNITED MARKETING GROUP, INC., NATIONAL CREDIT SERVICE AND AMERICAN FAMILY PROTECTION SERVICES WERE RESPONSIBLE FOR 17 MILLION DOLLARS IN SALES OF FRAUDULENT TRAVEL AND CREDIT CARD PROTECTION PACKAGES THAT GENERATED LOSSES TO 14 FINANCIAL INSTITUTIONS OF MORE THAN \$4 MILLION. THOUSANDS OF CONSUMERS WERE VICTIMIZED BY THIS SCHEME.

JOHN ARCHER WAS CONVICTED OF CONSPIRACY, BANK FRAUD, WIRE AND MAIL FRAUD, MONEY LAUNDERING, AND STRUCTURAL CURRENCY TRANSACTIONS IN CONNECTION WITH THE TELEMARKETING SCHEME. ARCHER WAS SENTENCED TO 30 MONTHS IMPRISONMENT, FOLLOWED BY 3 YEARS SUPERVISED PROBATION. ARCHER WAS ALSO FINED \$400.00.

BRIEF

CASE NO. 648-1025999-FG(1)

SUBJECTS: LARRY H. MASTERS
RICHARD GARZA

THE POSTAL INSPECTION SERVICE CONDUCTED AN INVESTIGATION CONCERNING FRAUDULENT MEDICARE CLAIMS. ON OCTOBER 13, 1989, A CRIMINAL INFORMATION WAS FILED IN THE SOUTHERN DISTRICT OF TEXAS, CHARGING ALTERNATIVE HEALTH CARE SERVICES, INC., SPRING, TX, ALONG WITH LARRY H. MASTERS AND RICHARD GARZA, WITH CONSPIRACY TO DEFRAUD THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES THROUGH THE SUBMISSION OF FRAUDULENT MEDICARE CLAIMS FOR PAYMENTS.

THE INVESTIGATION DETERMINED THAT APPROXIMATELY \$3.3 MILLION IN FRAUDULENT CLAIMS HAD BEEN FILED.

ON MARCH 2, 1990, LARRY H. MASTERS AND RICHARD GARZA WERE SENTENCED BY U. S. DISTRICT COURT JUDGE NORMAN BLACK. EACH OF THE DEFENDANTS WERE SENTENCED TO FIVE YEARS PROBATION AND EACH WAS JOINTLY AND SEPARATELY ORDERED TO PAY RESTITUTION OF \$826,000 AND FINES OF \$250,000.

BRIEF

CASE NO. 647-1083239-FG(1)

SUBJECT: STEVEN DAVID WYMER

ON DECEMBER 12, 1991, THE U.S. ATTORNEY'S OFFICE, LOS ANGELES, REQUESTED A POSTAL INSPECTION SERVICE INVESTIGATION AS A RESULT OF A SECURITIES AND EXCHANGE COMMISSION REFERRAL INVOLVING STEVEN DAVID WYMER, OWNER/OPERATOR, INSTITUTIONAL TREASURY MANAGEMENT, INC., FORMERLY J. A. DENMAN COMPANY, NEWPORT BEACH, CA. WYMER, WHO WAS MANAGING MONEY FOR CITIES, COUNTIES, INDIVIDUALS, AND OTHER COMPANIES THROUGHOUT THE COUNTRY, WAS DISCOVERED MAKING IRREGULAR AND/OR ILLEGAL TRADES IN ADVISORY CLIENTS' ACCOUNTS, WHICH HE PERSONALLY HANDLED, BY SECURITY AND EXCHANGE COMMISSION EXAMINERS. STEVEN D. WYMER WAS CAUGHT BY THE SECURITY AND EXCHANGE COMMISSION CONDUCTING NUMEROUS IRREGULAR AND/OR ILLEGAL TRADES IN AN APPARENT ATTEMPT TO COVER UP THE FACT THAT IN EXCESS OF \$65 MILLION OF ADVISORY CLIENTS' FUNDS WERE MISSING. ON DECEMBER 17, 1991, POSTAL INSPECTORS ARRESTED STEVEN DAVID WYMER ON A CRIMINAL COMPLAINT ISSUED BY U.S. MAGISTRATE VENETTA TASSOPULOS.

STEVEN DAVID WYMER DEFRAUDED APPROXIMATELY 17 OF HIS 61 MUNICIPAL/GOVERNMENT UNIT CLIENTS OUT OF APPROXIMATELY \$117 MILLION.

ON SEPTEMBER 29, 1992, DAVID WYMER PLED GUILTY TO A NINE-COUNT INFORMATION. ON MAY 11, 1993, WYMER WAS SENTENCED TO SERVE 14 YEARS, 2 MONTHS IN PRISON. HE WAS ALSO ORDERED TO PAY RESTITUTION OF \$92,732,000.

BRIEF

CASE NO. 592-1053008-FB(1)

SUBJECT: THOMAS J. BARDEL

THE POSTAL INSPECTION SERVICE RECEIVED COMPLAINTS THAT GENERAL DATA LIMITED, LARGO, FLORIDA, AND ITS OPERATOR, THOMAS J. BARDEL, ENGAGED IN A SCHEME TO OBTAIN MONEY THROUGH THE MAIL BASED ON FALSE REPRESENTATIONS. COURT PAPERS ALLEGED THAT GENERAL DATA LIMITED IS A TELEMARKETING OPERATION THAT VICTIMIZED BUSINESSES NATIONWIDE. TELEMARKETERS CALLED BUSINESSES TO OBTAIN AUTHORIZATION TO SHIP COMPUTER PRINTER RIBBONS USING DECEPTIVE TACTICS. SHORTLY FOLLOWING THE SHIPMENT OF THE RIBBONS, INVOICES WERE MAILED TO THESE BUSINESSES REQUESTING PAYMENTS BY RETURN MAIL IN AMOUNTS UP TO FIVE TIMES THE PREVAILING MARKET PRICES. THOMAS J. BARDEL HAD PREVIOUSLY ENTERED A GUILTY PLEA TO TWO COUNTS OF MAIL FRAUD ON MAY 26, 1993.

DURING THE 18 MONTHS THIS FIRM OPERATED (JUNE 1989 TO DECEMBER 1990), OVER 4,200 COMPANIES RECEIVED INVOICES FOR COMPUTER PRINTER RIBBONS WHICH THEY DID NOT KNOWINGLY ORDER AND WHICH HAD AN AGGREGATE FACE VALUE OF OVER \$2.9 MILLION. PAYMENTS WERE MADE BY DEFRAUDED COMPANIES TO GENERAL DATA LIMITED AND THOMAS J. BARDEL TOTALING IN EXCESS OF \$1.465 MILLION.

THOMAS J. BARDEL WAS SENTENCED IN UNITED STATES DISTRICT COURT, TAMPA, FLORIDA, ON OCTOBER 29, 1993. BARDEL RECEIVED A SENTENCE OF 37 MONTHS IMPRISONMENT FOLLOWED BY THREE YEARS PROBATION. ONE OF THE TERMS OF PROBATION WAS A BAR AGAINST INVOLVEMENT IN TELEMARKETING. UNITED STATES DISTRICT JUDGE STEVEN MERRDAY PRESIDED AT THE SENTENCING HEARING. ONE OF THE CONSIDERATIONS IN LEVYING THIS SENTENCE WAS THOMAS J. BARDEL'S OBSTRUCTION OF JUSTICE ACTIVITIES DURING THE INVESTIGATION WHICH CONSISTED OF ATTEMPTING TO INFLUENCE THE TESTIMONY OF WITNESSES AND CONCEALING EVIDENCE.

BRIEF

CASE NO. 600-1003095-FB(1)

SUBJECT: ROBERT BRUCE BURKE

THE POSTAL INSPECTION SERVICE ARRESTED ROBERT BRUCE BURKE ON MAY 7, 1990. A FEDERAL WARRANT WAS ISSUED CHARGING HIM WITH EIGHT ACTS OF OBSTRUCTION OF JUSTICE REGARDING A MAIL FRAUD INVESTIGATION CONDUCTED BY A FEDERAL GRAND JURY FOR THE EASTERN DISTRICT OF PENNSYLVANIA. SINCE 1984, PERSONAL INJURY ATTORNEY ROBERT B. BURKE WAS OPERATING AN EXTENSIVE INSURANCE FRAUD SCHEME BY STAGING AUTOMOBILE ACCIDENTS AND BY SUBMITTING FRAUDULENT MEDICAL CLAIMS THROUGH COOPERATING PHYSICIANS. THE CRIMINAL COMPLAINT CHARGED BURKE WITH ATTEMPTING TO PERSUADE INDIVIDUALS TO PROVIDE FALSE TESTIMONY TO THE FEDERAL GRAND JURY. ONE OF THE COUNTS ALLEGED, CONCERNED DONNA WILLARD. WILLARD WAS MURDERED ON MARCH 6, 1990, PRIOR TO HER SCHEDULED GRAND JURY APPEARANCE RELATING TO THE INSURANCE FRAUD INVESTIGATION. THE CRIMINAL COMPLAINT ALSO ALLEGED THAT BURKE MADE THREATS TO FORMER CLIENTS WHO HAD BEEN SUBPOENAED TO TESTIFY BEFORE THE GRAND JURY INVESTIGATING MAIL FRAUD. BURKE WAS ALSO CHARGED WITH NINE ADDITIONAL COUNTS OF MAIL FRAUD, FOUR ADDITIONAL COUNTS OF OBSTRUCTION OF JUSTICE AND EIGHT COUNTS OF MONEY LAUNDERING. ROBERT B. BURKE APPEARED IN U.S. DISTRICT COURT ON AUGUST 30, 1990 AND ENTERED INTO GUILTY PLEAS TO ALL BUT FIVE COUNTS OF A 106-COUNT FEDERAL INDICTMENT.

DURING THE PERIOD THAT ROBERT B. BURKE OPERATED THIS SCHEME, 53 INSURANCE COMPANIES WERE DEFRAUDED OF APPROXIMATELY \$1 MILLION.

ON AUGUST 26, 1993, U.S. DISTRICT COURT, PHILADELPHIA, PA, FORMER PHILADELPHIA ATTORNEY ROBERT B. BURKE WAS CONVICTED OF RACKETEERING, RICO FORFEITURE, ARSON, MURDER OF A FEDERAL WITNESS, CONSPIRACY TO MURDER FEDERAL WITNESSES AND USE OF INTERSTATE COMMERCE IN THE COMMISSION OF MURDER-FOR-HIRE. BURKE WAS CONVICTED IN AUGUST 1990, ON 97 COUNTS OF MAIL FRAUD, OBSTRUCTION OF JUSTICE, AND CONSPIRACY. HE WAS SENTENCED TO FIVE YEARS FOR THOSE CHARGES. THOMAS BURKE WAS ALSO SENTENCED TO THREE YEARS SUPERVISED PROBATION AFTER RELEASE FROM PRISON AND \$4,400.00 PENALTY ASSESSMENT. HE WAS FINED \$50,000.00, COURT ORDERED RESTITUTION OF \$262,846.00 AND VOLUNTARY RESTITUTION OF \$8,000.00.

VIDEO CLIPS OF NEWS ACCOUNTS OF VOLUME MAIL THEFTS

<u>VIDEO NUMBER</u>	<u>HEADER</u>	<u>LENGTH (MIN'S/SEC'S)</u>
1	12-30-93 HOUSTON, TX TIME LAPSE VIDEO OF VOLUME MAIL THEFT FROM APARTMENT HOUSE LETTER BOXES	14:15
2	02-92 PHOENIX, AZ ELEMENTS OF ORGANIZED SCHEME TO STEAL MAIL AS DESCRIBED BY NEWSCASTER	4:10
3	02-92 PHOENIX, AZ INTERVIEW OF MAIL THEFT VICTIM VICTIM	2:50
4	04-09-93 NATIONAL NEWS TOM BROKAW - AMERICA CLOSE UP VOLUME MAIL THEFTS INVOLVING CREDIT CARD FRAUD	3:25
5	04-02-93 LOS ANGELES, CA DAVID HOROWITZ - "FIGHT BACK" VOLUME MAIL THEFTS FROM POSTAL VEHICLES	3:10
6	10-05-93 LOS ANGELES, CA VOLUME MAIL THEFTS FROM POSTAL VEHICLES AND ROBBERY OF LETTER CARRIERS	1:35
7	04-26-93 DALLAS, TX VOLUME MAIL THEFTS INVOLVING TREASURY CHECKS	1:30
8	03-30-93 FRESNO, CA VOLUME MAIL THEFTS FROM POSTAL VEHICLES	1:30
9	06-28-93 PITTSBURGH, PA CREDIT CARD THEFT	:40
10	09-01-93 PHILADELPHIA, PA VOLUME THEFTS INVOLVING MULTI-AGENCY TASK FORCE	2:15

<u>VIDEO NUMBER</u>	<u>HEADER</u>	<u>LENGTH</u> <u>(MIN'S/SEC'S)</u>
11	06-13-91 SEATTLE, WA VOLUME MAIL THEFTS USING COUNTERFEIT ARROW KEYS	1:45
12	05-13-93 SEATTLE, WA VOLUME MAIL THEFTS OF CREDIT CARDS	3:25
13	02-22-94 SEATTLE, WA VOLUME MAIL THEFTS INVOLVING CHECK WASHING VICTIMS INTERVIEWED	2:30
14	02-23-94 SEATTLE, WA VOLUME MAIL THEFTS INVOLVING CHECK WASHING VICTIMS INTERVIEWED	2:00
15	02-25-94 SEATTLE, WA POSTAL SERVICE MODIFYING COLLECTION BOXES	4:30



Office of the Deputy Attorney General

Washington, D.C. 20530

March 18, 1994

044-6

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

Dear Judge Wilkins:

The following sets forth comments of the Department of Justice regarding proposed sentencing guideline amendments which were published in December 1993.

AMENDMENTS PROPOSED BY THE DEPARTMENT OF JUSTICE (Amendments 26-30)

As the United States Sentencing Commission is aware, the Department of Justice proposed amendments addressing several important areas of concern to law enforcement. These proposals involve significant issues such as crimes of violence by organized crime members, firearms offenses by members of criminal gangs, obstructing an election or registration, possession or discharging of a firearm in a school zone, and criminal history scoring. We continue to believe that these proposals have merit and should receive favorable consideration.

LIMITATIONS ON THE IMPACT OF CONTROLLED SUBSTANCES QUANTITY ON OFFENSE LEVEL DETERMINATIONS (Amendment 8)

This amendment consists primarily of three specific proposals which are designed to: (1) reduce the impact of drug quantity on the determination of offense levels for offenses involving drugs and (2) increase the offense levels where weapons are possessed or used in drug crimes.

(A) Changes in the Drug Quantity Table The first proposal lowers the base offense levels by revising the Drug Quantity Table to reflect the 5- and 10-year mandatory minimum sentences at levels 30 (97-121 months) and 24 (51-63 months), rather than their present levels of 32 (121-151 months) and 26 (63-78 months). This is accomplished by: (1) reducing the upper limit of the Drug Quantity Table from level 42 to 38, (2) reducing the number of drug offense levels, and (3) assigning lower offense levels to specific drug quantities than in the present tables.

