

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

PROBATION OFFICE

S. THOMAS NOELL, JR.
CHIEF PROBATION OFFICER
227 FEDERAL BUILDING
401 WEST TRADE STREET
CHARLOTTE, N. C. 28202

March 29, 1990

GEORGE E. MICHAEL, JR.
SUPERVISING PROBATION OFFICER

REPLY TO:

Charlotte, N.C.

Mr. Paul K. Martin
Communications Director
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

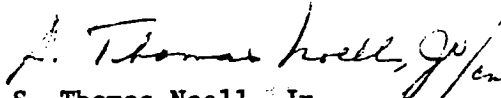
Re: Comments on Proposed
Guideline Amendments

Dear Mr. Martin:

I serve as Chief Probation Officer in the Western District of North Carolina and wish to forward my responses, comments and opinions on the proposed amendments to the Sentencing Guidelines, to be submitted to Congress on or before May 1, 1990. My comments are contained on the attached page(s) in response to the numbered proposed amendments and more specific to the changes proposed in revision of Chapter Seven (Violations of Probation and Supervised Release). My comments are responding only to those changes to which I highly favor or those changes to which I object.

Please see that this information is forwarded to the proper person for consideration. Thank you for soliciting input to the amendments.

Sincerely yours,


S. Thomas Noell, Jr.
Chief U.S. Probation Officer

STN:cm

Encl.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

On behalf of all Federal Public and Community Defenders throughout the United States, thank you for the invitation to testify. We also want to thank the Commission for

- 1) inviting a Federal Defender intern to join your staff, and
- 2) setting up a Defense Practitioner Advisory Committee.

We commend the Commission for inviting comments on the proposed amendments. As federal defense practitioners, we have been totally immersed in Guideline Sentencing.

A few opening salient points about Guideline practice.

While we who are present today in these hallowed chambers are privy to the inner-workings of the Guidelines of 1987, 1988, 1988 1/2, 1989 and now proposed 1990, we are not participants in all of the federal criminal cases in the 50 United States. And unfortunately, we cannot develop Guideline de-coder rings to include in lawyers boxes of Oat Bran.

Most of the participants in Federal Guideline practice have not even mastered the original Guidelines -- the complex, complicated categories, multipliers, aggravators, mitigators, etc., etc., etc.

- (1) The most constructive answer to the present-day situation is to put these amendment proposals on hold. Don't change the Guidelines; let everyone try to master them. You should, each and every one, and your entire staff, get out of Washington and visit the federal districts where they are being implemented, to find out first-hand what is going on. Watch sentencing proceedings, talk to participants, see if they truly know how to apply the Guidelines, ask for their suggestions. To use the old Railroad Crossing Maxim, we believe that the Commission should "stop, look and listen", then proceed cautiously.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

- (2) A second constructive suggestion would be for the Commission to establish a task force aimed at simplifying the Guidelines. They are extremely and unnecessarily complex.
- (3) The Commission should not propose any 1990 Guidelines amendments except for those few technical matters absolutely essential to the functioning of the Guidelines. These 88 pages of proposals lack necessary supporting background data and research. The explanations accompanying most of the amendments-- "clarification", "to even out penalties", "to better reflect the seriousness of the conduct" -- provide support for the Defender recommendation that these proposals be shelved.

We provide the following comments with regard to the specific proposals:

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

19613 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PA 19106

JUDGE EDWARD R. BECKER
CHAIRMAN

8-897-9642 (FTS)
815-897-9642 (COMM.)

VII. Concluding Comments

Since the effective date of the sentencing guidelines in November of 1987, the Commission has amended the guidelines on four occasions resulting in the incorporation of 306 amendments. The frequency and number of amendments is burdensome, not only in mastering the changes, sometimes minor and sometimes major, but also in dealing with legal issues that they generate such as the ex post facto considerations. The current notice of proposed amendments entails 70 more. I speak for my colleagues on the Committee and the federal bench as well as the U.S. probation officers that assist us in requesting that the pace of future amendments be slowed.

Beyond this general request for a substantially reduced pace of guideline amendments, I strongly urge that the Commission not promulgate any amendments at this time (this comment pertains to those addressed by Judge Kocoras as well as those addressed herein). That is because the Commission is far below its statutory complement and lacks the statutorily required three judicial members, 28 U.S.C. § 991, so that any guidelines that it promulgates may well be subject to legal challenge. The uncertainty, confusion and extra work that such challenges will create surely makes the game not worth the candle.



Washington, D.C. 20530

STATEMENT

OF

JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

Mr. Chairman and members of the Commission:

I appreciate the opportunity to appear before you to address the proposed sentencing guideline amendments. I am pleased that the proposals address a number of concerns of the United States Attorneys, including current weaknesses in the guidelines for assault with intent to commit murder and arson. While we recognize that some important amendments are needed, the United States Attorneys are concerned about the disruption caused by guideline amendments every year and the need to determine in each case which version of a guideline applies. We urge the Commission to give careful consideration to the proposed amendments and to adopt those that are necessary. I will address two areas where we believe that revision of the guidelines is necessary.

Mr. Chairman and Members of the Commission:

My name is Samuel J. Buffone. I appear today to testify on behalf of the 350,000 members of the American Bar Association in my capacity as Chairperson of the A.B.A.'s Committee on the United States Sentencing Commission. I am pleased to have this opportunity to convey the views of the A.B.A. with respect to the proposed 1990 amendments to the federal sentencing guidelines.

Our Committee has testified before the Commission on numerous occasions, and many of our comments have concerned the process by which the Commission promulgates guidelines. We have praised the Commission when its process has been most deliberative and receptive to the comments of interested observers, as in the case of guidelines for organizational defendants. But we have never hesitated to criticize the Commission when its process has been characterized by haste and inaccessibility. Today, I am compelled to convey the A.B.A.'s disappointment at the process by which the proposed 1990 guideline amendments are being promulgated. Our concerns lead us to urge that many of the proposed amendments not be transmitted to Congress.

Our position on the proposed guideline amendments is based upon our Standards for Criminal Justice (Standards). The

Standards envision a guideline process that has at its core an expert administrative agency with broad authority to draft and refine sentencing guidelines. The provisions of the Sentencing Reform Act reflect a similar view of the Commission. The Act grants broad authority to the Commission to promulgate and amend guidelines. The legislation, however, places limits on the amendment process.

The Commission is first required under 28 U.S.C. 994(x) to comply with the notice and comment procedures of the Administrative Procedures Act. 28 U.S.C. 994(o) provides authority to the Commission to amend and revise the guidelines "in consideration of comments and data coming to its attention." That same section sets out a process for solicitation of comments on the operation of the guidelines by interested segments of the criminal justice community. Finally, one of the statutory purposes of the Commission as set out at 28 U.S.C. 991(b)(1)(C) is to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."

The Standards' vision of an expert sentencing commission acting as an informed and responsive administrative agency is consistent with the Supreme Court's Mistretta opinion. In affirming the constitutionality of the Commission, the Court relied on the legislative standards for exercise of delegated authority and the status of the Commission as a true expert administrative agency.

Consistent with our view of the Commission as an expert administrative agency, we renew our suggestion that the Commission promulgate internal regulations to govern the guideline amendment process. We note that 28 U.S.C. 994(a) envisions that the Commission will promulgate and amend its guidelines pursuant to "its rules and regulations."