The Department strongly opposes this amendment. In our view the amendment represents an erosion of the seriousness with which

the Commission views narcotics offenses. We believe that even the upper limit of 38 proposed this year lessens the deterrent effect for drug traffickers who deal with the largest quantities of drugs, and the amendment creates problems with mandatory minimum provisions as well. By placing the guideline maximum at a level that barely accommodates the mandatory minimum sentence for certain drug quantities, this scheme effectively eliminates the range of sentences at certain offense levels from which the court should be able to choose an appropriate sentence. In addition, the court would be effectively precluded from recognizing guideline reductions in cases in which the mandatory minimum trumped the guideline sentence for offenders who played a minor or minimal role in the offense. Thus, the practical effect of the amendment would be to discourage guilty pleas because the mandatory minimum sentence would prevent reduction for role and for acceptance of responsibility for those defendants whose drug quantities are at or just above the mandatory minimum amounts. By contrast, the current offense levels are geared toward existing mandatory minimum sentences to a greater extent and in most cases allow for reduction for such characteristics as role in the offense and acceptance of responsibility. The amendment's stated concern for better sentencing at the high end of the drug quantity table simply transfers problems to the lower and middle levels, where many more defendants are sentenced.

Because the Commission had already decreased the impact of drug quantity on sentencing last year with its 1992 amendment of the relevant conduct guideline, which narrowed the conduct (*i.e.*, quantity of drugs) for which defendants would be responsible at sentencing, we urged it not to make further amendments last year until the effect of the relevant conduct amendment could be determined. We are not aware that the Commission has analyzed the extent to which this amendment cured any of the perceived problems.

(B) Weapons Enhancement Amendment 8 provides two approaches to increase the offense level for crimes involving drugs where weapons were used. Option 1 would add a 4-level enhancement in §2D1.1 for the use of a weapon, and a 2-level enhancement if the offense resulted in serious bodily injury. Option 2 would operate through a special instruction to apply the guidelines for assault with intent to commit murder or aggravated assault if the offense involved such conduct (in addition to the existing enhancement for possession of a dangerous weapon). The Commission also has invited comment on whether the weapons enhancement should be amended to differentiate by dangerousness certain weapons (*e.g.*, assault weapons, machine guns and sawed-off shotguns) and the number of weapons involved.

In view of the Administration's commitment to punish severely defendants who commit violent crimes, the Department

supports this amendment. Option 1 appears to embody a simpler approach to the issue. Similarly, we support greater enhancements for more dangerous weapons and larger numbers of weapons involved.

(C) Mitigating Role Adjustment Ceiling This amendment would provide a ceiling at level 32 or 30 for defendants who receive a mitigating role adjustment, thus making quantity less a measure of the seriousness of the offense than it would be for a defendant with a more important role in the offense. It is designed to limit the impact the quantity of drugs would have in determining the sentence of low-level defendants involved in drug crimes.

The Department supports the goal of this amendment but believes that as published the amendment is flawed. We would support the proposal if the following changes were made:

- ☐ the ceiling were set at level 32 (which covers a 10-year mandatory minimum sentence);
- ☐ the cap applied only to minimal, but not minor, participants (the least culpable group);
- ☐ drug defendants whose relevant conduct consisted only of drugs in their actual possession did not receive a mitigating role reduction and were not subject to the level 32 cap (because of the large amount of controlled substances in their actual possession);
- ☐ defendants who possessed or had ready access to a firearm or other dangerous weapon or engaged in assaultive or violent behavior did not receive a mitigating role adjustment; and
- ☐ language were retained in §3B1.2 stating explicitly that the downward adjustment for a minimal participant should be used infrequently.

DEPARTURES (Amendments 7 and 14)

Amendment 7 requests comment on whether the guidelines should provide that departures may be based on cultural characteristics of defendants or the collateral consequences (e.g., impeachment or a bar to holding public office) a public official and other defendants might encounter as a result of a conviction.

The Department believes that collateral consequences should not be the basis for a downward departure. The fact that one defendant may suffer collateral consequences as the result of

conviction does not alter either the nature of the crime or the nature of the offender. Indeed, this would run counter to the intent of the guidelines, which are designed to achieve, in part, the same sentences for similar offenses committed by similar offenders. Taking collateral consequences into account would appear to discriminate among defendants on the basis of prohibited factors such as education and occupation. In addition, the parties may not be able to determine the potential collateral consequences during the plea bargaining process or after a criminal trial; and even if identified, they may never come to pass. For example, in negotiating a plea in a criminal fraud case, is the prosecutor required to consider the potential outcome of possible civil litigation? There are numerous situations when consideration of collateral consequences would be highly inappropriate, including lower sentences for deportable aliens, antitrust defendants in bid rigging cases who may be debarred, and others who face the loss of some benefit as a result of committing a crime.

Similarly, we believe that cultural characteristics should not be the basis for a downward departure. To recognize such characteristics would appear to discriminate on the basis of race, sex, national origin, creed or religion, and socioeconomic status -- prohibited factors for departure under 28 U.S.C. §994(d). Criminal laws are enacted to reflect societal norms. The fact that a defendant's cultural heritage made the unlawful conduct more acceptable in his or her community should have no bearing on the sentence imposed. This argument could well be used in the future to justify downward departures for violent crimes by gang members, organized crime figures, and racially motivated individuals who assert they would have been subjected to shame or worse in the community had they not committed the offense.

Amendment 14 would revise §5K2.0, Grounds for Departure, by specifically permitting departures for offender characteristics or other circumstances not ordinarily relevant to that determination. The proposal provides that if the characteristic or circumstances, or combination of characteristics or circumstances, is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, then the factors may be considered.

This year the Department requested that the Sentencing Commission provide guidance regarding offender characteristics not ordinarily relevant for departure. However, the Commission has broadened the Department's proposal significantly by adding the language "or combination of characteristics or circumstances". This sweeping language may result in departures based on prohibited factors in 28 U.S.C. §994(d), which Congress intended would not be considered.

The Department has opposed this "combination of characteristics" approach in the past and continues to do so on the grounds that it would lead to an erosion of the guidelines and, thus, undermine the goal of consistency in sentencing.

MONEY LAUNDERING (Amendment 11)

The Department is opposed to the proposed changes to the money laundering guidelines.

ACQUITTED CONDUCT AS RELEVANT CONDUCT (Amendment 18)

The Department cannot support the published proposal advanced by the Practitioner's Advisory Group to change the definition of relevant conduct in guideline §1B1.3 to restrict the use of acquitted conduct in determining the guideline offense level. The amendment would provide that acquitted conduct may no longer be considered in determining the guideline range but can only be the basis for an upward departure.

This change would constitute a dramatic and illogical departure from the constitutional standards courts have historically applied in both pre-guidelines and guidelines cases and would reverse a long line of decisions in which ten courts of appeals have held that the Constitution does not preclude the use of acquitted conduct for sentencing purposes. These rulings are consistent with Supreme Court decisions allowing acquitted conduct to be introduced in evidence at a defendant's subsequent trial, *Dowling v. United States*, 493 U.S. 342 (1990), and allowing civil forfeiture notwithstanding acquittal on the same charges underlying the forfeiture. *United States v. 89 Firearms*, 465 U.S. 354 (1984). The broader rules of evidence admissible at sentencing, as compared to trial, also militate against a bar to using acquitted conduct for sentencing purposes. There is surely no unfairness in sentencing a defendant based on additional evidence, e.g., obtained from a search whose fruits could not be admitted at trial, that clearly shows that the defendant engaged in the conduct at issue.

There are, moreover, additional reasons why changing the present rules with respect to acquitted conduct would be unwise. First, the change would lead to a large increase in litigation. Frequently, the effect of an acquittal is unclear because the basis of the jury's verdict cannot be definitively established. For example, suppose a defendant and a confederate are charged with selling drugs and the defendant with using a firearm during and in relation to that crime (18 U.S.C. §924(c)). The defendant is convicted of the drug charge but acquitted of the firearms offense. Should that mean that the defendant can assert the acquittal to successfully resist the government's attempt to apply the enhancement in guideline §2D1.1 for possessing the

firearm? Not necessarily. The proof at trial may have been weak as to whether the firearm belonged to the defendant or to the confederate, also present in the room. The doubt may have been sufficient to cause the acquittal, but, if that was the basis therefor, not to preclude an enhancement under the guidelines. In other cases, the verdicts may simply be inconsistent, for example, a case in which the defendant is convicted of aggravated bank robbery (18 U.S.C. §2113(d)) for placing life in jeopardy by using a firearm, but acquitted under 18 U.S.C. §924(c) for using the firearm to commit the robbery. Based on anecdotal information from the United States Attorneys, it is our belief that the number of inconsistent verdicts, particularly in drug and fraud prosecutions, is growing. In each of these situations, if the Commission were to bar the use of acquitted conduct in determining the guideline range, difficult litigation would arise over the effect of the acquittal -- an increased burden on the already highly complex sentencing process that we think is unjustified and that many courts, we suspect, would not welcome.

Second, a limitation on the use of acquitted conduct would likely lead to unwarranted charging and sentencing disparity, contrary to the goal of the Sentencing Reform Act, and would encourage more trials and sentencing hearings. Under the proposal, the court would remain obligated to consider conduct not charged in the indictment but within the ambit of relevant conduct yet could not consider that same conduct if it had been charged and resulted in acquittal. Often, the decision whether to bring a charge that later results in acquittal will be a close one, on which reasonable prosecutors would reach conflicting judgments. If the rule on acquitted conduct were changed as proposed, these reasonable but opposing charging decisions by prosecutors would produce markedly different sentences. Moreover, the change would create a temptation for prosecutors to decline to bring charges that they fear could result in acquittal and wait to bring supporting facts to the court's attention at sentencing. Likewise, defendants, who are encouraged under the current definition of relevant conduct to enter pleas when charged with several counts with similar offenses will, if the proposed amendment is adopted, have a strong incentive to go to trial to try to defeat one or more of the multiple counts, thereby increasing the number of trials in the hard-pressed justice system. For all of these reasons, the superficially appealing but unsound proposal to limit the use of acquitted conduct should be rejected.

ACCEPTANCE OF RESPONSIBILITY (Amendment 32)

This amendment, published by the Commission at the request of a district judge, would provide an additional one-level decrease for a defendant who goes to trial but avoids actions that unreasonably delay or burden the proceedings or place an

undue burden on the government. We believe this additional point designed to assist the expeditious administration of justice will have just the opposite effect -- it will encourage defendants to go to trial. The Department believes there is no justification for this amendment.

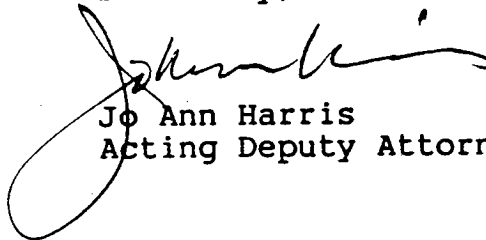
Under the current guidelines, many defendants who go to trial receive credit for acceptance of responsibility; the proposed point for not contesting frivolous issues will give them the same three points they would now receive for pleading early. They will be in the same guideline range and will have the right to appeal. The proposed additional point actually lowers the risk of going to trial. In some cases, defendants will actually receive more points for going to trial under this proposal.

The proposal also raises several difficult issues that would require litigation, such as what would constitute an undue burden or "frivolous" motion. Can the defendant receive the reduction for assisting in the administration of justice and then raise ineffective assistance of counsel on appeal? Would this amendment penalize defendants for exercising their constitutional rights? Litigation in the Ninth Circuit is now focused on the similar constitutional issue of granting a point for acceptance of responsibility for timely notification of intent to plead guilty. The proposal is also inconsistent with the principle that clients are not sanctioned for the inappropriate trial tactics of their attorneys.

TAX OFFENSES (Amendment 12(C))

The Department is opposed to any amendment of the tax tables this year. Because changes to the tax tables made during the last amendment cycle took effect as recently as November 1993, it is imperative that these amendments be allowed to work before further changes are made.

Sincerely,



Jo Ann Harris
Acting Deputy Attorney General

045-9

**PROBATION OFFICERS ADVISORY GROUP
to the United States Sentencing Commission**

Thomas N. Whiteside
Chairman, 4th Circuit

U.S. Probation Office
P.O. Box 809
Columbia, SC 29202-0809

Phone # 803-253-3330
Fax # 803-765-5110



March 15, 1994

Francesca D. Bowman, 1st Circuit
Thomas J. Downey, 2nd Circuit
Mary O'Neill Marsh, 3rd Circuit
Jerry Denzlinger, 5th Circuit
Billy D. Maples, 5th Circuit
Fred S. Tryles, 6th Circuit
Barbara Roembke, 7th Circuit
Jay Meyer, 8th Circuit
Nancy I. Reims, 9th Circuit
Joshua M. Wyne, 9th Circuit
Robert W. Jacobs, 10th Circuit
James B. Bishop, 11th Circuit
Robert C. Hughes, Jr., 11th Circuit
Gennine Hagar, DC Circuit
Magdeline E. Jensen, Probation Div. Ex officio
John S. Koonce, III, FPOA Rep. Ex officio

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
Federal Judiciary Building
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: 1994 Amendment Proposals

Dear Chairman Wilkins:

This letter is for the purpose of documenting recommendations of the United States Probation Officers Advisory Group pertaining to the 1994 proposed amendments.

As you know, we are most concerned about the issue of sentencing concurrently and consecutively where a defendant is already serving an undischarged term of imprisonment in a case unrelated to the federal case at hand (5G1.3(c)). We feel that the changes proposed in Amendment #23 would be better than what we have now. However, after testifying before the Commission and discussing the matter further, we suggest that even a better approach would be to eliminate all reference to the grouping rules at Application Note 3 of 5G1.3(c). This would avoid all confusion as to the application of the multi-count rule to state offenses and the issue of 5G1.3(c) would be permanently settled. The argument that one may advance against such a proposal would be that judges, given the option of sentencing concurrently or consecutively, would not proceed similarly, creating unwarranted disparity. That argument would have some reliable basis if sentences currently being imposed as a result of the application of 5G1.3(c) were

[239]

not disparate anyhow. Given the confusion of applying 5G1.3(c), we currently have many districts incorrectly applying this guideline, while at the same time relying on state sentences that in most cases have little relation to the actual time served. Our recommendations to the judges, where this issue is involved, are generally not based upon reliable information. I would be surprised if giving judges total discretion within the provisions of 18 USC 3553 and 3584(a) would result in an increased and unwarranted disparity. Further, if this guideline was changed as we propose, the hours saved in probation officer, defense attorney and judges time would be immeasurable. Therefore, the Probation Officers Advisory Group recommends the following in place of the current guideline.

5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

- (c) in any other case, the sentence for the instant offense may run concurrently or consecutively to the prior undischarged term of imprisonment, except to the extent otherwise required by law.

* * * *

Commentary

Application Notes:

* * * *

3. Where the defendant is subject to an undischarged term of imprisonment in circumstances other than those set forth in subsection (a) or (b), subsection (c) applies. In imposing sentences under this section, the factors listed in 18 USC 3553(a) should be considered along with the statutory authority of the imposition of concurrent and consecutive terms under 18 USC 3584(a).

Using the district response survey, a copy of which was provided to each Commissioner prior to our testimony on February 24, 1994, the Probation Officers Advisory Group identified seven (7) proposed amendments and/or issues that received almost unanimous support (90% or better) for this year's amendment cycle. They are listed as follows and are identified as they appear in the document, Proposed Guideline Amendments for Public Comment published by the Commission.

<u>AMENDMENT</u>	<u>PAGE</u>	<u>ISSUE</u>
5A	8	This amendment makes adjustments for value of payment and high level official cumulative under 2C1.1; 2C1.2; and 2C1.7. Currently they are alternative. This amendment would increase offense levels where both high value of payment or benefit and high level officials are involved. Ninety-six percent (96%) of the districts that responded to our survey favored the passage of this amendment.
8B	21	Option I of this amendment provides an enhancement for discharge of firearm and serious bodily injury under the drug trafficking guideline, 2D1.1. Ninety-one percent (91%) of the districts that responded chose this option over Option 2, which creates a cross-reference to attempted murder and aggravated assault. The question came up at the Commission meeting as to whether the probation officers wanted either option. Our survey does not address that question. However, during last year's amendment cycle, probation officers were not enthusiastic about adding additional specific offense characteristics and in fact, changes in this area of the drug guidelines were not proposed by the probation officers. Therefore, if the Commission is inclined to place less emphasis on weight of drugs in guideline calculations, probation officers support by a wide margin the addition of specific offense characteristics involving weapon use and bodily injury.
11	28	This amendment revises the money laundering guideline. During last year's amendment cycle, the probation officers by greater than a two-thirds (2/3) majority recommended changes to the money laundering guideline. The money laundering guideline as currently written is rigid and as a result may be used as a tool for manipulation by prosecutors. If the guideline had more basis in the underlying offense as proposed Amendment #11 provides, the ultimate sentence would be more reflective of the defendant's actual criminal conduct and you still have a

monetary table for which a sentence can be based for the professional money launderers.

- | | | |
|-----|----|---|
| 12B | 36 | This amendment raises the base offense level in 2B1.1 from level 4 to level 6, the same as 2F1.1 and it conforms the loss table in 2B1.1 to that in 2F1.1. All of the districts that responded to our survey support this change. The amendment essentially makes theft and fraud the same and results in the same sentence for low guideline exposure defendants charged under either 2B1.1 or 2F1.1. |
| 26 | 88 | This amendment provides for a base level of 12 in 2H2.1 in all cases where the defendant corrupts the registration or votes of others while the alternative base level of 6 applies where the defendant corrupts only his or her own registration or ballot. Ninety-six percent (96%) of the districts responding to our survey support this amendment. |
| 28 | 90 | This is an issue for comment as to whether 2K2.5 be amended to include enhancements if the firearm was discharged or loaded or if the defendant possessed both a firearm and ammunition in a school zone. Ninety-four percent (94%) of the districts were in favor of increasing the base offense level from 12 to 14 for persons who sell firearms with knowledge or reason to believe the recipient is a felon or other prohibited person or an underage person. Although responses from the field did not include extensive written comments, it seems reasonable to conclude that this amendment was favored because it equalizes the base offense level of the person who sells to a prohibited individual with a base offense level now assigned to the prohibited person who possesses, receives, or transports the firearm. |
| 30 | 90 | This is an issue for comment pertaining to changing 4A1.1 (Criminal History Category) and Chapter 5, Part A (Sentencing Table). Comment was invited as to whether or not 3-point convictions should be counted as they have been or should distinctions be made for longer sentences. The question is also raised as to whether a distinction should be |

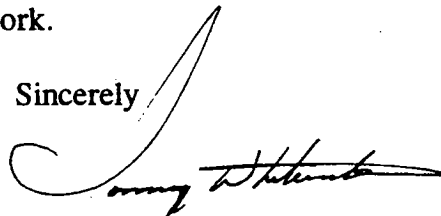
made where the prior offense and instant offense are similar. Further inquiry was made as to whether or not new criminal history categories should be created on both the low end (no record) and on the high end where defendants have significantly more criminal history points than 13. Of all the options listed, the probation officers favored only one, and that was to leave the counting of 3-point convictions as is. This received favor from ninety-three percent (93%) of the districts that responded to our survey.

Although we did not poll the probation officers on their feelings about consolidation and clarifying amendments, it is our position based upon last year's work that probation officers generally support any amendments that clarify, define and/or consolidate guidelines. Changes to the commentary that make application of guidelines clearer pay many dividends. Not only do they provide for more consistent application across the board thereby narrowing the possibility for disparate sentences, they cut down on the hours that we spend debating the intent of the guideline.

Also, as an addition to this letter I am attaching a separate letter addressed to you from Robert Hughes, Deputy Chief Probation Officer, Middle District of Georgia and member of the Advisory Group, which best advances our position on the retroactivity amendments. Robert testified as to this issue before the Commission on February 24 and his letter best reflects the feelings of the probation officers on the retroactivity issue.

Again, let me on behalf of the Probation Officers Advisory Group take this opportunity to thank the Commissioners for the attention that they have given to our concerns about changes in the guidelines. The probation officers are enthusiastic about providing input because they know that the Commission is genuinely interested in their work.

Sincerely



Thomas N. Whiteside
Chairman
Probation Officers Advisory Group

TNW/jsd
Enclosures

046⁶

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
PROBATION OFFICE

THOMAS J. WEADOCK, JR.
CHIEF PROBATION OFFICER

945 POST OFFICE & COURTHOUSE
BOSTON 02109-4561

March 17, 1994

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

Dear Chairman Wilkins,

It was again a great pleasure to present the Commission with Probation Officers' views on the guidelines and proposed amendments and we continue to be very grateful for the opportunity to do so. As always, we on the Advisory Group feel an enormous responsibility in representing the field, especially so because the Commission is so positively disposed to our input.

While I am aware that you have already received a written report on the Advisory Group's recommendations regarding proposed amendments, there is one additional comment which the Group discussed and I made comment on at the Hearing. Tommy Whiteside, Chairman of the Advisory Group suggested I send this letter as a supplement to his general report. The comment regards clarification amendments and one in particular:

Amend. 17 (Pg 62) Miscellaneous Substantive, Clarifying and Conforming Amendments

Clarification amendments are always worth passing because they result in no litigation, but may forestall any misunderstanding that might have occurred and also clear up any that have already occurred. The Commission staff is applauded for fine tuning the language of the guidelines to better communicate Commission intent and provide a clearer, efficient, more uniform application process. As in the past, the Probation Officers Advisory Group encourages the adoption of all clarifying amendments.

In particular, **Amend 17F** on Page 68 referencing §§ 2D1.6 (Use of Communication Facility in Committing Drug Offense; Attempt

(2447)

or Conspiracy), 2E1.1 (RICO), 2E1.2 (Travel in Aid of Racketeering), 2E1.3 (Violent Crimes in aid of Racketeering), and 2E1.4 (Use of Interstate Facilities in Murder for Hire) clarifies what is meant by "underlying offense" by making reference to § 1B1.2 application note 5. Whereas most other guidelines that refer to "underlying offense" make it clear that the "underlying offense" must be charged or be the offense of conviction (e.g. § 2X3.1 Accessory After the Fact Application Note 1. "Underlying Offense" means the offense as to which the defendant is convicted of being an accessory), the above referenced guidelines have left open a measure of ambiguity which could give rise to misinterpreting the Commission's intent.

This amendment would serve a vital need by making clear that offense guideline is selected on the basis of offense of conviction under §1B1.2 . Because it is a complicated issue, it is believed that the amendment could be made even stronger by inserting a parenthetical at end of the first sentence of application note 1. of §§ 2E1.1, 2E1.2, 2E1.3 and 2E1.4 that expressly reference that this determination is made on the basis of the conduct for which the defendant was convicted. Discussion with commission staff indicate that they concur with this suggestion.

Thank you for considering this supplement along with the other recommendations made by the Advisory Group.

With my very warmest regards, I remain

Very Truly Yours,



Francesca D. Bowman
Deputy Chief USPO

cc: Tommy Whiteside, Chairman
Probation Officers Advisory Group

047-9^u

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
PROBATION OFFICE

March 3, 1994

U.S. POST OFFICE & COURTHOUSE
P.O. BOX 1766, ALBANY 31702-1766
912-438-9461

U.S. POST OFFICE & COURTHOUSE
P.O. BOX 788, ATHENS 30603-0788
706-546-2119

U.S. POST OFFICE & COURTHOUSE
P.O. BOX 494, COLUMBUS 31902-0494
706-649-7818

U.S. POST OFFICE & COURTHOUSE
P.O. BOX 456, VALDOSTA 31603-0456
912-247-4631

DANIEL C. LANFORD, JR.
CHIEF U.S. PROBATION OFFICER

ROBERT C. HUGHES, JR.
DEPUTY CHIEF U.S. PROBATION OFFICER

U.S. POST OFFICE & COURTHOUSE
P.O. BOX 1736, MACON 31202-1736
912-752-8106

REPLY TO MACON

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

Dear Judge Wilkins:

I write to summarize the Probation Officer Advisory Group's response to Amendments 19 and 31 as published in the United States Sentencing Commission December 1993, Proposed Guideline Amendments for Public Comment. As you will recall, we discussed our responses with the Commission during the public hearing on February 24, 1994.

Amendment 19 makes a number of minor revisions to clarify the operation of §1B1.10 (Retroactivity of Amended Guideline Range). This particular amendment was not included in the Probation Officer Advisory Group Survey, however, the amendment was discussed at length by the Advisory Group during our working session. It is noted that the amendment does, in fact, make several minor revisions which do clarify the operation of this policy statement. For example, it will eliminate any question about the policy statements applicability when it states that if an amendment is not listed in §(d), a sentence reduction is not authorized versus not consistent with this policy statement. It also makes it very clear that the court is to apply the Guideline Manual currently in effect to determine the amended sentence.

It appears, however, that the amendment broadens the court's discretion as to the amount of sentence reduction. The amendment deletes current §1B1.0(c) which is, in essence, a "cap" on the amount of time the court can reduce a defendant's sentence. In addition, this broader discretion is of some concern as we feel it may serve to increase disparity throughout the system. Certainly, there was some rationale for the original "cap" inclusion in the guidelines and to remove this boundary raises a question. Also, we

are not convinced that there presently exist a problem to the degree that significant change to the policy statement is warranted.

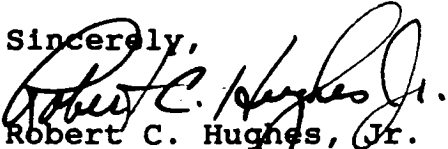
Amendment No. 31 was included in the Probation Officer Advisory Group Survey. We received fifty-five (55) responses to this amendment, 78% of which stated that the guideline should remain as written. We examined and discussed this amendment in our working group and concluded that the amendment does, in fact, offer some positive change. As we analyzed the written comments in our survey, we theorized that responding U. S. Probation Officers were, in fact, asking the Commission for stability and consistency in the area of guidelines and policy statement modification. Again, it does not appear that Probation Officers perceive a problem significant enough to warrant formal change in this area.

As mentioned, the working group had somewhat of a different view. One of the issues in this change concerns the "whole book concept" versus the "retroactive amendment concept". In essence, when the court modifies a sentence under this policy statement, the court presently applies the entire set of guidelines. Under the proposed amendment, the court would apply only the retroactive amendment within the set of guidelines under which the defendant was originally sentenced. The argument here is that the current method, "the whole book method", makes every guideline in the new guideline set retroactive "en masse" generating complications and disparity.

There have been some problems in resentencing LSD cases. For example, a defendant in an LSD case being resentenced may receive consideration for a possible application of the third level of "acceptance" effective November 1992, in the current guidelines even though other codefendants are denied retroactive consideration. Also, new factual issues can arise whenever it is necessary to determine new guidelines. This may serve to complicate the resentencing process. It may require an evidentiary hearing to determine the new facts to determine the guidelines which did not exist or were different at the time of sentence.

In summary, although we recognize there are some problems with the application of §1B1.10, we are of the opinion that these problems do not warrant significant change to the policy statement at this time.

Sincerely,


Robert C. Hughes, Jr.

Deputy Chief U. S. Probation Officer

048-91

The Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
1 Columbus, N.E.
Suite 2500, South Lobby
Washington, D.C. 2002-8002

Dear Judge Wilkins:

Pursuant to our recent conversation concerning the 1994 proposed amendments to the Sentencing Guidelines, specifically proposed Amendment 12(C), the following information concerning the Internal Revenue Service's position thereto is provided for your consideration. As a result of our conversation, it is my understanding that you concur with our opposition to Amendment 12(C) and, accordingly, feel it will be unnecessary for the Service to provide oral testimony at the Commission's scheduled hearing. Therefore, this written submission is in lieu of our giving oral testimony.

I would like to extend my appreciation to the Commission and its Staff for its previous support provided to the Internal Revenue Service in fostering voluntary compliance with our Nation's tax laws. Last year, when concerns were raised regarding the disproportionate relationship between the Tax Table and the Sentencing Table, the IRS and the Tax Division, Department of Justice worked closely with you and your Staff to help resolve the problem. In addition, we were able to consolidate several existing tax guidelines thereby creating a clearer definition of "tax loss," and ensuring that the guidelines applicable to tax offenses could be more easily understood and applied.

As I stated in my testimony last year, the Internal Revenue Service is involved in a new program designed to help us with the problems of non-compliance, called Compliance 2000. Although Compliance 2000 includes assistance and outreach efforts to taxpayers, some segments of the population will still fail to voluntarily comply with the tax laws. Accordingly, our compliance efforts still depend on the effectiveness of our tax law enforcement efforts. By effectively identifying and dealing with the segment of intentional non-compliance that justifies criminal prosecution, we send a strong message to every American that there are serious consequences for failing to voluntarily comply with the tax laws of our Nation.

-2-

The Honorable William W. Wilkins, Jr.

As a result of the 1993 amendments to Part T of Chapter 2 of the Federal Sentencing Guidelines, the Tax Table's proportionate relationship to the Sentencing Table is expected to ensure that sentences rendered in regard to tax offense convictions will include some type of confinement, which is necessary to achieve general deterrence and essential to effective and efficient tax administration. It is because of the significant tax administration accomplishments of the 1993 Amendments to Part T of Chapter 2 of the Federal Sentencing Guidelines, that we are particularly concerned about and opposed to proposed Amendment 12(C) as it pertains to the Tax Table. Since the Sentencing Table and the Tax Table were most recently amended in November of 1992 and 1993, respectively, we believe that further changes will only serve to complicate the sentencing process as prosecutors, the defense bar, probation officers and judges struggle to determine which of the several Tax Tables apply to a particular offense. We strongly urge the Commission to apply judicious restraint in amending the Sentencing Guidelines and agree with the Commission that frequent amendment of the Sentencing Guidelines only makes their application increasingly more difficult. The IRS readily agreed that last year's changes would be the last advocated for several years, thus providing a consistent framework upon which their effectiveness could be determined.