This model for the Commission's deliberative process also furthers another major goal recognized in the Standards. The Commission must develop the confidence of those who work in the criminal justice system. The development of institutional credibility should be a priority for the Commission. If judges, probation officers, prosecutors and defense attorneys recognize the fairness and thoroughness of the process by which guidelines are developed, implementation will be smoother.

We fear that the proposed amendments stray far from this model of decision making in at least three respects. The Commission has offered little time to respond to complex amendments. The proposals lack meaningful statements of reasons for their adoption. Perhaps most significantly, the proposals do not appear to be grounded in an empirical analysis of current guideline practice.

Turning first to the issue of timing, I wish to express the A.B.A.'s dismay at the very short comment period the Commission has established for this set of amendments. Less than 30 days

have passed since these highly complex proposals were published in the Federal Register. We are aware that the comment period will remain open until March 30, but that allows for only 42 days during which the federal bench and bar are expected to discover, decipher and comment on the significance and desirability of the proposals. This period is clearly inadequate, and may account for the paucity of witnesses at today's hearing.

It must be remembered that the Sentencing Commission is a quasi-legislative body. In the absence of Congressional intervention, this Commission writes law, but does so without the benefit of the legislative process. These proposals will probably not be the subject of committee hearings, or a committee report, or debate on the floor of the House or Senate. In light of the importance of the Commission's work, the underpublicized nature of the amendment process, and the large number of judges, lawyers and citizens who have a stake in the guidelines, it would not be unreasonable to suggest that the Commission initially circulate proposed amendments by December 15 of the year preceding the May 1 submission to Congress.

Our concern over the abbreviated comment period is exacerbated by the absence of meaningful explanations accompanying the proposed amendments. Some of the proposals are merely technical or clarifying and do not warrant an extended rationale, but many others represent far reaching changes in the structure of the guidelines and the scope of criminal punishment. Yet there is

little in the Federal Register that explains the reasoning underlying the Commission's substantive proposals. If the Commission relied on current practice data or social science research or studies of any kind in support of its work, one would not know that from reading the perfunctory explanations accompanying these proposals. As a result, it is exceedingly difficult to evaluate the need for many of the proposed amendments or their efficacy.

Many of the proposals would alter offense levels, resulting in harsher sentences. Why should this occur? Does empirical research demonstrate that current sentences are too low? Are these lengthier sentences based on a deterrence rationale or a retributive rationale, and are they justified by either rationale? In an era of dangerously overcrowded prisons, a heavy burden of persuasion rests on anyone who would advocate longer periods of incarceration, and the Sentencing Commission has not met this burden.

In the absence of supporting data or explanatory position papers, we can only assume that these amendments reflect the normative views of the four remaining Commissioners. Is robbery more serious than extortion? Is two years enough punishment for selling obscenity? Congress created a commission of social scientists, correctional specialists and judges: in short, a commission of experts. Congress anticipated that this expert commission would seek objective answers in the literature of

penology, in legal precedents, and in the experience drawn from the application of the guidelines. This commission's work product does not, as far as we can tell from this set of amendments, draw upon any of these sources.

To be sure, social science does not have all the answers -- Congress itself makes many normative judgements about the severity of criminal conduct without reference to the scholarly literature. We do not believe, however, that the Sentencing Reform Act of 1984 created the "junior-varsity Congress" Justice Scalia feared in his Mistretta dissent. The Act created an administrative agency to make decisions within legislative constraints based on technical material uniquely within the agency's ken. To justify its existence, the Commission must produce empirical research that supports each policy decision it reaches. Virtually all of the substantive amendments the Commission has proposed this year fail that basic test and therefore should not be adopted.

The proposed amendments fail a second test: they are not accompanied by research that predicts their likely effect. Specifically, they are not accompanied by prison impact statements.

The population of the federal prison system exceeds capacity by more than 50%. The Commission is not unaware of that fact but goes about its business as though it were not required to "take into account the nature and capacity of the penal, correctional

and other facilities" in promulgating guidelines. 28 U.S.C. 994(g). In fact, 994(g) mandates that the guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission." We do not know if the Commission complied with this directive, because its proposals are not accompanied by any prison impact analysis. This is another ground upon which a number of the proposals should be rejected.

Finally, the Commission is to be faulted for not encouraging the development of a common law of sentencing, one of the stated goals of the Sentencing Reform Act. There are two ways in which this goal could be furthered. First, when the Commission proposes to amend a guideline that the courts have already interpreted, the explanation accompanying the proposal should reference the published opinions on the subject. Hopefully the Commission is using the "feedback" process inherent in the guidelines system to inform its decision-making process, and interested observers should be able to comment on proposed amendments in light of the available case law. Second, there are a number of areas in which the Commission should not rush to respond to individual judicial decisions, but should instead permit courts to interpret the guidelines over a period of time. The Commission should encourage, not stifle, the ability of judges to influence the guideline system through the process of guideline interpretation.

Let me highlight three of the proposals to illustrate the concerns I have just expressed.



Washington, D.C. 20530

STATEMENT

OF

PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

Mr. Chairman and members of the Commission:

I am pleased to appear before you today to discuss the amendments recently proposed to the sentencing guidelines. We find that many of the amendments will improve the implementation of the guidelines. We applaud the Commission's efforts in several important areas, including the amendment of the arson guideline, the revisions made to the guidelines relating to child pornography, and the addition of a new criminal history category for serious offenders. These amendments will foster the purposes of sentencing set forth in the Sentencing Reform Act and assure that serious offenders are punished appropriately. We urge the Commission to adopt these amendments for submission to the Congress by May 1. There are several areas, however, where we believe further work is needed before amendments are submitted to Congress.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PROBATION OFFICE

CARLOS JUENKE
CHIEF PROBATION OFFICER

364 U.S. COURTHOUSE
P.O. BOX 012559
MIAMI, FL 33101-2559

March 8, 1990

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

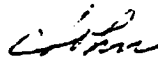
Dear Sharon:

Enclosed for your review are three copies of the letter that was directed to Judge Wilkins in reference to the findings and recommendations of the work group on probation revocations. I have sent copies directly to Jerry, Joe, Nancy and Bill. I would ask that you provide copies to Patricia and Tim. Additionally, please feel free to make copies for distribution to Rusty, Jay, Phyllis and anyone else that you feel may be interested.

There is something that you should be aware of in terms of the letter's contents. I was not the sole author. The letter was very much a group project. I wrote an initial draft of a letter. The contents of that letter were reviewed with each work group member. Several of the members felt that changes should be made. For example, two members felt that the paragraph describing the committee's recommendations as to Option Two were too tame. Consequently, stronger language was inserted at the request of these members. I point this out in case a suggestion is made that the letter was written on behalf of the committee members without their approval.

This is a highly charged issue and generates considerable personal investment for all parties. If you wish to discuss this matter further or review the letter, please do not hesitate to contact me. Thank you for asking me to participate on the committee and please do not hesitate to contact me again if you feel I may be of the slightest assistance to the commission.