Beyond my general conviction that no amendment should be made to the Tax Table, I am of the opinion that there is no justification to support the adoption of either Option proposed by Amendment 12(C). Although both Options provide for a more uniform slope throughout the range of tax losses in the Tax Tables, there is no evidence that a more uniform slope is desirable in the Tax Table or that the present slope reflects such an unfair distinction between convicted tax violators so as to justify an amendment, especially so soon after the most recent amendment cycle. In fact, proposed Amendment 12(C) seems to be contrary to the position shared by the Commission and the IRS, that tax crimes are serious matters.

The current Tax Table provides for a Zone B sentence of confinement for at least one month for tax offenders with a tax loss of at least \$13,501, even with a two-level reduction for acceptance of responsibility. Under Options 1 and 2 of proposed Amendment 12(C), these threshold amounts are increased to at least \$15,001 and at least \$25,001 respectively. These significant modifications, especially in Option 2, would clearly place these threshold Tax Table amounts and corresponding offense levels beyond the amounts of

-3-

The Honorable William W. Wilkins, Jr.

tax due on the majority of returns filed by taxpayers each year. As a matter of fact, based on the 28% rate utilized in the Guidelines, taxpayer who accept responsibility for their actions can already evade the payment of tax on \$48,214 in additional net income without being sure of receiving some period of confinement. If Option 1 were adopted, the figure would jump to \$53,571 of additional unreported income and up to \$89,285 of additional net income under Option 2. Increasing the level allowed for unreported income by over \$5,000 as suggested in Option 1 or by \$41,000 as suggested by Option 2 would be contrary to the Commission's intent to treat tax crimes as serious offenses and could seriously impair the Service's efforts to effectively address the issue of widespread non-compliance.

Proponents of proposed Amendment 12(C), suggest that the two-level incremental increases as provided by Option 2, would reduce the number of contests concerning tax loss computations because there would be fewer points at which an increased or decreased tax loss will change the offense level. Since, after conviction, the defendant's objective will still be to avoid confinement, we believe that the two-level incremental increases would have little or no effect on the number of tax loss contests and might increase the intensity at which the challenged ones are contested. We are also am unconvinced that the single increments of the Tax Table create an appearance of complexity, especially when compared with the voluminousness of the Drug Table. We do not believe that the current Tax Table should be converted to two-level increments simply because the Drug and Alien Tables incorporate that type of progression. Consequently, we believe that no changes to the Tax Table should be made.

Another area of the proposals published by the Sentencing Commission which cause me concern is the area relating to money laundering. This is important to the internal Revenue Service because a number of taxpayers involved in a plethora of illegal activities are investigated by special agents of our Criminal Investigation Division relative to their failure to correctly report the income derived from their illegal endeavors. In addition to gathering evidence pertaining to tax evasion, our investigators frequently develop evidence of money laundering as the defendants attempt to hide or conceal their ill gotten gains. I realize there has been substantial dialogue between your Staff and the Department of Justice and that the Department of Justice is the appropriate spokesperson

-4-

The Honorable William W. Wilkins, Jr.

for the government in the money laundering arena, but I feel it is important for you to know that the Internal Revenue Service is indeed very concerned about Proposal 11.

If there appears to be any significant disagreement among the members of the Sentencing Commission concerning our opposition to Amendment 12(C), we would be pleased to provide additional information or, in the alternative, formally present oral testimony.

Sincerely,

Michael P. Dolan
Deputy Commissioner

cc: The Honorable Julie E. Carnes
The Honorable Michael S. Gelacak
The Honorable A. David Mazzone
The Honorable Ilene H. Nagel

049-9



INFORMATION SECURITY CONSULTANTS

5 Keane Terrace, Natick, MA 01760 FAX: (508) 650-0157

Phone: (508) 653-7101

**Written Testimony Submitted to
the United States Sentencing Commission
In Support of the Proposed Amendment Regarding
Computer-Related Offenses**

**Sanford Sherizen, Ph.D.
President
Data Security Systems, Inc.
Natick, MA**

March 15, 1994

March 15, 1994

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

Dear Commissioners of the United States Sentencing Commission,

I would like to go on record as encouraging the Commission to support the proposed amendment regarding computer-related offenses. It is imperative that the Commission act favorably on this amendment during this period when computer crime problems are becoming increasingly serious.

For purposes of identification, I write to you as an information security professional actively engaged in consulting, conducting seminars, and writing books and articles. I have written analyses for the Office of Technology Assessment (OTA) and testified before U.S. Senate as well as state legislative committees on computer crime and privacy issues. My information security consulting has been with businesses as well as Government agencies and I have lectured around the U.S. as well as internationally.

Based on the twelve years that I have involved with information security and the prior ten years in criminological research and university teaching, I find that computer crime has grown into a complex legal and social problem and current trends are quite worrisome. Computer crime can best be understood as the computerization of traditional crimes. While new crimes are possible with the use of computers (such as those criminal acts for which laws have not been defined or which are so unique that they are not possible without the technology), the majority of computer crimes are well known crime activities that existed prior to computerization. There is a need to differentiate between new information crimes that are possible only because of the existence of a new technology (computer viruses) from traditional crimes using new technology (desktop publishing fraud and forgery).

The computer criminal has changed from the "old days" of just a few years ago. In the majority of financial offenses which I have come across, computers are essential to the act or play a major role in the occurrence. Hackers who break into computer and phone systems and those who develop and spread viruses are still a problem today. Yet, there are now new and potentially more destructive computer criminals, including competitors who want product designs, angry employees seeking revenge for downsizing, inside traders searching for strategic plans, professional criminals

manipulating credit information and criminal histories, and journalists investigating scandals. More types of "new" computer criminals are expected.

Yet, despite these threats, information security in many organizations has failed to keep up with technological advances and information vulnerabilities. Few senior executives realize that they have to fulfill information security responsibilities in order to meet legal and fiduciary requirements. Relatively few organizations have achieved a level of information security sufficient to meet today's skilled computer criminal.

With these comments as background, I view the proposed amendment as an **interim but important response** to computer-related offenses. The next phase of the Commission's treatment of computer-related offenses should be to revisit this issue and, as suggested by the Working Group in cooperation with the Department of Justice's Computer Crime Unit, consider more specific action, such as a new computer guideline regarding these offenses. I would hope that the drafting of a new guideline will not be overly delayed since, as the Working Group correctly indicates, new cases (and, I would add, new harms) will almost certainly surface soon.

It is important for the Commission to develop a sentencing approach to computer-related crime which does not focus on harsh punishment, since that alone will not solve the computer crime problem. In research which I have recently completed on the effectiveness of deterrence, a review of the relevant empirical social science studies leads to the conclusion that deterrence is much more complex than theory (and common sense) suggest. Criminals may not act as rationally as the theories assume, there are complicated rules affecting how an individual perceives risky situations, and many individual as well as organizational factors intervene between the threat of legal sanctions and behavioral outcomes.

Even though there are state and Federal computer crime laws, there have only been a handful of criminal prosecutions to date. If the perception of the certainty and severity of punishment is a key variable in explaining deterrence, then the law has not been an effective force in controlling computer crime. Deterrence of computer crime should focus on tailoring penalties to computer crime severity, with special attention being paid to key information processes, industries, and types of violations.

Detering computer crime will require careful consideration of the seriousness of computerrelated crime for sentencing purposes. The Commission might weigh the larger number of harms beyond invasion of privacy and consequential recovery costs. Computerrelated crimes can add significant burdens to organizations and individuals who are victimized. These include direct financial losses as well as the less direct costs of additional information security personnel, security access control and identification products, system redundancies and other additional operating expenses due to security, and staff time spent cooperating with investigating law enforcement personnel.

There is also a need to review wire and mail fraud laws so that they will more directly apply to new technological development. These fraud laws, as well as other statutes, have often been used by prosecutors in place of weak or outdated state and federal computer crime laws. Prosecutors have expressed concern that computer crime legislation does not take into consideration their prosecutorial needs and, as a result, they are often forced to "shoehorn" computer-related crimes.

The Commission can assist with computer crime prevention by highlighting the importance of the issue and by providing direction for judges. In this symbolic as well as functional role, the nation can gain an increased protection. In a similar sense, the guidelines' model program provides senior executives with a clear view of their responsibility for crime control. Information protection must become a priority business and agency requirement. Senior executives must realize that they now have a major obligation to ensure that information is adequately protected. Deterring computer crime will require the Congress to pass improved legislation and for Government agencies and the private sector to develop and implement appropriate security measures.

I thank you for this opportunity to present these comments as written testimony and I stand ready to assist the Commission in this important effort.

050-94

FEDERAL BAR ASSOCIATION**CRIMINAL LAW COMMITTEE**
Co-Chairmen**PRESIDENT**
Luther E. Weaver, IIIStanford Shmukler
Packard Building
24th Floor
Philadelphia, PA 19102
(215) 751-3500Howard B. Klein
Blank, Rome, Cornisky & McCauley
1200 Four Penn Center
Philadelphia, PA 19103
(215) 569-5651**EXECUTIVE COMMITTEE**Burton A. Rose
SecretaryCreed C. Black, Jr.
Treasurer
Ballard, Spahr, Andrews, & IngersollMark Klugheit
Planning Subcommittee
Dechert Price & RhoadsJoel Slomsky
Public Relations Subcommittee
By-Laws SubcommitteeJames A. Backstrom
Banquet Chairman
North & ValraStanley Weinberg
Award Subcommittee
Saidel, Sand & SaidelJames M. Becker
Sentencing Guidelines Subcommittee
Saul, Ewing, Remick & SaulMaureen Kearney Rowley
Sentencing Guidelines Subcommittee
Chief Federal DefenderBruce A. Franzel
Liaison to Criminal Justice Section
By-Laws Subcommittee
Oxenburger & Franzel**EX-OFFICIO MEMBERS**Hon. Anthony J. Scirica
U.S. Court of Appeals
for the Third CircuitHon. Clifford Scott Green
United States District Court
Eastern District of PennsylvaniaHon. William F. Hall, Jr.
United States Magistrate Judge
Eastern District of Pennsylvania

March 25, 1994

**RE: Federal Bar Association - Criminal Law
Committee**

Dear Mr. Courlander:

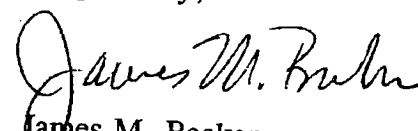
We are writing on behalf of the Criminal Law Committee of the Federal Bar Association's Philadelphia Chapter to express our strong support for two proposed amendments under consideration by the Commission during the 1994 amendment cycle.

First, we strongly support the proposed amendments to U.S. S.G. §§ 2S1.1 - 2S1.2 pertaining to money laundering offenses for the reasons stated in our comments upon a similar proposed amendment during the 1993 amendment cycle. Our earlier comments are enclosed.

Second, we strongly endorse proposed Amendment 12(A) concerning the specific offense characteristic for "more than minimal planning." Courts generally have found "more than minimal planning" to be present in virtually all cases, even relatively simple, unsophisticated ones. The result is that the two level upward adjustment for "more than minimal planning" is automatic, and does not provide a meaningful specific offense characteristic capable of

differentiating cases according to the planning and preparation involved. The proposed amendment, which would define the specific offense characteristic for planning in terms of "sophisticated planning" will help to narrow the range of cases in which the upward adjustment for the level of planning is applied.

Respectfully,


James M. Becker
Jeffery M. Lindy

JMB/kg

FEDERAL BAR ASSOCIATION

PRESIDENT
Luther E. Weaver, III

CRIMINAL LAW COMMITTEE Co-Chairmen

Stanford Shmukler
Packard Building
24th Floor
Philadelphia, PA 19102
(215) 751-9500

Howard B. Klein
Blank, Rome, Comisky & McCauley
1200 Four Penn Center
Philadelphia, PA 19103
(215) 569-5651

EXECUTIVE COMMITTEE

March 16, 1993

VIA TELECOPY AND FEDERAL EXPRESS

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

Re: Proposed Sentencing Guideline Amendments
for Public Comment - 1993 Amendment
Cycle

Dear Mr. Courlander:

I am writing on behalf of the Criminal Law Committee of the Federal Bar Association's Philadelphia Chapter. Our Committee consists of federal criminal law practitioners in the Eastern District of Pennsylvania. The Committee has reviewed the proposed guideline amendments for public comment published in the December 31, 1992 edition of the Federal Register. This letter constitutes our comments on the proposed amendments. The Committee has not undertaken to comment on all of the proposed amendments. Rather, we have selected only a few on which to submit comments. They are as follows:

1. Amendment No. 20 - Money Laundering.

The Committee strongly supports the proposed amendment to U.S.S.G. §§ 2S1.1 through 2S1.4 applicable to money laundering offenses. The amendment would tie the base offense level for money laundering violations more closely to the underlying conduct that is the source of the illegal proceeds.

This represents a significant improvement in the money laundering guidelines. Our Committee is aware of cases in this District and elsewhere in which the money laundering guidelines have allowed the government to obtain a

Burton A. Rose
Secretary

Creed C. Black, Jr.
Treasurer
Ballard, Spahr, Andrews, & Ingersoll

Mark Klugheit
Planning Subcommittee
Dechert Price & Rhoads

Joel Slomsky
Public Relations Subcommittee
By-Laws Subcommittee

James A. Backstrom
Banquet Chairman
North & Vaira

Stanley Weinberg
Award Subcommittee
Saidel, Sand & Saidel

James M. Becker
Sentencing Guidelines Subcommittee
Saul, Ewing, Remick & Saul

Maureen Kearney Rowley
Sentencing Guidelines Subcommittee
Chief Federal Defender

Bruce A. Franzel
Liaison to Criminal Justice Section
By-Laws Subcommittee
Oxenburg & Franzel

EX-OFFICIO MEMBERS

Hon. Anthony J. Scirica
U.S. Court of Appeals
for the Third Circuit

Hon. Clifford Scott Green
United States District Court
Eastern District of Pennsylvania

Hon. William F. Hall, Jr.
United States Magistrate Judge
Eastern District of Pennsylvania

Mr. Michael Courlander
Page 2

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. An example in our District is United States v. Brian M. Maier, Criminal No. 91-00235, (E.D. Pa.). This was a fairly simple fraud scheme in which the "loss" within the meaning of U.S.S.G. § 2F1.1 was between \$40,000 and \$70,000. The total offense level for the mail fraud offense was 13, which yielded a guideline prison range of 12-18 months. However, by adding a violation of 18 U.S.C. § 1957, based solely on the defendant's removal of some of the fraud proceeds from the bank account into which they had been deposited, the government successfully increased the total offense level to 19 and the corresponding guideline prison range to 30-37 months. The Commission's October 14, 1992 Working Group Report on Money Laundering has apparently identified numerous other examples nationwide of this form of "count manipulation." The money laundering charges in these cases often involve "monetary transactions" normally not thought of as sophisticated "money laundering."

With the government's increasing emphasis on forfeiture, the number of cases in which violations of 18 U.S.C. §§ 1956 and 1957 are added to fraud and other charges will only increase. This is because violations of 18 U.S.C. §§ 1956 and 1957 are among those for which civil and criminal forfeitures are authorized under 18 U.S.C. §§ 981 and 982, even though forfeiture may not be available as a remedy for the underlying offense.