Sincerely,



John M. Shevlin, Supervising
U. S. Probation Officer

JMS:mhd

Enclosures

PREPARED REMARKS OF BENSON B. WEINTRAUB ON BEHALF OF
THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL)
AT A PUBLIC HEARING BEFORE THE UNITED STATES SENTENCING
COMMISSION ON MARCH 15, 1990

Judge Wilkins and Members of the Commission:

I am a partner in the law firm of Sonnett Sale & Kuehne, P.A. with offices in Miami, Florida. My practice is substantially limited to the representation of offenders in connection with matters relating to application of the sentencing guidelines, direct appeals and habeas corpus proceedings. For the past five years I have served as the Chair or Vice Chair of the NACDL Sentencing Committee and have had the pleasure of working with members of the Commission and its staff in matters concerning drafting of the guidelines and proposed amendments. I also have the distinct privilege of serving on the Commission's Practitioners' Advisory Group.

In preparing these remarks, I have considered the consensus of opinion on behalf of the constituency which I am pleased to represent, more than 20,000 criminal defense lawyers who practice in every State and Federal District throughout the nation.^{1/} Quite candidly, my colleagues have not only expressed substantial objections to the guidelines generally but to these amendments specifically.

^{1/} NACDL is the only national bar association devoted exclusively to the defense of criminal cases. Its goals are to assure justice and due process for persons accused of crime, to foster the independence and expertise of the criminal defense bar, and to preserve the adversary system of criminal justice. The membership of NACDL and its 40 State and Local affiliates includes criminal defense practitioners, public defenders and law professors.

I will comment on salient portions of the proposed amendments. At the outset, however, I must relate certain procedural objections to the Commission's rulemaking process. Under 28 U.S.C. §994(x), Congress deemed the notice and comment provisions of the Administrative Procedure Act applicable to the Commission's rulemaking function. 5 U.S.C. §553. However, the APA merely provides that "general notice of proposed rulemaking shall be published in the Federal Register" and such notice shall include the time and place of the public hearing and the subject matter of the agency's proposals. Parties interested in preparing substantive comment, testimonial or otherwise, have simply had insufficient time within which to prepare for today's hearing.

NACDL concurs with those who have expressed the position that proposed amendments being considered for the May 1st submission to Congress should be circulated and published no later than December 15th of the preceding year. Interested parties should be provided with annotated versions of the full text of any proposals at the time of the notice.

Before addressing the substantive proposals, those members of NACDL who have studied the amendments have identified several relevant themes of general application.

First, the Commission is dutybound to conduct extensive empirical research in monitoring sentencing trends under the guideline system in order to best reflect how the new process is working. Prior to undertaking development of the initial set of guidelines, the Commission reviewed previous sentencing practices

through statistical analysis based upon summary reports of approximately 40,000 convictions and 10,000 Presentence Investigation Reports.^{2/} As one of our colleagues succinctly stated, "If the Commission relied on current practice data or social science research or studies of any kind in support of its work, one would not know that from reading the perfunctory explanations accompanying these proposals." Consequently, it is difficult, if not impossible, to evaluate the need for many of these amendments based upon the Commission's generalized statement of reasons published in the Federal Register. Similarly, we have not discerned any evidence that the Commission has or is considering guidelines which "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. §991(b)(1)(C). Moreover, since the vast majority of substantive changes appear to lengthen the amount of actual prison time required to be served under the guidelines, we have not been made aware of substantial evidence indicating that the Commission has complied with its statutory mandate to consider the impact of the guidelines and amendments on prison population. See generally 28 U.S.C. §994(g).

^{2/} Interestingly, NACDL has been seeking access to the Commission's raw data for several years, especially that data upon which the original set of guidelines was based. NACDL has sought to avail itself of the Commission's rule relating to public access to Sentencing Commission documents and data and we have been consistently frustrated in accessing specific data concerning FPSSIS through the Inter-University Consortium for Political and Social Research.

Through these amendments, the Commission seeks to further limit the traditional exercise of the Court's discretion at sentencing by proposing changes to guidelines where the Court might otherwise employ a departure in an appropriate case. These sweeping changes are too broad and remedial action, if indicated, can frequently be obtained through departure.^{3/}

As a final introductory note, NACDL has noted with interest the apparent impact of the Department of Justice on this judicial agency. This is best seen through a full-time staff position occupied by an AUSA. Why not have a full-time defense advocate serve on the Commission's staff to contribute much needed insight and balancing to the deliberative process?

Proceeding to the merits, I will address certain amendments which have been proposed. However, no inference should be drawn with respect to any amendment which is not specifically addressed as we have not had sufficient time within which to prepare a comprehensive response.

^{3/} According to the Commission's 1988 Annual Report, 82.3% of all sentences imposed were within the guidelines; 2.91% were above; 9.1% were below; and 5.7% of the sentences were below the guidelines based upon USSG §5K1.1. Does the Commission believe that the departure rate is too high? Too low?

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

CHAPTER 1 -- Part A (Introduction)

4(b), Departures, at Page 8,

In rewriting the provision, the Amendment deletes two sentences from Page 7 of the Guidelines that should be retained:

Thus in principle, the Commission by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the court's departure powers.

They should be retained to permit the courts, where necessary, to fashion justice through a departure, which will then be channeled back to the Commission for a better understanding of how the Guidelines are functioning. This is just the type of information the Commission needs as a basis for implementation of future amendments.

4(c), Plea Agreements at Page 9

The rewrite Amendment deletes the last sentence from page 8 of the Guidelines:

Since they will have before them the norm, the relevant factors (as disclosed in the

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plea agreement), and the reasons for the agreement, they will find it easier than at present to determine whether there is sufficient reason to accept a plea agreement that departs from the norm.

This should be retained. The Commission should not discourage proper departures. They should be utilized, where appropriate, as the type of experience that can form the basis for constructive amendments in the future.

(g) Sentencing Ranges, at Page 12

The rewrite Amendment neglects to update the prison population numbers and projections. We propose the revised numbers. As of 11-1-87, Federal Prisons were at 159% of capacity; as of 3-12-90, they are at 168% of capacity. Inmate numbers have gone from 44,000 to 55,000.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 1. This amendment would revise the introductory chapter of the guidelines. This appears to be an unwise amendment. Chapter One is a historical account of the initial guideline promulgation process, and any changes in it, even if not intended to be substantive, will be interpreted as a change in the key compromises underlying the guidelines. The topics discussed in Chapter One include real offense sentencing, plea bargains, departures and consideration of offender characteristics. The Commission should send only the clearest signals in these important areas, and indeed should address each topic comprehensively. The proposed amendment of Chapter One may be read as an attempt to address these subjects through indirection, a problem complicated by the absence of meaningful statements of reasons throughout the amendment package.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

1. Reference to the proposed amendment to Chapter One, Part A is correlated with the pagination of the December 16, 1989 draft of "1990 Amendments 001" at 1.7. Under subsection "(b) Departures.," NACDL feels it would be inappropriate to delete the language: "Thus, in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure." The next sentence should also remain and be modified to reflect: "At this time, however, the Commission does not so limit the courts' departure powers." The spirit of full faith and credit, without limitation, should be accorded the concept of "'judicially-created' departures." United States v. Summers, 893 F.2d 63 (4th Cir. 1990) (Wilkins, J.). 18 U.S.C. §3553(b). Judicially created departures may sometimes override the Commission's self-imposed limitation on the availability and extent of departures purportedly proscribed by USSG §§5H1.1-.10.

Regarding the second full paragraph of 1.8, "(c) Plea Agreements.," we feel that the elimination of the last full sentence is unwarranted ("Since they [Courts] will have before them the norm, the relevant factors (as disclosed in the plea agreement), and the reason for the agreement, they will find it easier than at present to determine whether there is sufficient reason to accept a plea agreement that departs from the norm.") 1.8-1.9.

Elimination of this sentence would be inconsistent with the spirit of 18 U.S.C. §3553(b).

As a general observation with respect to plea agreements, the prosecutors' unbridled ability to manipulate the guidelines through charging decisions is capable of gross abuse. This position is in marked contrast to the statement at 1.6 (last paragraph, second sentence) which states "Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence." Ibid. (emphasis supplied). That statement is erroneous because the standard of evidence relating to a finding of guilt radically differs from the standard governing resolution of disputed facts or factors relevant to sentencing. Moreover, through multiple count charging, the prosecutor can immediately upgrade guideline units and bring relevant conduct within the scope of the count to which the defendant may plead guilty pursuant to a plea agreement. The Commission must proceed cautiously and carefully, taking into account the views of both prosecutors and defense lawyers regarding the effect of the guidelines on plea practices.

The Commission purports to have considered the "Sentencing ranges in light of their likely impact upon prison population." 1.11. However, we feel that it would be disingenuous to rely upon data generated in 1987 with respect to current and future prison population, particularly in view of the guideline amendments and legislative changes which have taken their course in the interim.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

CHAPTER 1 -- Part B

2, Page 13 -- §1B1.8(b)

We object to the proposed amendment to §1B1.8(b) that creates a new subdivision (2) that would permit the use of information provided under cooperation to raise that individual's criminal history score.

The protections provided to a defendant by the cooperation agreement are destroyed by this exception. Contrary to the Reason for Amendment, Application Note 2 currently speaks of determination of criminal history adjustments from the probation interview -- not from this cooperation interrogation. This Amendment should be deleted. Indeed, the Commission should act to clarify, that in view of Fed. R. Crim. P. 11 and F.R.E. 410, any such use should be prohibited.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 2. We view with disfavor any attempt to narrow the scope of 1B1.8. This important guideline serves to encourage defendants to cooperate with the government, and the current amendment runs counter to this important policy goal.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

2. USSG §1B1.8. NACDL strenuously opposes the modification and in its place offers a proactive amendment proposal. This amendment unnecessarily serves to vest even more discretion than before in the prosecutor. By requiring the contours of USSG §1B1.8 to be construed only in the context of a plea agreement, even more so than through the existing provision, it unfairly and adversely impacts upon a defendant seeking to cooperate and plea bargain in good faith by allowing statements to be admitted into evidence in the Government's case-in-chief should the plea negotiations break down.

In a case in which I was recently consulted, immediately upon his arrest a defendant made uncounselled statements regarding the nature and extent of his activities and the activities of others in an attempt to cooperate. Ultimately, the case proceeded to trial and the defendant's statements came into evidence notwithstanding a motion to suppress. The defendant was told by an FBI Agent at the time that it would be in his "best interest" to waive his Miranda rights and tell all he knows. An Assistant United States Attorney was on the arrest scene and took the statement. Subsequent plea negotiations through counsel for the defendant and the government never reached fruition and the FBI Agent testified at trial as to the defendant's statements regarding

an additional load of drugs about which the government had been unaware. The impact upon the sentence as well as the conviction is self-evident.

This is fundamentally unfair and, in our view, contrary to the plain terms of Rule 11(e)(6), F.R.Cr.P. ("Inadmissibility of Pleas, Plea Discussions and Related Statements") and Rule 410(f), F.R.Cr.P. which excludes "any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty...").

While the proposed changes appear minor, USSG §1B1.8 needs to be strengthened rather than weakened to give substance to the principles which lead to its enactment in the first instance. The guideline assumes that a plea agreement or cooperation agreement has already been executed. In many instances, the Defendant, with or without counsel, must make an instant decision to cooperate even in the absence of an agreement. To encourage early cooperation rather than to penalize it, statements made by a Defendant in this regard should never affect the guideline calculations except as provided in the existing provisions of subsection (b).

The guidelines should be amended to expressly provide, in the text rather than through the Commentary, that statements made by a Defendant pursuant to this section "shall not be used in determining the applicable guideline range or as a basis for upward departure or adjustment expect under USSG §3E1.1."

The proposals codified at subsection (b)(2) and (b)(4) should not be adopted. Since the Commission recognizes in the Commentary that the Defendant's prior conviction(s) will generally

be obtained from the USPO "independent of information the Defendant provides," such information from the Defendant should not be used in computing the guidelines absent official documentation. Regarding the proposal to subsection (b)(4), the caselaw is replete with instances of the Government breaching plea agreements. Therefore, a Defendant should not be penalized in [further proceedings] by having statements made under USSG §1B1.8 rendered admissible in the event that the Court determines the Government has breached the agreement and the plea is vacated.

NACDL is aware that USSG §1B1.8 should be read in conjunction with 18 U.S.C. §6002 regarding immunity. However, the policies and social interests furthered by the guideline and the statute are separate. In summary, NACDL opposes the proposed change to USSG §1B1.8 and urges the Commission to expressly include language indicating that statements made under this section (1) need not be governed by a cooperation agreement, particularly in the absence of counsel; and (2) statements made pursuant to this section shall not be used in computing any adjustment or departure under the guidelines with the exception of USSG §3E1.1.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

3, Page 14 -- §1B1.3

We object to this Amendment. Further, we believe that the Commission should revisit the issue of Relevant Conduct under §1B1.3 and other provisions. Specifically, we object to convicting and sentencing a defendant for conduct based on hearsay, secondhand statements.

Example:

A defendant pleads guilty to possession of 1 ounce of cocaine. A D.E.A. agent says he heard that defendant told an informant that

he would deliver 5 kilograms. The defendant is sentenced for 5 kilograms and an ounce because the district judge found by a preponderance of the evidence that this could happen.

We believe that the Commission should raise the standard of evidence required to include, in creating the sentencing range, conduct beyond the offense of conviction. We suggest that the Commission should require, at minimum, clear and convincing evidence.

Unlike pre-Guidelines sentencing, where the Judge had the option to take other conduct into account, now, when the Probation Officer plugs the unconvicted conduct into the Guidelines, the Judge must sentence in the Guideline range for 5 kilos and 1 ounce.

This is clearly the single, most significant fairness issue raised by the Guidelines and these amendments. We hope that the Commission will respond affirmatively to the Federal Defender suggestion and raise the evidentiary standard to clear and convincing.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

3. . NACDL opposes the modification to USSG §1B1.3. The hypothetical in the proposed "Application Note" assumes that the Government can establish, by an appropriate quantum of proof, that all alleged acts and omissions would constitute factors which warrant consideration under the multiple counts rule. In this regard, it is NACDL's position that disputed facts or factors relevant to sentencing should be established by the Government under the standard of clear and convincing evidence. Finally, NACDL is not unmindful of the Ninth Circuit's action granting en banc consideration in the matter of United States v. Restrepo, 883 F.2d 781 (9th Cir. 1989).

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

4. Page 15 -- §2A2.1

We object to this Amendment which significantly raises the Guidelines levels for this offense.