Proposed Amendment No. 20 is a significant step toward elimination of the unfair treatment that can result from manipulation of money laundering charges. One concern we have arises from proposed § 2S1.1(a). This provision requires that in non-drug cases the greater of the following base offense levels be applied: (a) the offense level for the underlying offense from which the funds were derived; or (b) eight plus the number of offense levels from the table in § 2F1.1 corresponding to the value of the funds. The offense level for fraud offenses is six. Thus, in fraud cases in which the government adds a money laundering charge, the base offense level under § 2S1.1(a) will always be two levels higher (i.e., the difference between eight and six), simply because the government has added the money laundering charge.

The Committee believes this is inappropriate. In many ordinary fraud cases, the conduct giving rise to a violation of 18 U.S.C. §§ 1956 or 1957 does not, in any meaningful way, make the defendant more culpable or deserving of punishment than the defendant who happens not engage in a "monetary transaction" within the meaning of §§ 1956 and 1957. Accordingly, the Committee recommends that § 2S1.1(a)(3) be changed to read: "six

Mr. Michael Courlander
Page 3

plus the number of offense levels..." instead of "eight plus the number of offense levels..." Offenses involving relatively sophisticated "monetary transactions" can properly be dealt with through the specific offense characteristics set forth in proposed § 2S1.1(b).

2. Amendment No. 5 - Fraud, Theft and Tax - More than Minimal Planning/Use of Sophisticated Means.

This amendment would eliminate "more than minimal planning" as a specific offense characteristic under §§ 2B1.1(b)(5), 2B1.2(b)(4)(B) and 2F1.1(b)(2) and use of "sophisticated means...to impede discovery of the nature or extent of the offense" as a specific offense characteristic in tax cases under §§ 2T1.1-2T1.4. Instead, the amendment would modify the loss tables under the applicable guidelines to incorporate gradually an increase for "more than minimal planning" and use of "sophisticated means."

The Committee strongly opposes this approach. The underlying premise apparently is that offenses involving a certain amount of "loss" necessarily involve these specific offense characteristics. Therefore, they should be uniformly applied through appropriate increases in the loss tables. Thus, for example, offenses involving a "loss" in excess of \$40,000 will have offense levels two levels higher than under the 1992 guidelines.

The Committee believes this premise is seriously flawed. Monetary "loss" does not measure in any meaningful way the degree of planning or sophistication involved in a particular offense. A theft or fraud involving a loss of \$100,000 can often be as simple as a similar offense involving only a few thousand dollars. Good examples are cases in the Eastern District of Pennsylvania in which the government prosecutes relatives of deceased Social Security beneficiaries for receiving and cashing social security checks after the payee's death. These cases usually involve little or no planning. The relative is often surprised to learn that the government continues forwarding Social Security checks, even after the payee's death. The theft continues, and the "loss" increases, as long as the government continues to forward the checks and the relative cashes them. The amounts can often exceed \$40,000. Nevertheless, few would argue seriously that such offenses involve any significant degree of planning or sophistication. There are countless other examples of theft and fraud offenses in which the "loss" may be relatively high and the degree of planning relatively low.

For this reason, the Committee believes the preferred approach to these specific offense characteristics is one

suggested in the "additional issues for comment" accompanying Amendment No. 5. Specifically, the Committee recommends that the Commission change the specific offense characteristic from "more than minimal planning" to one of "extensive or sophisticated planning." This approach would tend to eliminate a disparity which the Committee believes now exists. Section 1B1.1's emphasis on "repeated acts," along with the examples given in Application Note 1, have lead courts to conclude that the "more than minimal planning adjustment" has a relatively low threshold. As a result, individuals engaged in elaborate and sophisticated fraud schemes receive the same treatment as the individual whose planning may be "more than minimal," but is far from extensive or sophisticated. A guideline that defines the planning necessary to establish the enhancement as "extensive or sophisticated planning" would still require subjective interpretation by the courts. However, such an approach would more fairly differentiate those defendants who deserve an upward adjustment based on the degree of planning from those who do not.

The Commission should, at the very least, eliminate the references to "repeated acts." Individuals who engage in repeated acts of fraud or theft are adequately dealt with through increases in the loss tables, because repeated acts almost always result in higher loss.

3. Amendment No. 23 - U.S.S.G. § 3B1.3 - Abuse of Position of Trust.

This amendment would change this role in the offense adjustment to "abuse of position of special trust." The definition of "special trust" makes clear that the two-level upward adjustment in offense level is intended only for individuals in positions of "public or private trust characterized by professional or managerial discretion." The definition further clarifies that the adjustment is not intended for employees whose responsibilities are primarily administrative in nature."

This amendment would substantially improve the operation of this guideline. Under the current guideline, the two level upward adjustment has been applied, even when the abuse of trust involved is little more than a breach of an employee's fiduciary duty to the employer. A good example is United States v. Milligan, 958 F.2d 345 (11th Cir. 1992), in which the court upheld the application of § 3B1.3 to a United States Post Office window clerk convicted of misappropriation and embezzlement of postal funds. The Committee strongly recommends that this adjustment apply only to individuals, who, because of their higher level positions, have significantly more responsibility than the ordinary employee. The amendment goes a long way

Mr. Michael Courlander
Page 5

towards accomplishing this objective, and the Committee therefore strongly supports it.

4. Amendment Nos. 24, 31, and 47 - U.S.S.G. § 5K1.1 - Substantial Assistance to the Authorities.

The Committee believes amendment 24 is a step in the right direction in that it would allow the district court to make the ultimate determination, in a limited number of cases, of whether or not a defendant has provided substantial assistance in the investigation or prosecution of another person warranting a downward departure. However, the Commission should go further by allowing the district court to make this determination, regardless of whether or not the defendant is a non-violent first offender. Accordingly, the Committee prefers the recommendations by the American Bar Association in proposed Amendment No. 31 and the legislative sub-committee of the Federal Defenders in proposed Amendment No. 47.

Following the Supreme Court's decision in Wade v United States, 112 S. Ct. 1840 (1992), defendants have very limited opportunity to challenge the government's refusal to file a substantial assistance motion under § 5K1.1. The Committee maintains that, as with all other determinations under the guidelines, the district court, not the government, should make the final determination on whether or not a defendant has provided substantial assistance. As a practical matter, the government will, in most cases, be highly influential in the district court's determination. In those cases where the parties disagree, defendants should be entitled to their day in court, just as they are now on the many factual and legal disputes arising under the guidelines. Access to a judicial determination of the issue should not turn on the defendant's criminal history or offense characteristics.

The government would still be protected in two ways. First, as is mentioned above, it will likely be the most influential voice on the substantial assistance question at sentencing. Second, it can appeal an adverse determination.

Finally, this issue implicates very directly the appearance of justice. Under the current regime, both defendants and the public-at-large can legitimately question the fairness of a sentencing system that allows the defendant's adversary to make unilaterally such an important determination in the sentencing process. Elimination of the requirement for the government motion would solve this problem (at least to the extent mandatory minimums are not involved) by making the substantial assistance determination no different than any other sentencing determination, that is, one ultimately for the district court.

Mr. Michael Courlander
Page 6

5. Amendment Nos. 8-10, 50 - Drug Offenses.

Amendment No. 8 would provide a ceiling of offense level 32 in the drug trafficking guideline (§ 2D1.1) for defendants who qualify for a mitigating role adjustment under § 3B1.2. Additionally, it would revise the commentary to § 3B1.2 to describe more clearly cases in which the mitigating role adjustment is warranted.

These amendments constitute much needed reforms. As the Commission's synopsis of the proposed amendment suggests, existing drug guidelines have tended to overpunish certain lower level defendants in jointly undertaken activity because the sentence is driven primarily by the quantity of drugs involved in the offense. This problem has been particularly acute in the Eastern District of Pennsylvania, which has seen an increased emphasis in recent years on what are referred to as "neighborhood" drug cases. These have consisted of as many as thirty or forty defendants in one indictment. Typically, certain lower level participants have been sentenced on the basis of extremely high drug quantities because of the manner in which the relevant conduct guideline (§ 1B1.3) has been applied.

The proposed revisions to the commentary to § 3B1.2 (along with prior clarifications of the relevant conduct guideline) will improve the situation. They will help clarify the participants in jointly undertaken activity for whom the mitigating role adjustment is intended. The absence of more expansive commentary and the emphasis upon the defendant's lack of knowledge or understanding of the scope and structure of the enterprise have caused district courts to be unduly restrictive in their application of the mitigating role adjustment. The Committee strongly endorses the Commission's identification of the non-exhaustive list of characteristics identified in proposed Application Note 5 that are ordinarily associated with the mitigating role.

With regard to Application Note 7 pertaining to transporters of contraband, the Committee opposes option 3. This would prohibit any mitigating role adjustment for that quantity of contraband the defendant transported. This seems unfair to the defendant who, on the facts of a particular case, might otherwise have a strong claim that he or she qualifies for the mitigating role adjustment. As for options one and two, the Committee prefers option one because it is more flexible and easier to understand.

The Committee also endorses Amendment 9, which would restore the upper limit of the drug quantity table to level 36. Prior increases in the upper limit to level 42 reflected an undue

Mr. Michael Courlander
Page 7

emphasis on quantity in determining the overall sentence. Moreover, the Committee recommends that the Commission consider further reductions in the quantity table's upper limit, along with an increased emphasis on specific aggravating offense characteristics such as the ones identified in Amendment 9.

Finally, the Committee endorses proposed amendments 10 and 50 pertaining to the definition of "mixture or substance" under § 2D1.1, Application Note 1, and the appropriate method of determining the relevant quantity in cases involving LSD.

6. Amendment No. 2 - Use of Guidelines Manual in Effect on Date of Sentencing (§ 1B1.11).

This amendment reinforces the Commission's so-called "one book rule," and extends it to multiple count cases in which the effective date of guideline revision(s) occur between offenses of conviction. The Committee opposes this amendment. The "one book rule," in our view, violates the Sentencing Reform Act. Specifically, section 3553 of Title 18, United States Code, requires the sentencing court to apply the guidelines "in effect on the date the defendant is sentenced." If the application of a particular guideline in effect on the day of sentencing would violate the ex post facto clause of the United States Constitution, then the district court must resort to the guideline in effect at the commission of the offense. It does not follow, however, that the entire guidelines manual in effect at the time of the offense must also be applied. Rather, under Section 3553, the court must continue to apply all other guidelines in effect at the time of sentencing, as long as their application does not violate the ex post facto clause.

7. Amendments 29 - Specific Offender Characteristics

The Committee strongly supports this proposed amendment by the Criminal Law Committee of the Judicial Conference of the United States. It would reinforce an important point. While a particular offender characteristic may ordinarily be irrelevant in determining whether a sentence should be outside the applicable guideline range, the presence of such a characteristic to an extraordinary degree (and therefore to a degree not adequately taken into consideration by the Sentencing Commission) is an appropriate reason for departure from the guidelines.

More importantly, the amendment would clarify that even though any one offender characteristic may not be present to a degree sufficient to support a departure, two or more characteristics may be present in combination to an extent that warrants a departure. This is consistent with the language of 18 U.S.C. § 3553(b), which contemplates departures based upon an

Mr. Michael Courlander
Page 8

aggravating or mitigating "circumstance." Moreover, the proposed amendment will better enable district courts to accomplish the statutory sentencing goals identified in section 3553(a).

Amendment 32 calls for the Commission to invite comment on 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 and, if so, whether this should be accomplished either by: (A) providing an additional ground for departure in Chapter 5, Part K; or, (B) increasing the number of offense levels in Zone A in criminal history category 1. The Committee endorses such an amendment. There are still far too many cases involving such offenders where the guidelines require a sentence of imprisonment. The Committee believes that the recent amendments increasing the number of offense levels in Zone A in Criminal History Category I from six to eight constituted a significant improvement. However, the Commission should undertake to identify through a separate ground for departure in Chapter 5, Part K, the relevant factors that would support departures for first-time, non-violent offenders.

Thank you for the opportunity to comment on these important sentencing issues.

Very truly yours,

James M. Becker
James M. Becker

JMB/mf/800

cc: Stanford Shmukler, Esquire
Howard B. Klein, Esquire
Co-Chairs

051-9



International Association of Residential & Community Alternatives

POST OFFICE BOX 1987 • LA CROSSE, WISCONSIN 54602
(608) 785-0200 • FAX (608) 784-5335 PETER R. KINZIGER, ADMINISTRATOR

Board (1992-93)

President
James Lawrence
Akron, OH • (216) 535-8117

First Vice President
John J. Larivee
Boston, MA • (617) 428-9800

Secretary
Richard Billak, Ph. D.
Youngstown, OH • (216) 744-5143

Treasurer
Pamela S. Henley
Tucson, AZ • (602) 624-0075

Immediate Past President
Neil Tilow
Cincinnati, OH • (513) 751-7747

Vice Presidents

Region II
Dan Lombardo
Collingswood, NJ • (609) 854-4660

Region III
James Whitworth
Greenville, SC • (803) 268-1360

Region IV
John Wynbeck
Grand Rapids, MI • (616) 245-4346

Region V
Lanny Schwartz
Miami, FL • (305) 754-1683

Region VI
Richard Staley
Nashville, TN • (615) 371-9046

Region VII
Terry Marshall
Madison, WI • (608) 255-0307

Region VIII
David J. Meyer
St. Louis, MO • (314) 652-6004

Region IX
Dan Freaney
Arlington, TX • (817) 274-5801

Region X
Gary Corbett
Englewood, CO • (303) 761-0807

Region XI
J. Jeff Fly
Visalia, CA • (209) 732-8086

Region XII
Michael Dumovich
Granite Falls, WA • (206) 435-7634

Region XIII
Janet Everest
Halifax, Nova Scotia • (902) 423-1219

Region XIV
Danielle Des Marais
Montreal, Quebec • (514) 939-0202

Region XV
Peter Aharan
London, Ontario • (519) 663-0330

Region XVI
John Bissett
Saskatoon, Sask. • (306) 975-5629

Region XVII
Paul Barnett
Campbell River, BC • (604) 286-0611

Advisory Council Chair
Cleveland Bell
Miami, FL • (305) 545-0926

International Vice President
Michael F. Crowley
Guelph, Ontario • (519) 837-6320

Western European Representative
Steve Murphy
London, England • 011-44-1-222-5656

U.S. Bureau of Prisons Liaison
Dave Wollner
Washington, DC • (202) 307-3171

Correctional Services of Canada Liaison
James Murphy
Ottawa, Ontario • (613) 992-6374

March 15, 1994

The Honorable William W. Wilkins, Jr.
Chairman

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

RE: Proposed Guideline Amendments for Comment

Dear Chairman Wilkins:

On behalf of the International Association of Residential and Community Alternatives (IARCA), this is to respond to your December 21, 1993 issues for comment. Specifically, I address proposed amendment number 16: the question whether and how the guidelines, policy statements and pertinent statutory provisions should be amended to provide greater sentencing flexibility or authority for modification of a previously imposed sentence of imprisonment, in the case of older, infirm defendants who do not pose a risk to public safety.

The situation in our Federal system is unparalleled: an increasing number of persons are aged and infirm. This is caused in part by mandatory minimums and a greater number of older persons receiving prison terms. (Bureau of Prisons, Long-Term Confinement and the Aging Population, Dec. 7, 1990, Forum on Issues in Corrections, U.S. Dept of Justice). About 12% of all prisoners are now over age fifty. (U.S. Dept of Justice, An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories, Washington, D.C., Feb. 4, 1994). Given an increasing number of mandatory sentences for drug and repeat offenders, the infirm are likely to increase. The controlling statutes should be revised to expedite matters and modification of sentence process should be clarified.