There is no documented information provided that supports this increase, i.e., upward departures, correspondence from judges, and surveys of guideline sentencing for this offense.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 4. This amendment would increase the penalty for attempted murder and assault with intent to commit murder. Because the proposed amendment is not accompanied by a meaningful explanation of the need for this change, the proposal should be rejected.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

4. NACDL opposes inclusion of USSG §2A1.5 as a new guideline. The proposed base offense level, 28, appears arbitrary. Has the Commission considered sufficient empirical data to justify this new guideline and base offense level? The same comment applies to USSG §2A2.1.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

5, Page 16 -- §2B1.1

We object to the staff's suggestion here, and in subsequent provisions that the so-called anomolous differential among these statutes should be cured by raising the lower base offense level (BOL) to the higher BOL. Since three provisions contain the lower BOL and only one provision the higher, why not bring down the higher to correct the anomaly?

The "Reason for Amendment" provides no comprehensible justification.

STATEMENT OF
SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 5. The Commission has discovered an anomaly in the operation of several larceny-related guidelines. Certainly an amendment is

justified to correct this anomaly, but the explanatory paragraph does not tell us why the Commission chose this "fix." Specifically, why has the Commission chosen to conform the lower offense level in sections 2B1.1, 2B1.2 and 2B1.3 to the higher offense level in 2B5.2 instead of lowering the offense level in 2B5.2? Perhaps there is a technical drafting reason why the anomaly was corrected in this manner, but the Commission has not provided it.

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ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

5. Noting the "anomalous" result, why not employ the principle of parsimony by resolving the differences through application of the lower level for purposes of conformity?

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

6, Page 17 -- §2B1.1

We object to the Amendment inserting a new Application Note 3 that eliminates even the present-minimal standard for the court ascertaining the loss. The proposed new standard, is "only make a reasonable estimate of the range of the loss".

The "Reason for Amendment" says that this "clarifies Application Note 3." We beg to differ -- it completely eviscerates it. Present Note 3 speaks of "reasonably reliable information" -- something tangible and meaningful. The proposed "reasonable estimate" sets no standard of reliability for the information.

We believe that the Guidelines should clearly state that the parties have a right to a hearing on the issue of loss when that factor is in dispute.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

6. With specific reference to proposed Application Note 3, this appears to further dilute the standard of evidence applicable to the resolution of factual disputes. Again, NACDL urges adoption of the clear and convincing evidence standard. Notwithstanding this position, the Commission's use of the term "reasonable estimate" does not even appear to satisfy the preponderance standard through critical indicia of reliability.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

7, Page 18 -- §2B1.3

This provision alters charged-based sentencing to offense-based sentencing. Any such Amendment should be tied to the "clear and convincing" standard of evidence, previously discussed.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 7. This amendment alters the Property Damage guideline, 2B1.3, in a manner that provides for real offense sentencing in cases of arson. Previously, the Commission had treated arson as a charge-based guideline: a defendant would have to be convicted under the specific criminal statute prohibiting arson before being punished for arson. That may or may not have been a wise policy - the arguments for and against real offense sentencing are highly complex and therefore beyond the scope of these comments -- but it was where the Commission had drawn the line.

A one sentence explanation says that the Commission now considers the difference between property damage and arson to be analogous to the difference between robbery and armed robbery. This explanation begs several questions: What principles underlie these distinctions? What research supports them? What has the experience been with the current real offense/charge offense distinctions? Is this part of a broader movement toward real offense sentencing and, if so, what is the likely impact of that shift on the federal criminal justice system? The Commission should explain such an important policy shift, and until it does so the status quo should be maintained.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#10, Page 19 -- #2B3.1

This increase for multiple robbery offenses comes on top of last year's increase. The Commission's staff has not even been provided time to gather experience under last year's change.

Have there been upward departures in these types of cases? If yes, on what grounds? Again, the staff has not provided the necessary background data.

Neither option is appropriate.

Again, if any change is made, the clear and convincing evidence standard should apply to all "non-conviction" offenses.

STATEMENT OF
SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 10 presents two options for amending the robbery guideline. Both options would alter the core of the Commission's widely-advertised modified real offense sentencing system by making 2B3.1 a pure real offense guideline. The explanation accompanying this major change is wholly inadequate and both proposed options should be rejected.

In the initial set of sentencing guidelines, the Commission explained with great clarity the all-important choice it faced between real offense and charge offense sentencing. In promulgating what it termed a modified real offense sentencing system, the Commission resolved a difficult issue in a reasoned, justifiable fashion. As Judge Breyer has written: "One may argue about the wisdom of the line the Commission has drawn, but we cannot say that the Commission has not drawn it." U.S. v. Blanco, 2 Fed. Sent. R. 144, 147 (1989). To continue Judge Breyer's

metaphor, if the Commission now chooses to move the line, it must explain why.

Most notably, the explanation does not inform the reader that the base offense level in 2B3.1 was raised in the last set of amendments partly in response to the argument that the then-current base offense level did not adequately reflect the case in which a defendant convicted of a single bank robbery has in fact committed multiple robberies. Now, a specific offense characteristic is proposed on precisely the same grounds to augment the increased base offense level.

Both proposed options are defective. Option 1 would make this an exceedingly real offense guideline, because the offense of conviction would not even serve as an anchor for the court's consideration of other robberies. Thus, if the defendant were convicted of a bank robbery corresponding to level 21 but was found by a preponderance of the evidence to have committed a bank robbery corresponding to level 27, the operation of the multiple count rules would, in effect, require the court to use 27 as a base offense level. In short, the defendant's sentence for the level 21 robbery would not be augmented by a post-verdict finding that he engaged in a level 27 robbery; instead, he would be punished for a level 27 robbery that had never been proved beyond a reasonable doubt. This amendment is possibly unconstitutional, probably unwise, and certainly lacking a rationale.

Option 2 seems overbroad. This option would not even limit the court's consideration to robberies committed as part of a common scheme or plan with the offense of conviction. In light of its stated purpose, the option is also poorly drafted, because an individual convicted of one robbery would be worse off than an individual convicted of two robberies, because the latter, unlike the former, would not receive an augmented sentence even if both had committed many additional robberies.

The explanatory paragraph accompanying item 10 does not sufficiently explore the real offense/charge offense implications that flow from either option. For that reason alone, the amendment should be rejected.

These examples demonstrate the hazards of amending the guidelines in a vacuum. The issues raised by the proposals are central to the operation of the guideline system, but the Commission has either not considered these ramifications, or has not made public its decision-making process in a manner that would facilitate useful public comment. In either event, the Commission has not fulfilled its statutory responsibilities and should therefore refrain from making these substantive changes in the guidelines this year.

My written submission contains comments about several other proposed amendments. I would note, however, that our ability to comment on the proposals in a thoughtful, comprehensive fashion

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has been hampered by the abbreviated comment period, the absence of meaningful explanatory statements, and the lack of supporting data. Indeed, many of the comments we have submitted are based upon these very troublesome process issues I have already raised.

At this point I would be pleased to answer your questions.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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

A. Amendment 10. I appreciate the Commission's concern to make sure that punishment adequately reflects multiple robberies, but I caution against moving too far towards "real offense" sentencing and away from the "modified real offense" approach that underlies most of the Guidelines. Option 1 takes the extraordinary step of treating as an offense of conviction (for purposes of multi-count analysis) offenses that did not result in conviction and may not even be charged offenses. And in doing so, it would result in having the multi-count analysis start with the offense level for the most serious of the robberies, even though that one was uncharged. That approach not only undermines the basic approach of the Guidelines but also poses an undue deterrent to plea bargaining. If option 1 is nonetheless preferred, I suggest it be modified so that the multi-count analysis always starts with the offense of conviction. However, I think option 2 is preferable, provided it is limited, as option 1 is, to robberies committed as part of the same course of conduct or common scheme as the offense of conviction. Without this limitation, robberies would become pure "real offense" sentencing, and hearings would be held as to all prior robberies, regardless of when or where they occurred. That is an undue burden on sentencing courts.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

10. NACDL does not support either of the options proposed.
See NACDL comment at item 3, supra.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#11, Page 20 -- §2B3.2

We object to raising the extortion BOL to that of robbery. There are significant differences between the two offenses; robbery is more serious as the Commission recognized in raising

that BOL in 1989. The "Reason for Amendment" provided by the staff, to conform it to robbery, is not a valid justification.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 11. This amendment conforms the base offense level for extortion to the higher base offense level for robbery. Faced with a choice between increasing or decreasing offense levels to smooth out unintended disparity, the Commission should be guided by the rule of lenity that governs courts in other areas of the criminal law. This amendment appears based on a rule of severity: when in doubt, increase punishment.

4

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

11. NACDL opposes the two level increase. See comment 5,
supra.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#12, Page 12 -- §2B1.1

The Commission should define "substantially" in such a way as to carry out Congress' intent to limit this punishment to major episodes of criminality. We assume this would not apply to the teller whose \$10,000 embezzlement pushed the bank to insolvency.

Further, why is level 24 selected; to what other offense is it comparable? Again, a reason has not been provided.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 12. Congress instructed the Commission to provide for a "substantial period of incarceration" for certain fraud offenses. How did the Commission arrive at an offense level of 24? That offense level is the offense level that would be assigned to someone who had stolen \$20 million. Has research demonstrated that \$20 million is the "heartland" theft in such bank fraud cases? Or is this a normative judgment that five years (level 24, criminal history category 1 results in a guideline range of 51-63 months) constitutes a "substantial period of incarceration?" Clearly the Commission must respond to the congressional directive, but in the absence of research or explanation, and in light of the rule of lenity, it is hard to see why the offense level should be 24 rather than, for example, 20.

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BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

12. NACDL believes that there is insufficient empirical data to justify the proposed specific offense characteristic relating to federally insured financial institutions. We believe that the Commission's statutory mandate to consider this factor might best be served through a departure under appropriate circumstances. Moreover, this proposed specific offense characteristic appears to be inconsistent the principle of parsimony codified at 18 U.S.C. §3553(a). See United States v. Denardi, 892 F.2d 269 (3d Cir. 1990) (Becker, J., concurring in part and dissenting in part).

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 14. The Commission is to be commended for a fairly thorough explanation of this issue, and for citing a court decision that addresses the issue. The Third Circuit's approach in Gurgiolo seems reasonable. The second option suggested by the Commission would undermine sound legislative judgments about the relative harmfulness of different controlled substances.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#15, Page 23 -- §2D1.2

We believe that §2D1.2 should be amended to distinguish cases in which only a portion of the drugs involved meets the criteria of this guideline. The specific facts of each episode should determine the BOL.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#16, Page 23 -- #2D1.6

We object to this change uncapping the BOL for this crime.

The "Reasons for Amendment" assumes, incorrectly, that United States Attorneys are not following Attorney General Thornburg's memorandum and other Justice Department orders to engage in "honest" plea bargaining.

The "reasoning" in the last paragraph on Page 24 states, incorrectly, that a prosecutor can reach a desired result by a "stipulation" to the underlying conduct. That is not accurate, since any such stipulation is not binding on the Probation Officer or the Court.

Again, the "Reason" lacks supportive data, other than an undocumented suspicion of improper plea bargaining.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 16. This amendment presents a similar real offense/charge offense issue as Items 7 and 10 and should be rejected for the reasons stated in the body of the testimony.

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BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

16. NACDL strenuously objects to correlating the base offense level of USSG §2D1.6 with the offense level from USSG §2D1.1. NACDL expressed strong opposition to this amendment last year. In practice, prosecutors rarely agree to charge bargaining for a telephone count in large scale cases. However, the window should be left open for plea bargaining under this guideline for an appropriate case. Quantity and quality can still serve as a basis for departure without overly restricting the application of this guideline.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#17, Page 25 -- §2D1.11

Comment will be provided in the March 30, 1990, Final Paper.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 17. The 1988 drug bill created several new offenses for which the Commission is now promulgating guidelines. This particular proposal appears to lack proportionality: under the draft guideline, a defendant will receive the same punishment for possessing certain paraphernalia, such as drug scales, as if convicted of conspiracy to distribute drugs. Since the conspiracy guideline already results in the same punishment for conspiracy to distribute drugs as for actual distribution, these three different acts, each corresponding to different levels of harm and different degrees of culpability, result in equivalent punishment. This policy runs counter to established principles of proportionality and deterrence.

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BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

17. The proposed new guideline, USSG §2D1.11, appears to lack proportionality because a Defendant merely possessing "certain equipment" e.g. scales, paraphernalia, etc. would be held as accountable as a principal involved directly with narcotics. The social harm which this amendment addresses is different from other provisions of the ADAA.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#19, Page 26 -- §§2F1.1

We object to the change in Application Note 8 which eliminates any standard for proving loss.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

19. See comment 6, supra.

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

19613 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PA 19106

JUDGE EDWARD R. BECKER
CHAIRMAN

8-597-8642 (PTS)
213-597-8642 (COMM.)

I. Comments Relative to The Structure of the Sentencing Guidelines

- § 2G2.2: Transporting, Distributing, Receiving, Possessing with Intent to Sell, or Advertising to Receive Material Involving the Sexual Exploitation of a Minor
- § 2K2.6: Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition by Convicted Drug or Violent Felon
- § 2L1.1: Smuggling, Transporting, or Harboring an Unlawful Alien

The organization of the Guidelines Manual designates distinct functions to the chapters. Chapter Two provides guidelines tailored to specific types of offenses, focusing on the offense behavior of the case to be sentenced. Chapter Three addresses universal adjustments common to all offenses. Criminal History determinations are presented in Chapter Four. However, in each of the three proposed amendments listed above, there are specific offense characteristics addressing prior criminal conduct within the Chapter Two guideline. In order to retain the integrity of the structure of the guidelines, it would appear that such prior criminal conduct considerations would be more properly addressed in Chapter Four. Although I am doubtless missing something, in which case you will correct me, save for the Career Offender Guidelines, also contained in Chapter Four, I know of no instance where prior criminal history affects offense level. I fear that the proposals will cause confusion, as well as skew the guidelines structure.

In sum, in developing the procedures to determine a defendant's criminal history score, the Commission decided that points are assigned based upon the sentence imposed rather than the substance of the offense of conviction. The proposed specific offense characteristics in the three referenced amendments incorporate sanctions for the nature of a prior offense(s) or criminal conduct. If the Commission is now seeking to incorporate sanctions for the nature and essence of prior criminal behavior, perhaps a more comprehensive approach can be developed within Chapter Four, rather than piecemeal in certain Chapter Two guidelines.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#23, Page 29 -- §2G2.2

We object to the increased penalties for this non-violent conduct wherein selling certain obscene materials would result in more severe punishment than the commission of some robberies (BOL 20).