IARCA urges the Sentencing Commission to hold hearings to develop clear policy statements concerning modification of a term of imprisonment for aged or infirm prisoners. Such hearings should include development of policies and guidelines under the present Statute as well as reasons for changes in the relevant statutory provisions. Of particular importance

are circumstances under which it is appropriate to require nonviolent, elderly and infirm persons to be held in a prison rather than an unsupervised release, supervised community release or residential facility.

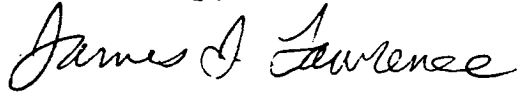
Although 28 U.S.C. Sec. 994(t) specifies that the Commission define what may be considered as "extraordinary and compelling reasons" for modification of an infirm person's sentence, the precise test remains unresolved. Secs. 5H1.1 and 5H1.4 indicate that a below guideline departure in sentencing may be appropriate where the defendant is elderly or infirm and that home confinement may be appropriate. But applicability of this provision is unclear on the modification issue. Lack of guidance could make it difficult to screen for appropriate cases and for judges to render decisions whether proposed releases will be consistent with the Commission's policies as required by 18 U.S.C. sec. 3582 (c)(1)(a).

IARCA believes that the Commission should consider what changes are needed in the statutes governing modification of a sentence. 18 U.S.C. sec. 3582 (c)(1)(A) provides for an exception to the rule that a court may not generally modify a sentence of imprisonment. This applies where the Director of the Bureau of Prisons may by motion affirm that there are circumstances covered by 3553(a), and the court finds extraordinary and compelling reasons for a reduction, and that they are consistent with "applicable policy statements issued by the sentencing Commission." This three part test presents a number of hurdles to be overcome resulting in unnecessary delay. The statute should be reconsidered particularly as to who is permitted to make this motion Should it remain the Bureau of Prison's responsibility? Should the Public Defender be allowed to bring the motion forward?

28 U.S.C. Sec. 994(t) requires the Commission to describe what are "extraordinary and compelling reasons" for reducing a sentence. Criteria to be applied, and a list of specific examples should be developed. Applying a system of interchangeable punishment and supervision options under these circumstances would make it possible to release and supervise such inmates. Supervised release of elderly and aged prisoners could be a vehicle for introducing interchangeable punishment units to the sentencing guidelines. The remainder of the sentence to be served could be considered as a community correctional option under this approach.

Thank you for this opportunity to comment. If I can provide the Commission with additional information about residential or community-based correctional facilities, please contact me.

Sincerely,

A handwritten signature in cursive script that reads "James J. Lawrence".

James J. Lawrence
President

cc: Peter R. Kinziger

KENNETH LERNER
ATTORNEY AT LAW

052-94

600 ONE MAIN PLACE
101 S.W. MAIN ST.
PORTLAND, OR 97204
TEL: 503/ 223-0442
FAX: 503/ 226-4290

March 15, 1994

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

Dear Commissioners:

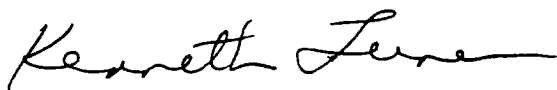
I have reviewed a proposed change in the guideline calculations for marijuana plants and am writing to comment on this proposition. I am currently a CJA attorney in the District of Oregon, and a former Federal Public Defender. I handle a great many cases in Federal Court and have had a great deal of experience with the marijuana guidelines.

I certainly encourage the commission to make an independent gradation for marijuana plants as suggested in the proposed guideline ranging, in order to eliminate the cliff effect. I think that this would be helpful, particularly in this district and others, where the practice is that U.S. Attorneys often do not allege the mandatory minimum amounts. In this circuit and in this district, this change would promote plea bargaining and avoid much undue hardship which the cliff effect creates, since the probation office in this district will not require the mandatory minimum terms of the statute under such circumstances.

I also wish to comment on some of the alternative approaches. The treatment of small seedlings, starts, clones, or other barely established plants on the same level as mature or maturing plants is particularly unjust. While all plants must certainly begin at this stage, many do not survive unless the operation is extremely sophisticated. Also, the cloning method that some growers use, never results in fully mature marijuana plants with the types of yields which government studies tend to show. These plants become growing flower stems of marijuana, harvested for their high resin content. Nevertheless, the dried weight of each plant is significantly less than 100 grams.

Let me close by saying that this is a welcome step in the right direction and I am glad that the sentencing commission is addressing this disparity.

Sincerely yours,



Kenneth Lerner

KL:jeb
corresp\sent-com.lt1

[269]

053-94

J. Matthew Martin
Attorney at Law
113 East King Street
Hillsborough, N.C. 27278-2518

March 21, 1994

Willlliam W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, North West
Suite 1400
Washington, D.C. 20004

Dear Chairman Wilkins:

The Executive Council of the Criminal Justice Section of the North Carolina Bar Association has reviewed the proposed amendments to guidelines, policy statements, and commentaries to the Federal Sentencing Guidelines published in the December 21, 1993, Federal Register for the 1994 amendment cycle.

Our Council has also established a liaison with your Practitioners Advisory Group and has studied the Group's responses to the amendments for this cycle.

The Council fully endorses the responses of the Practitioners Advisory Group to each of the amendments proposed during this cycle. The Council strongly advocates the adoption of Amendments concerning money laundering and drugs, especially the options and modifications proposed by the Practitioners Advisory Group.

The Council thanks the Sentencing Commission for this opportunity to express our views on these matters.

Sincerely,



J. Matthew Martin
Chairman
Criminal Justice Section
North Carolina Bar Association

JMM:mep

[270]

054-94

LAW OFFICE
JAMES F. WYATT, III
435 EAST MOREHEAD STREET
CHARLOTTE, NORTH CAROLINA 28202-2609
704-331-0767
FAX 704-331-0773

21 March 1994

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

Dear Chairman Wilkins:

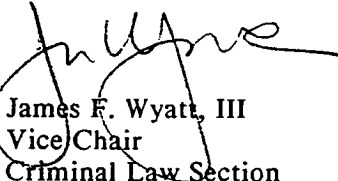
The Criminal Law Section of the North Carolina Academy of Trial Lawyers has carefully studied the proposed amendments to the guidelines, policy statements and commentaries to the Federal Sentencing Guidelines published in the 2 December 1993 Federal Register for the 1994 amendment cycle.

Our Section has also established a dialogue with your Practitioners Advisory Group and has studied the Group's responses to the amendments for this cycle.

The Criminal Law Section of the North Carolina Academy of Trial Lawyers fully endorses the positions taken on each of the proposed amendments by the Practitioners Advisory Group. The Criminal Law Section especially urges the adoption of those amendments and modifications endorsed by the Practitioners Advisory Group in regards to money laundering and controlled substances.

The Criminal Law Section of the North Carolina Academy of Trial Lawyers thanks the Sentencing Commission for this opportunity to express its views on the proposed amendments and remains available for future consultation on these and any other matters.

Cordially,


James F. Wyatt, III
Vice Chair
Criminal Law Section
North Carolina Academy of Trial Lawyers

JFW,III:af

[271]

055-94



OFFICE OF THE CHIEF POSTAL INSPECTOR
Washington, DC 20260-2100

April 8, 1994

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

Attention: Judge William W. Wilkens
Chairman

Based on discussions with my staff, the following proposed guideline commentary is submitted as an alternative to our two proposed guidelines (Amendments 34 and 35). We believe this commentary better fits into the current guideline framework and more directly addresses our concerns which were raised in the two proposed amendments. The commentary will be added to Application Note 6 of § 2B1.1 to determine the dollar loss in volume mail theft crimes.

Commentary

Application Notes:

6. "Undelivered United States Mail" means mail that has not actually been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mail box). "Sealed mail" includes First-Class Mail, Express Mail, international letter mail, and Mailgram messages.

In the case of the theft of undelivered United States Mail, loss is to be treated as equal to the greater of (1) the estimated number of pieces of sealed mail stolen valued at \$25 each; or (2) the total actual loss from the offense determined under Application Notes 2 - 4 above.

For the purpose of estimating the number of pieces of sealed mail stolen -

- a. if the theft is from a Postal Service relay box, the number of pieces of sealed mail shall be determined to be 1000, unless sufficient information is available to make a more accurate determination;
- b. if the theft is from a Postal Service collection box or delivery vehicle, the number of pieces of sealed mail shall be determined to be 400, unless sufficient information is available to make a more accurate determination;
- c. if the theft is from a Postal Service satchel or cart, the number of pieces of sealed mail shall be determined to be 50, unless sufficient information is available to make a more accurate determination;

52727

- d. if the theft is from an individual mailbox, the number of pieces of sealed mail shall be determined to be five, unless sufficient information is available to make a more accurate determination.

Background:

Because of the inherent difficulty in establishing the actual amount and value of mail taken, loss proxies for the various forms of mail theft have been included.

K M Hearst

**K. M. Hearst
Deputy Chief Inspector
Office of Criminal Investigations**

03.23.94 03:46 PM

P01

056-9^u

March 22, 1994

U. S. Sentencing Commission
One Columbus Circle, N.E. #2-500
Washington, D. C. 20002-8002

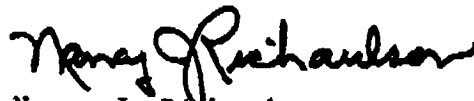
ATTENTION: PUBLIC COMMENT

Dear Chairman and Members of the Sentencing Commission:

On behalf of the 500 plus members of FAMM (Families Against Mandatory Minimums) in the State of Colorado, I am forwarding the attached position paper for your most valued review and consideration at your March 24th hearing.

Thank you for the opportunity to provide input to your meeting.

Sincerely,



Nancy J. Richardson
FAMM, Colorado Coordinator
21990 WCR 62
Greeley, Colorado 80631

Attachment

March 10, 1994

Distinguished Members of the Sentencing Commission:

The role of judicial discretion in the sentencing process is a fundamental and inescapable issue that has been reduced to a mechanical formula with the implementation of mandatory minimum sentences that were prescribed in the Anti-Drug Abuse Act of 1986. This bill was created and enacted by politically conscious legislators in a fit of political hysteria to coincide with the sentencing guidelines that were already in effect. This poorly written bill in effect cut the legs out from under the Sentencing Commission. No thought was given to the devastating effect it would have on families or society at large. The guidelines allow judges much more leeway and are subject to judicial review, while the mandatorys are "set in stone."

The intended separation of the legislative and judicial branches of government was violated by Congress when they passed the Statutory Anti-Drug Abuse Act of 1986. This Act contained the mandatory minimums and incorporated the sentencing guidelines formulated by the congressionally appointed Sentencing Commission in 1984 and enacted by Congress in 1987. In essence, Congress not only tied the hands of all Federal Judges, but also the Sentencing Commission which they created, as well as the many members of the Federal Judiciary System who should have a justifiable influence in the sentencing process.

As it stands now, the statutory mandatory minimums are denying the Sentencing Commission, again, from accomplishing their most important and laudable goals for which they were created. This would be to receive and give serious consideration to the majority of the proposals and input they will receive from reasonable and sincere people and organizations at this year's hearings, for them to study, consider and submit to Congress. Many of these proposals will not be in the Commission's final recommendations because their implementation is not feasible due to the mandatory minimum sentencing structure.

There are many people and organizations who oppose mandatory minimums, including the majority of Federal Judges who dislike mandatory sentences of any kind. One of the main intentions of creating this predefined sentencing structure was to eliminate the disparity between the sentences handed down by Federal Judges across the country under the guidelines system that was in effect. In so doing they took all the power and discretion in determining an appropriate sentence out of the hands of the judges and transferred it to the oftentimes vindictive, power hungry prosecutors, and many inexperienced pre-sentencing investigators. With the aid of a vast array of large enhancements at their discretion, they are now able to give a person what amounts to a life sentence for something a Judge might have given them five years or less for, if the power to do so were in his hands, as it should be, based upon the premise of individualized justice that is supposedly guaranteed in our Constitution. When it comes to the exercise of discretion in sentencing, are the prosecutors more to be

trusted than the Judges? There is much to be said for restoring judicial discretion to the Judges who were appointed for that purpose and who exercise it in the public's view.

The combination of mandatory minimums with the sentencing guidelines do not allow a Judge to even consider any of the ten Statutory or mitigating factors and fair criteria, such as a defendant's personal history or prospects for rehabilitation. Some of the key factors about the "offender" that are eliminated from the sentencing computation are the person's age, employment, whether or not it was violent crime or the person's history of non-violence. The fact that whether or not the person has ever been to prison before cannot be given any consideration. There are many very rehabilitative non-violent offenders who were given 15-30 years on their first prison sentence. This was the minimum time allowed under the mandatory minimums for a person, with prior felonies, no matter what type or how marginal they may have been.

The disparities created from this trend are based on non-violent factors such as race, gender, crime rates, case loads, circuit and prosecutorial practices---sentences levied under the current guideline system "often dramatically outweigh the severity of the offense." Senior Judge Myron Bright of the U.S. Court of Appeals for the 8th Circuit has claimed that "the U.S. sentencing commission in its finite wisdom, set the scales of punishment for drug crimes based on the weight of the drugs, not the criminality of the offender. In too many cases, the sentences directed by the guidelines waste the lives of men and women."

In their over-zealousness to prove that they were tough on crime, Congress took the possibility of parole and all good time incentives from everyone sentenced under a mandatory minimum. They now must serve 85 percent of these extremely lengthy sentences, regardless of how rehabilitative the person might be, even though anyone sentenced under the old guidelines are parole eligible after one third of their time. One of the results of this provision is that non-violent first time offenders who could benefit from rehabilitative sentences are given much more longer sentences than people who have committed such heinous crimes as child molestation, rape and murder. These violent offenders are frequently granted early release to make room for offenders serving mandatory minimum sentences. The national average sentence for a drug offender is 6.5 years; for manslaughter, 3.6 years.

As the nation's population swells towards 1.4 million, prison officials must release career offenders to make room for first time drug offenders. The politically popular war on drugs of the 80's has given rise to the far less attractive cell crunch of the 90's. Mandatory minimum sentences for minor drug crimes have stuffed the prisons to bursting with non-violent offenders. The U.S. Sentencing Commission has estimated that the sentencing guidelines and tougher penalties for drug law violations may result in a 119 percent increase in the Federal prison population from 1987 to 1997. In 1980 about 25 percent of the sentenced Federal population was convicted of a drug offense. Today narcotic offenders occupy 61 percent of

the beds in Federal prison. At the current rate it is projected to be 72 percent by 1997. From 1986 to the present time the average length of stay for drug offenders has increased from 21.3 to 81.5 months for low level drug law offenders currently in the Bureau of Prisons. According to the latest study on nonviolent drug offenders, released on February 4, 1994 by the U.S. Department of Justice, under the present guideline system, these individuals will serve on the average, at least 5-3/4 years before release from prison.