The "Reason for Amendment", at Page 31, states only the need to better reflect the severity of more grievous offenses. Again, the Commission's staff has not provided justifiable background or supportive material.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#24, Page 31 -- §2G3.1

We object for the same reasons set forth in #23.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Items 23 and 24 would, if adopted, result in dramatically increased punishment for the crime of selling obscenity. The sole published rationale for this change is "to better reflect the severity of more grievous offenses." To be sure, many consider the sale of obscenity to be grievous conduct, but who is to say that the current guideline does not adequately reflect that fact? Are there cases in which courts have departed upward from the current guideline? Are there sentencing opinions in which judges have complained about the leniency of the guideline? Has the Commission conducted a survey of current obscenity sentencing practices? Has there been an increase in the sale of obscenity within federal jurisdiction since the current guideline became effective in November, 1987?

This proposal would provide for extraordinarily long periods of incarceration for non-violent conduct. Selling certain obscene materials would result in more severe punishment than committing most robberies. Specific offense characteristic (b)(3) in proposed 2G2.2 is especially troublesome, because it expands the real offense concept to unrelated conduct, no matter how remote in time. The Commission alludes to, but does not cite, social science research concerning a correlation between sexual abuse and selling obscenity.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

The Commission's failure to provide all but the most boilerplate rationale for this proposal leads to the conclusion that it is not based on legal or penological research but instead has emerged, Athena-like, from the heads of four Presidential appointees sitting around a table in Washington. The Federal Communication Commission does not award broadcast licenses on such a basis. The Food and Drug Administration does not regulate new medications on such a basis. The United States Sentencing Commission should not increase punishment on such a basis.



CDL

April 6, 1989

Honorable William W. Wilkins, Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue NW, Suite 1400
Washington, D.C. 20004

Dear Sir:

I serve as General Counsel of Citizens for Decency through Law, Inc., a national, non-profit legal organization devoted to assisting police and prosecutors to enforce constitutional laws prohibiting obscenity and regulating pornography. Since 1957, CDL has been involved in all aspects of the fight against pornography, but especially in providing expert legal assistance to allow communities, cities, states and the federal government to take effective action against illegal activity involving pornography.

Because the proposed sentencing guidelines for pornography offenses are so lenient they will be ineffective in dealing with this organized-crime controlled industry, we oppose the proposed amendments.

Citizens for Decency through Law, Inc., assisted Congress in drafting the federal pornography statutes affected by these guidelines. Indeed, on several occasions CDL provided expert testimony in Congress. Memoranda of law authored by CDL's legal staff were entered into the Congressional Record as bedrock support for these laws on three separate occasions. CDL has submitted amicus curiae briefs in every case before the Supreme Court involving obscenity or pornography for the last three decades. In addition, CDL currently represents a 4-year-old victim of dial-a-porn in a \$10-million lawsuit against the pornographic message provider and Pacific Bell. The child was molested by a 12-year-old boy after he listened to two-and-a-half hours of explicit sex messages. CDL has hundreds of affiliated citizen organizations around the United States with thousands of members, and hundreds of thousands of contributors. These supporters were instrumental in motivating Congress to pass the above legislation.

The proposed sentencing guideline amendments, No. 126 (distributing obscene matter), No. 127 (obscene telephone

Honorable William W. Wilkins
April 6, 1989
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communications) and No. 128 (broadcast obscenity), would be completely ineffective in deterring and punishing violators of these statutes. By taking the teeth out of these criminal laws, the amendments would in one fell swoop negate the years of work that went into this legislation -- by the Attorney General's Commission on Pornography, by citizen and community leaders, and by many members of the Senate and House of Representatives. Most importantly, the amendments would frustrate the will of Congress, which overwhelmingly passed the Child Protection Act in response to demonstrated and serious national problems.

IMPORTING, MAILING OR TRANSPORTING OBSCENE MATTER

The base offense level of 6 for "Importing, Mailing, or Transporting Obscene Matter," is ridiculously low for what always has been considered a very serious offense. These laws have traditionally been aimed at preventing huge interstate shipments of obscene material. And it is the consensus of law enforcement officials nationwide that there is no major interstate distributor of hard-core pornography who is not affiliated with or directly controlled by organized crime. (See generally Attorney General's Commission on Pornography Final Report, Vol. II at 1037-1238). Organized crime is not likely to be deterred from engaging in an \$8 billion annual industry by a sentence of six months probation. Most states have higher penalties for transporting obscene material into the state than for selling it within, and virtually all of those states punish the crime more severely than under these proposed guidelines.

Additionally, making the penalty dependent on the volume of obscene materials transported along with whether transported for "pecuniary gain," forces the government to prove for purposes of sentencing two elements not relevant to whether the statute has been violated. This is inadvisable, for in a very real way this has the effect of amending the statute. So too with the proposed increased penalties if the material depicts sado-masochism or violence. Sado-masochism is not an element of the test for obscenity. The Congress has not determined that sado-masochistic obscenity is more heinous than other forms of obscenity; neither should this commission. All obscenity is heinous, and should be treated more seriously than by these proposed guidelines.

OBSCENE TELEPHONE COMMUNICATIONS FOR A COMMERCIAL PURPOSE

Interestingly, where the transportation of obscene material penalties are increased if for "pecuniary gain," the

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penalty for telephone obscenity remains Level 6 even though the entire telephone pornography industry is engaged in the business for pecuniary gain. If pecuniary gain is important in transporting obscene materials so that the penalty can become much higher than Level 6, why is the penalty for obscene telephone communications not higher?

Again, the problem is that this commission apparently does not believe obscene telephone messages to be a serious problem, despite the clear concern expressed by Congress for the victims of telephone pornography, most frequently children. The increase by a mere two levels for dissemination to a minor is outrageous considering the documented harms associated with this activity, including those suffered by our client in the above-mentioned case. The exemption if the defendant took "reasonable action" to prevent access by minors or relied on such action by the phone company is equally outrageous, and almost certainly broad enough that no one will be sentenced according to this provision. And again, there is an unnecessary and unwarranted increase in levels if the material is sado-masochistic. Why is a description of orgasms achieved by sex with animals, or through defecation and urination, treated less severely than descriptions of someone being spanked in conjunction with sexual activity?

The telephone pornography business is a multi-million dollar industry that will not be affected in the least by laws which carry such impotent penalties.

BROADCASTING OBSCENE MATERIAL

In the broadcast medium, along with telephone pornography, we have the greatest possibility that children will be in the initial audience -- much more so than with material sold in sexually oriented businesses. Those who are responsible for disseminating harmful, illegal and obscene sex scenes in such a reckless manner must be dealt with harshly, certainly more harshly than under these proposed amendments. Also, the broadcasting industry is obviously engaged in business for pecuniary gain, yet in this area again, that does not seem to affect the commission's thinking -- the punishment remains at Level 6. And as discussed previously, CDL does not support separate categories of penalties based on the type of illegal obscenity being disseminated.

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CONCLUSION

CDL urges this commission to reconsider its proposed guidelines in the above-discussed areas, and increase considerably the penalties for violations of these important federal laws. Passing these proposed amendments as currently written will have two primary effects:

(1) federal prosecutors will not seek to enforce these laws, knowing that the penalties are so weak as to not have any effect on the illegal activities; and

(2) no distributor of obscenity, no company that sells telephone sex messages, and no broadcaster of pornography will alter their behavior in an attempt to comply with the law, but will view any potential penalties as minor and incidental costs of doing business.