Dramatic increases in admissions for drug offenders and more than a threefold increase in the length of their stay has led to a burgeoning prison population. Why has the average length of stay for drug offenders increased so dramatically? The answer lies in the relationship between sentencing changes that resulted from mandatory minimum sentencing and the incorporation of these changes into the U.S. Sentencing Guidelines for drug offenders. Compounding this situation is the fact that the U.S. Sentencing Commission, to meet the provisions of the Statutory Congressional Law, has written its drug offense guidelines to be consistent with the severe penalties prescribed by mandatory minimums.

First time offenders currently make up to 56 percent of the approximately 90,000 Federal inmates. President Clinton stated more than once during his presidential campaign that we needed to get these first time offenders back on the streets. In his first televised presidential debate he also stated that the criminal justice system saved the life of his half brother Roger, who was convicted in 1984 of Federal conspiracy and cocaine trafficking charges. His brother served 16 of the 24 month sentence he received. It isn't clear whether the President thinks his brother's life would have been saved by receiving the 10 years in a Federal Penitentiary which he would get today on the trafficking charge alone. This does not include any of the vast array of possible guideline enhancements he would have been eligible for and the fact that he would have had no parole possibilities or good time incentives, if he would have been convicted after November 1, 1987. If Roger Clinton would have been convicted a few years later this would have quite obviously been a waste of a "good man's life." He went on to successfully rehabilitate himself and now leads a very useful, productive life.

We are happy for the Clintons, but many families of people sentenced to a mandatory minimum are left wondering why Roger Clinton and others were given a chance to rehabilitate themselves in a relatively short period of time when thousands of other nonviolent offenders like him across the country are sentenced to the better part of their lives in prison and denied this same opportunity. We are not saying that people ought not to go to jail for their crime, but two years, three years, not 10, not 15 and certainly not twenty plus years for nonviolent crimes of mutual consent, when, in 1990, the average Federal sentence for homicide was six years eight months; robbery, eight years and sex offenses, five years and one month.

Much has been made of family values by the last three administrations, but what is the value to the family when a first time nonviolent offender has to serve many years in prison, leaving

spouse, children and family to suffer the devastation of a wrenching separation and financial hardship. We may fool ourselves into thinking we can afford the tremendous fiscal cost of our current doomed approach, but we will never be able to pay the greatest cost of all; the social cost incurred in the needless devastation of family's lives because it is impossible to replace years spent away from children and family. The social cost is never more evident than when one visits the visiting rooms at any of the many Federal prisons across the country and sees all of the fatherless children who will suffer irreversibly from the lifelong effects of these laws.

Aside from the hidden social costs there are billions of dollars being wasted annually due to our present sentencing policies. A recent Justice Department study concluded that one in five people in Federal prison today are there for nonviolent petty drug crimes. They alone are costing the American taxpayer 326 million a year. The study also concluded that longer sentences are no more rehabilitative than shorter sentences. Mandatory minimums have an adverse affect on the economy in ways too numerous to mention. They are the main contributor in the huge increase in prison population which has doubled with mainly nonviolent offenders since their implementation only seven years ago.

Once incarcerated, along with the social costs, there are many hidden fiscal costs, as the families left behind are often forced to seek public assistance. The cost of useless incarceration of most nonviolent offenders is alarming when you consider that the average cost per prisoner has recently been approximated at \$25,000.00 per year. This is made even worse by the fact that they could and should be paying taxes as productive members of society, instead of being supported by two or three taxpayers for each year of their incarceration. On top of this, at the 13 percent annual rate our jail population is rising, it will cost at least 100 million per week, for construction of new facilities alone, and we are just talking about Federal facilities here. In short, billions of tax dollars and human misery are the costs!

We applaud the Sentencing Commission's past findings and resulting recommendations to abolish the mandatory minimums. We know that your opinion is joined by the U.S. Judicial Conference which is the administrative arm of the Federal Courts and broadly reflects the thinking of the Federal Judiciary. All 12 Judicial Circuits and the Federal Courts Study Commission have come to this same conclusion. Just a few other people and organizations who oppose mandatory minimums include members of the clergy, civil rights leaders, the organized bar, prison officials, including the current Director of the Federal Bureau of Prisons, Kathleen Hawk, not to mention Attorney Janet Reno, Louis Freeh, F.B.I. Director and numerous other citizen groups across the country. We are grateful to the Sentencing Commission for the opportunity to at least have our voices heard and feelings known through written comment at these hearings. Even if most of our proposals do not have a realistic chance of being implemented due to the statutory mandatory minimums, hopefully Congress will hear our message through these hearings, and our

opinions and facts will have an impact on the elimination of mandatory minimums, which in turn, will inspire "Just and Creative" changes within future sentencing policies.

One of many issues that we would like to address, is the need for alternative sentencing for nonviolent crimes. We must consider the fact that only 25 percent of all sentenced offenders have been convicted of a violent crime and less than that on the Federal level. Despite what politicians attempt to portray, recent public opinion surveys in a number of states show that the public is supportive of alternatives to prison in appropriate cases. Nationally, four out of five Americans favor community corrections programs for offenders who are not dangerous. Attorney General Janet Reno has been instrumental in bringing alternative sentencing to the public's attention. She has been a breath of fresh air and a ray of hope. We applaud her call for a radical review of Federal crime fighting tactics and agree with her underlying view of more rehabilitation and drug treatment, rather than the "lock 'em up and throw away the key" policy in effect now, which in reality translates into, "Lock 'em up and spend thousands of dollars on them!"

Prison officials argue that the prison system would function more effectively if justice were served more swiftly, sentences imposed more reliably and space allocated more rationally. To that end Ms. Reno has suggested a much broader use of home confinement, probation with special conditions, boot camps, drug court with strict supervision and alternative sanctions as opposed to a mandatory minimum for relatively minor drug offenses. Sanctions that say you need and will get continual counseling and monitoring and if you successfully participate in these counseling and educational programs we are going to give you every chance to reintegrate into society with the resources and ability to cope as opposed to going to jail. We also feel these programs can work for the majority of nonviolent offenders provided they are provided with the resources. The resources they will need are far less than the resources that are necessary to maintain people in prison year after year.

Work programs can benefit inmates and taxpayers alike. For example, Minnesota's sentencing to service program has been putting nonviolent offenders to work in communities throughout the state since 1986. So far, it has logged 530,000 man hours, and when program costs are offset against earnings and reductions in prison costs, the effort comes up 6 million in the black. In work programs, inmates feel like they are paying back society instead of wasting away. Prison space must be allocated more judiciously; this means finding and exploring alternative penalties for nonviolent offenders.

Ms. Reno made another bold statement when she proposed dropping the automatic charges for using a gun in a Federal crime. As alarmed as every American is and has every right to be over guns and violence, they would be even more appalled to see the many instances of prosecutorial abuse involved in implementing the automatic enhancements for a gun in drug crimes. The majority of people convicted of a drug offense where a firearm was discovered along with

drugs in a search and arrest are serving more time for the firearm, which was in most cases legally purchased and never remotely used or brandished in said crime. Most of these firearm charges carry a minimum of five years and range to a minimum of thirty years without parole regardless of mitigating factors. Attorney General Reno is absolutely right again in calling for a review of these sentences and favoring a policy which would allow mitigating circumstances to be taken into account. An automatic five years in prison is too much time for a nonviolent person, legally possessing a gun.

Ms. Reno has also stated that the mandatory minimums shouldn't be used as leverage. Critics say when a person is facing a 10 to 15 year mandatory minimum, he gives up the names of his bosses. In actuality the reverse is usually true - the bosses give up the underlings or anybody for that matter. A person is likely to say most anything or prefabricate testimony to serve the prosecutor's needs in order to avoid doing the majority of the rest of their life in prison. Therefore, much of this form of testimony should be considered what it is; tainted and prejudicial. In so many cases it is a grave compromise of justice and judicial integrity.

The Attorney General has suggested returning to plea bargaining prohibited by the 1989 Thornburg Memo and giving judges and defense attorneys more input in sentencing reductions. The current rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The guidelines have limited Federal prosecutor's formal authority to offer concessions and provide much leeway in a plea bargain. In regard to the leverage issue, the new provisions under the mandatory minimums create multiple charges out of one charge in drug and firearm cases, for the additional purpose of intimidating the accused into accepting an outrageous plea bargain, as opposed to taking it to trial where if convicted on all charges with enhancements he would face what amounts to a life sentence. Many people have accepted outrageous plea bargains which must conform to the guidelines, rather than take the chance of this happening to them, and in many cases do so upon the advice of their attorneys who know all too well the consequences of taking a case to trial and losing.

An example of this and one of the most overlooked victims of the government's war on drugs is its female P.O.W.'s. The majority of these women are minor players overrun by the government's blitzkrieg. Thousands of women are in prison today as first time offenders on such bogus charges as aiding and abetting, harboring a fugitive, failure to report a crime and - the vaguest and most abused charge - CONSPIRACY. Prosecutors use it as a blackmail tool, threatening and often indicting uncooperative or unknowing partners. (The crime should be labeled, "being loyal to your spouse"). In many instances, women receive harsher sentences than the guiltiest participants, because the most active drug traders are more useful to the Feds as informants.

A perfect, but very sad illustration of several of the preceding abuses, is the case of twenty year old Nicole Richardson, who languishes in a Federal prison today, sweating out a 10 year sentence

because she passed her drug-dealer boyfriend's number to one of his LSD customers. Her much more guilty boyfriend got only half her sentence because he had information to trade with prosecutors. Jurors in the Richardson case later said they would not have convicted her had they known about the mandatory minimum sentence she faced. Lately we are starting to see the reverse effect of the mandatory minimums at work as juries understand more and more what's happening with this sentencing scheme. They are becoming more reluctant to convict a person because the sentences are too tough.

The saddest and most ironic development of the Richardson case occurred after Nicole was in prison serving her 10 year sentence. While she was on the phone to her mother a man broke into her mother's house with the intent of raping her. Nicole heard her mother pleading for her life and notified one of the correctional officers who called local authorities back home. Upon arriving at the Richardson residence, a man was caught holding a gun to Mrs. Richardson's head while committing the act of rape. The man was later convicted of first degree assault and rape, plus attempted murder. His state sentence will make him eligible for parole in four years with a good chance for release because of overcrowding and parole regulations in that state, while Nicole, the victim's daughter, will remain in prison for another five years.

This is just one of thousands of examples of the mandatory minimums incarcerating first time, often marginal, nonviolent drug offenders for longer than many convicted murderers and rapists on the state level. There is a tremendous disparity between state sentences which tend to be on the average of a much more violent nature than the nonviolent Federal crimes where people are serving much lengthier sentences. Attorney General Janet Reno has addressed the situation we have now where there are relatively low level nonviolent offenders serving 10, 15, and 20 plus year mandatory minimum sentences in Federal prisons while in state court and state prisons, people are getting out of their sentence after serving 20 to 60 percent of their time for armed robbery and other serious violent crimes. Ms. Reno has asked the judiciary and defense attorneys to have a better dialogue over what is Federal jurisdiction and what is state jurisdiction. We support the Attorney General's invitation for a ethical deliberation on this issue and agree with her suggestion that many of these minor drug offenses would be better prosecuted by local authorities. There is no doubt that justice would be better served by this approach and it is simply astonishing that politically conscious legislators are able to continue to turn a deaf ear to this grave injustice.

We also welcome the proposals that were offered and contained in remarks made by Kathleen Hawk, the Director of the Federal Bureau of Prisons, before the Subcommittee on Intellectual Property and Judicial Administration, House Judiciary Committee in May of 1993. These proposals were the result of a study by the Federal Bureau of Prisons that was ordered by Ms. Reno and the Justice Department. One hypothetical strategy would be to shorten sentences, especially for nonviolent offenders. The proposal mentioned relating to this, would be to cut drug sentences for first time offenders by 50 percent and

other drug sentences by 25 percent. Under this scenario we recognize that obviously at least three significant changes to the current system should be considered. Number one: if not abolished, there would have to be a change to the mandatory minimum sentences. Number two: the U.S. Sentencing Commission would have to revise its drug guidelines. Number three: some kind of provision would have to be made to effect the sentences of offenders already adjudicated and in custody, for example, a re-sentencing procedure. To that end we recommend the creation of a review panel, possibly made up of selected and appointed Federal Judges to review the mitigating factors in each case, (something that they have not been able to do in the last seven years) that should have been taken into consideration in their original sentence. This provision would be to insure equity and parity, so that sentence reductions would be applied retroactively. There would be a substantial initial expense in the creation of the review board, but in the long run this would be money well spent as it would alleviate the tremendous unnecessary tax burden of the useless lengthy incarceration of many intensely scrutinized nonviolent offenders. The adoption of this proposal alone could justifiably correct some of the thousands of injustices which have occurred since the implementation of the mandatory minimums.

The second hypothetical proposal, offered by Kathleen Hawk, that we strongly recommend and favor, is that current good time awarded be increased from 15 percent (54 days a year), to 30 percent (108 days a year). This could be optional based upon an inmate's institutional behavior and record. This reward would provide a valuable incentive to encourage inmates toward self-improvement activities and successful involvement in programs designed to help them prepare for a productive return to the community. This opportunity is lost under the current system. The former and present Director of the Federal Bureau of Prisons both realized that the current minuscule good time allowance has created a time bomb that is waiting to go off. It seems that we have forgotten the original purpose and intention of the penal system, which was to punish people for their crimes by removing them from society, and in this process rehabilitate them in preparation for their return to society, instead of the current "warehousing them for life" approach. The implementation of the good time is a statutory change which could be applied retroactively through administrative processes that do not require re-sentencing.

The third hypothetical strategy mentioned by Kathleen Hawk was the diversion from traditional incarceration for carefully selected offenders who pose a negligible risk to the community. The Justice Department's long awaited report on mandatory minimum sentencing which was released February 4, 1994, concluded that long mandatory sentences for low level drug offenders don't deter crime any better than short sentences. The report also found that low level, nonviolent drug offenders account for 21.2 percent of the Federal prison population. This would mean that approximately 16,316 prisoners could be eligible for consideration to some type of diversion program which can meet specific offender needs, including increasing the opportunities for home confinement and more fully utilize halfway houses. Currently the Federal Bureau of Prison policy is to allow a maximum of six months

participation in these community programs. Why? Why not one or two years, or more? Why is home confinement used to such a minuscule degree? These programs are definite deterrents to a vast majority of nonviolent offenders. Isn't deterrence from future criminal activity one point of the criminal justice system? As history has shown, to just be tough is dumb - - and expensive.

These proposals were a small result of the Attorney General's invitation to the Federal Bureau of Prisons to assist her with identifying strategies that would better serve justice and reduce the growth rate of the Bureau of Prisons inmate population. This would be a secondary benefit of all three of these proposals. It is obvious they would all better serve justice. They lean more toward emphasizing drug treatment and rehabilitation instead of extreme punishment which inflicts tremendous social and fiscal costs yearly. It is our feeling and opinion that these alternative proposals make common sense, and should be given serious consideration by Congress. This apparently has not happened as we have heard no mention or discussion of any of these proposals since they were suggested to select members of Congress in May of 1993. It appears that opposing the mandatory minimums is too bold of a step for our politicians and the current administration, even though the evidence is in their own latest report!

There are many organizations in this country who seek to reform sentencing policies. Included in them are the Sentencing Project, the Criminal Justice Policy Foundation, and the National Drug Policy Foundation. We hope that their collective input will have some negligible influence in the shaping of future sentencing policies as they focus more on prevention and rehabilitation and less on the current "warehouse them" for punishment approach. The Research and Advocacy Group, the National Council on Crime and Delinquency also seeks to influence public policies that deal with crime and the criminal justice system. They also encourage citizen involvement in effective, humane, and economically sound solutions to the problems of crime and delinquency.

This private agency has been asked to provide input to the Clinton Administration on the issue of sentencing reform. Lee Brown, the current Drug Czar and the nation's first law enforcement professional to be named to head this department, is a former board member of the National Council on Crime and Delinquency. It is refreshing to see Janet Reno, Lee Brown, Louis Freeh and the Clinton Administration seeking input from an organization like the NCCD, because we believe that their hard answers and common sense plan will reduce crime and violence in America and save tax dollars in so doing.

In the summer of 1992 the National Council on Crime and Delinquency issued a new statement on sentencing policies in the United States. We feel that each of their 13 positions contained in this statement bear mentioning and each should be given serious consideration. Their positions are;

Sentencing Philosophy:

Position 1: Objection criteria, designed to make discretion visible and to promote the accountability of government officials, should be adopted at every stage of the sentencing process.

Position 2: The court's sentence should take into account: a) the gravity of the offense, b) the offender's current risk to public safety, c) offender rehabilitation and treatment needs, and d) the relative costs-benefits of each available sanction.

Position 3: No sentencing legislation should be implemented without a complete fiscal impact statement on the likely effects of proposed legislation on prisons, jails, probation, parole, and public safety.

Position 4: Victim's interests should be effectively represented in the sentencing decision.

Position 5: Existing alternative sentencing options should be used more fully by the courts.

Position 6: Financial incentives should be created for local governments to regulate both the number of prison admissions and sentence length, and to expand the use of alternative sentencing options.

Prison Sentences:

Position 7: Prison sentences should be principally reserved for three types of offenders: a) first time felons who have committed a violent or heinous crime, b) repeat felons whose new crimes involve a substantial threat to public safety, and c) felons whose crimes involve substantial violations of the public trust.

Position 8: In general, prison sentences should be short and determinant.

Position 9: Repeat felon offenders and/or those convicted of extraordinarily violent or heinous crimes should be given maximum terms that allow for the possibility of parole.

Position 10: The use of mandatory prison sentences and life sentences without the possibility of parole should be abolished.

The Release Decision:

Position 11: For those offenders who have been given a lengthy period of imprisonment, the main consideration in the release decision should be the inmate's risk to the community, once a satisfactory fraction of the term has been served.

Position 12: The availability of earned good time credits for inmates who participate in meaningful work, educational, and other self-improvement programs should be expanded.

Research:

Position 13: A rigorous program of research should be conducted on the effects of various sanctions on offenders, the corrections system, and crime reduction.

The last two issues that we would like to address are the ones at the forefront of discussion at this year's Sentencing Commission hearings. There are the changes in weights used to determine the length of a sentence in crack and marijuana. More specifically, the 100 to 1 ratio of crack to powder cocaine and the 10 to 1 ratio used on every marijuana plant over 50 in Federal marijuana convictions. Both of these current sentencing procedures are beyond the arbitrary and capricious that several appeals courts have ruled them to be. They border on the ludicrous and the absurd. These are just two of the

many particulars that Congress did not consider when they created the mandatory minimums with the structured, predetermined sentences for a predefined weight on drugs they knew nothing about. These fallacies in determining weights used at sentencing not only create an unbelievable disparity, but are also very racist in the case of crack cocaine because a much higher percentage of black men are convicted of crack cocaine than whites, who are convicted for a much higher percentage of powder cocaine. The current weights used in crack and marijuana make huge differences in the length of a person's sentence in related cases. This is something that we hope the Sentencing Commission will take immediate and forceful action on at this year's hearings. There are a few of the issues that represent obvious injustices that should facilitate a recommendation for change by the Sentencing Commission with some of the remaining authority vested to them by Congress.

As Janet Reno said earlier this year: "Sometimes doing the right thing is very politically unpopular. Sometimes it will be painful, or it will of necessity hurt someone." Asked what happens when the right thing conflicts with the law, Ms. Reno replied, "You try to get the law changed." We can only pray and hope that the Honorable members of the Sentencing Commission will exert their power and influence the members of Congress to "Do the right thing", and recommend the appropriate changes in these unjust Federal Sentencing Laws.

In our conclusion, we quote and wholeheartedly agree with the Honorable Judge Donald P. Lay of the Eighth Circuit Court of Appeals in his speech to the National Association of Pre-Trial Services Agencies in September of 1990.....

Judge Lay: "The public has every right to deeply resent those who commit crime. However, I respectfully submit that the "knee jerk" reactions by angry executives, politically conscious legislatures, and vindictive judicial officers is taking us down a primrose path with little success in combating crime. The resulting approach is accomplishing nothing more than exorbitantly wasting tax dollars, creating a warehouse of human degradation, and in the long run breeding societal resentment that causes more crime....."

Space does not permit discussion of another failure of our criminal justice system: the cost of the useless incarceration of persons convicted of nonviolent offenses. There exists a crying need to develop a nationwide system of intermediate sanctions for those who are convicted of nonviolent felonies. Our penology systems needs to develop work release programs, community service programs, schooling, vocational training, and other forms of supervised productivity in lieu of wasteful expenditures of tax dollars and wholesale warehousing of individuals. Punishment is one thing, but our current incarceration policies are wasteful and should be changed. Present policies breed further crime, dehumanizes individuals, and require gross expenditures of tax dollars needed for other purposes. With our nation facing both societal and fiscal crises of unrivaled proportions, we must move quickly and forcefully to overhaul the current system.

057-94

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

L. RALPH MECHAN
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

WASHINGTON, D.C. 20544

WILLIAM R. BURCHILL, JR.
GENERAL COUNSEL

April 13, 1994

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

Dear Judge Wilkins:

On behalf of the Subcommittee on Criminal Law and Sentencing of the Judicial Conference Criminal Law Committee, I thank the Commission for providing us the opportunity to comment on this year's proposed amendments at the meeting on March 25, 1994. At that meeting, the Commission invited the Subcommittee's response on further drafts of certain proposed amendments. The Commission sent us new drafts of several amendments, along with staff analysis of those drafts. We appreciate this further opportunity to respond.

As you are probably aware, this specific response is that of the Subcommittee and it does not constitute a formal, direct response by the entire Criminal Law Committee, which itself meets only in December and June, and therefore has not deliberated on these latest amendment drafts. Nevertheless, our Subcommittee has a mandate to review and comment on guideline proposals.

We are aware of concern by some whether the Commission should pass any amendments this year, given questions raised about the status of the Commission membership. It would be inappropriate for us to express a legal opinion on these questions. Nevertheless, we urge the Commission to go forward on those amendments which are sound and which would improve the fairness and efficiency of the system. A blanket refusal to adopt any amendment due to questions about the Commission's status would, it seems, be tantamount to a concession that Chairman Wilkins and Commissioner Nagel are not legal members of the Commission. Moreover, even in the unlikely event that the current Commission is later found to have exceeded its authority, the result would not be appreciably worse than were the Commission simply to do nothing.

I. Substitute Amendment 14 (5K2.0 - Departures)

This amendment is responsive to the Judicial Conference's proposal that language be included to endorse a departure based on a unique combination of circumstances, under appropriate conditions. Accordingly, we strongly support it.

We request that the Commission consider one change to the substitute amendment: that the second sentence of the proposed commentary be changed from "The Commission does not foreclose the possibility of an extraordinary case that...", to "The Commission acknowledges the possibility of an extraordinary case that...." We believe that this more affirmative language better states the spirit of the Subcommittee's proposal. Otherwise, we endorse and urge the Commission's adoption of this amendment, which we believe is a much needed recognition of legitimate departure in extraordinary cases, and which has been supported in essence by the Judicial Conference for several years.

II. Substitute Amendment 19 (1B1.10 - Retroactive Amendments)

The Subcommittee has urged the Commission to adopt a procedure for § 1B1.10 which applies only the retroactive amendments(s), rather than the entire current manual of guidelines, for all the reasons given in our position paper and orally on March 25. We therefore appreciate and strongly endorse substitute amendment 19, as the Commission has drafted it.

We had proposed (in an Exhibit to our position paper) some commentary to ensure the understanding that only the retroactive amendment(s) should be used. In lieu of any of those forms of commentary, this draft utilizes one sentence at the end of proposed Note 2, which we believe is crucial and key to a clear understanding and uniform application of the intended procedure: "All other guideline application decisions remain unaffected." We believe that, as long as this sentence is retained, this draft accomplishes what the Subcommittee proposed, and we urge that the Commission pass it.

III Substitute Amendment 10 (Role)

We applaud the Commission's effort to give more guidance to the meaning of the terms "minor" and "minimal", which are among the most often-considered adjustments in the guidelines. This revised, comprehensive rewriting of the section on role in general, and on mitigating role specifically, is more detailed than our Subcommittee has had time to properly digest. Considering the complexity of the proposed amendment, and the novelty of its analytical construct, we urge you to

Honorable William W. Wilkins, Jr.
Page 3

"field test" this proposal before making a final decision. On an expedited basis, this testing could perhaps be accomplished during the summer months. Enclosed herewith as Exhibit A are some technical suggestions and observations which we offer for your consideration. In sum, we strongly support the goal of this amendment but believe that it is not ready for adoption in its present form.

IV. Substitute Amendment 8 (D) (Commissioner Nagel's Proposal)

This proposal is much too sweeping to be digested at this time. While we do not oppose it, neither are we prepared to endorse it. Preliminarily, we note a potential issue of whether it comports with statutory authorization, and we note that it may not be as beneficial to defendants on the low end as it might be. For defendants who currently would be at a level lower than 19, the amendment actually appears to be harsher. Moreover, it cannot be an effective substitute for the role amendment, because it only addresses drug offenses, whereas courts must address role considerations in all cases.

We also believe it tactically prudent to await the fate of the mandatory minimum "safety valve" in the Congress before considering such a profound revision of the entire drug sentencing scheme.

V. Amendment 8(A) (Drug chart)

We support the Commission's suggestion that the drug chart be topped off at level 38, as a reasonable way to put a cap on how high amount, alone, can drive a base offense level.

As we discussed in our meeting, however, we have serious qualms about lowering the entire drug chart by two levels. Whether we like it or not, we cannot avoid the reality of the mandatory minimums and how they affect disposition of actual cases. A system in which a defendant has absolutely nothing to lose by going to trial, and conversely, nothing whatever to gain from entering a plea of guilty, is not only unfair but very unwise. This would be the result if the defendant's guideline level calls for a sentence significantly less than the mandatory minimum.

Sincerely yours,

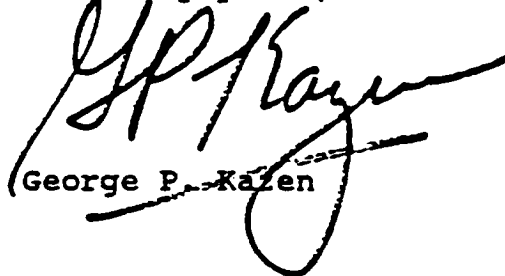

(George P. Kazen)

EXHIBIT A

April 13 Judicial Subcommittee Letter to the Commission Notes Regarding Substitute Amendment 10

1. Perhaps the most significant feature of the proposed amendment is the generation of a common standard of analysis for determining mitigating role (i.e., that the defendant be "substantially less culpable than a person who committed the same offense without the involvement of any other participant."). This analysis is new, and difficult to apply without thorough understanding. This could be accomplished by a more sequential presentation of the analysis, and the addition of several more examples from common cases (particularly drug offenses).

A. Organization of the analysis

Perhaps a step-by-step construct for the proposed analysis could be used, such as:

- (1) The fact that relevant conduct defines the scope of role consideration should be the first point (moved up from proposed Note 1(D)), in order to set the outer boundaries of the analysis.
- (2) Then, it should be made clear that the defendant should be compared to other participants within that scope.
- (3) Then, any disqualifiers for mitigating role should be stated. The proposed amendment states these as qualifying characteristics at Notes 2 and 4 (e.g. characteristics ordinarily associated with mitigating role, such as "the defendant had no material decision-making authority..."). It might be easier to understand if they were stated as disqualifiers (e.g. the defendant would not qualify if: "the defendant had material decision-making authority..."). At any rate, to qualify for mitigating role, a defendant must meet (or not meet) all or most of these, as the amendment sets out in Note 1(A) and (B).
- (4) Then, any defendant who passes the disqualifier test should be compared to the list of what might be called "general descriptors" of mitigating role (as currently set out in the amendment at Note 1(E)).
- (5) If, and only if, a defendant is still "in the running" after the disqualifier- and general descriptor- tests, the hypothetical-defendant analysis (as explained in Note 1 and at points elsewhere) would be applied. That is, if such a defendant were then found to be substantially less culpable than a person who committed the same offense alone, he/she should receive a mitigating role adjustment.

2. The first sentence of the proposed Introductory Commentary states that for role adjustments to apply, "the offense must involve the defendant and at least one other participant, although that other participant need not be apprehended." We believe that this qualification may be confusing, perhaps implying that the participant be subject to arrest or be a fugitive. Instead of this phrase, a reference to the definition of "participant" in Note 1 to §1B1.1, might be more clear. ("participant, as defined at...")

3. It is unclear whether Note 6 concerns the same standard for a firearm adjustment as that in 2D1.1(b)(1) (where a dangerous weapon is "possessed" in a drug offense). Perhaps that could be clarified. If it is a stricter standard, that is the defendant him/herself had to possess or direct the possession, then perhaps either option is alright. On the other hand, if the same standard is implied (which, as it reads now, using the same word "possessed", it probably would be), considering the extremely broad application of the firearm adjustment in drug offenses, we would recommend option #2, which might provide some amelioration where the firearm adjustment has been broadly applied, such as when it is found at a co-defendant's home.

4. This amendment will require case law development to define some of the new concepts, such as "unsophisticated tasks", "substantial part", and "ownership interest". However, the ambiguities may be lessened with some clarifying definitions. For example, does a street seller who buys drugs and resells them in use-quantities have an "ownership interest" in what he/she sells? Does it change if he is advanced the drugs (i.e. on credit), which is common? Is serving as an interpreter during drug negotiations an "unsophisticated task?" Does performing in that role reflect a "substantial part" in negotiating the terms of the same of the drugs? Is the ability to drive an "18 wheeler" to transport drugs an "unsophisticated task?" Does a defendant have an "ownership interest" in drugs he/she is transporting if his/her compensation for his/her services is a portion of the drugs being transported? Or a portion of the profit? These are common sentencing situations, to which the amendment does not adapt easily without further explanation and examples.

5. Finally, if the Commission passes this amendment, we would recommend consideration of further refinement (regarding these ideas or others) over the summer, as well as the development of a specific training module (written, video, etc.) dealing with this guideline to be made available to the field prior to its effective date, which would include several scenarios like those mentioned above, to help familiarize practitioners with the concepts introduced in this very important guideline.