The law will be unenforced by prosecutors and ignored by the industry. Hence, the victimization of women and children by pornographers will continue unabated. The Child Protection Act might as well never have been passed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Benjamin W. Bull". The signature is fluid and cursive, with the first name "Benjamin" and last name "Bull" clearly distinguishable.

Benjamin W. Bull
General Counsel



Children's Legal Foundation

"protecting the innocence of children"

March 22, 1990

Paul K. Martin
Communications Director
U.S. Sentencing Commission
1331 Pennsylvania Ave., N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Martin:

I am writing in reference to the proposed amendments to the federal sentencing guidelines, in particular, Amendments 22, 23, and 24 concerning child pornography and adult obscenity offenses.

Children's Legal Foundation, Inc. (CLF), formerly Citizens for Decency through Law, Inc., is a non-profit legal organization founded in 1957. The Foundation exists to assist public officials in the enforcement and drafting of constitutional obscenity and child pornography laws. CLF provides public information on legal and social issues related to pornography, and on sexual exploitation and victimization by pornographers. The Foundation has a legal staff of attorneys practicing exclusively in the First Amendment/pornography area. CLF has more than 120 affiliated chapters across the nation representing approximately 100,000 supporters.

CLF supports any increases in penalties for violations of the obscenity and child pornography statutes. Department of Justice statistics describe the pornography industry as a \$9 billion annual revenue enterprise controlled by organized crime -- indeed, their third most profitable enterprise behind only gambling and narcotics. Because of that, the Foundation strongly endorses any increases in these penalties, which might give federal prosecutors incentive to vigorously enforce the statutory provisions and which might deter the pornographer by increasing his risk of doing business.

CLF believes that overall the obscenity base offense level of "6" is too low to adequately confront this organized crime problem. I am attaching copies of two letters previously sent to the Commission addressing our concerns and advocating increased penalties. CLF respectfully requests that the arguments and recommendations contained therein be considered again.

Paul K. Martin
March 21, 1990
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CLF approves of the change to include in the sentencing consideration a defendant's prior history of sexually abusing minors, found in Amendment 23. The Attorney General's Commission on Pornography pointed out: "The great bulk of child pornography is produced by child abusers themselves in largely 'cottage industry' fashion, and thus child pornography must be considered as substantially inseparable from the problem of sexual abuse of children." [Final Report, p.68, Rutledge Hill Press]. Much of child pornography involves photographs taken by child abusers themselves, and which is then either kept or traded with other child abusers. An excellent summary of the unique subculture of child pornography and child abusers is found in Chapter 7 of the Final Report of the Attorney General's Commission on Pornography, a copy of which is attached.

Statistically, a defendant convicted of distributing or possessing child pornography is highly likely to be a child abuser, and also a pedophile. "Child pornography plays a central role in child molestations by pedophiles, serving to justify their conduct, assist them in seducing their victims, and provide a means to blackmail the children they have molested in order to prevent exposure." [Report of the U.S. Congress Permanent Subcommittee on Investigations on Child Pornography and Pedophilia, 1986].

Dr. Eugene Abel, Professor of Psychiatry at the Emory University Medical Center, clinically studied 240 child molesters (pedophiles). They averaged 30 (homosexual or same-sex) to 60 (heterosexual) victims before being caught. The average number of children molested by these pedophiles was 380 in a lifetime. [Abel, 1986].

The fact that a person convicted of possessing or distributing child pornography has a previous history of sexually abusing minors is very relevant to the sentencing of that individual. Especially in light of the fact that pedophilia is considered untreatable and thus the primary goal of sentencing should be removal of the pedophile offender so that he or she does not present a threat to society -- hopefully for a long time.

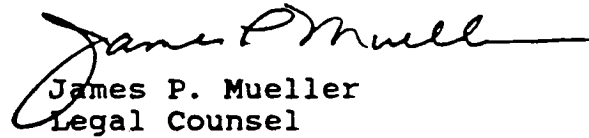
The proposals found in Amendment 22 (increases based on age of victims, based on whether the perpetrator is in supervisory control of the child, or based on the number of victims exploited) are well-reasoned and certainly justified. Also, the provisions found in Amendments 23 and 24 which, in effect, require courts to impose the more severe sentencing guidelines of the original offense in cases of "plea bargaining" are an excellent method of keeping the pornographer from avoiding the

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penalty for his intended criminal act. This proposal is much needed and CLF strongly recommends its adoption.

CLF supports the recommended increases in sentencing for obscenity and child pornography violations, found in Amendments 22, 23 and 24, and urges further increases.

Sincerely,


James P. Mueller
Legal Counsel

JPM/lak

Enclosures

Child Pornography

THE SPECIAL HORROR OF CHILD PORNOGRAPHY

What is commonly referred to as "child pornography" is not so much a form of pornography as it is a form of sexual exploitation of children. The distinguishing characteristic of child pornography, as generally understood, is that actual children are photographed while engaged in some form of sexual activity, either with adults or with other children. To understand the very idea of child pornography requires understanding the way in which real children, whether actually identified or not, are photographed, and understanding the way in which the use of real children in photographs creates a special harm largely independent of the kinds of concerns often expressed with respect to sexually explicit materials involving only adults.

Thus, the necessary focus of an inquiry into child pornography must be on the process by which children, from as young as one week up to the age of majority,⁷⁰ are induced to engage in sexual activity of one sort or another, and the process by which children are photographed while engaging in that activity. The inevitably permanent record of that sexual activity created by a photograph is rather plainly a harm to the children photographed. But even if the photograph were never again seen, the very activity involved in creating the photograph is itself an act of sexual exploitation of children, and thus the issues re-

lated to the sexual abuse of children and those related to child pornography are inextricably linked. Child pornography necessarily includes the sexual abuse of a real child, and there can be no understanding of the special problem of child pornography until there is understanding of the special way in which child pornography is child abuse.

CHILD PORNOGRAPHY AS A COTTAGE INDUSTRY

In addition to understanding the way in which child pornography is defined by its use of real children engaged in real sexual activity, it is important to understand the way in which the "industry" of child pornography is largely distinct from any aspect of the industry of producing and making available sexually explicit materials involving only adults.

A significant aspect of the trade in child pornography, and the way in which it is unique, is that a great deal of this trade involves photographs taken by child abusers themselves, and then either kept or informally distributed to other child abusers. As we discuss in more detail later, some of these child abusers are situational, abusing children on occasion but not restricting their sexual preferences to children. Others are preferential, not only preferring children as a means for achieving sexual satisfaction, but seeking out children in order to satisfy this desire. We have heard substantial evidence

⁷⁰ A significant amount of sexually explicit material includes children over the applicable age of majority who look somewhat younger. Because people who are actually minors are not used in this type of publication, it would not qualify as child pornography although it might still be legally obscene. In general, this variety of material does not cater to the pedophile, but instead to those who prefer material with young-looking models.

that both situational and preferential child molesters frequently take photographs of children in some sexual context. Usually with non-professional equipment, but sometimes in a much more sophisticated manner, child abusers will frequently take photographs of children in sexual poses or engaged in sexual activity, without having any desire to make commercial use of these photographs. At times the child abuser will merely keep the photograph as a memento, or as a way of recreating for himself the past experience. Frequently, however, the photograph will be given to another child abuser, and there is substantial evidence that a great deal of "trading" of pictures takes place in this manner.⁷¹ The desire to have collections of a large number of photographs of children seems to be a common, although not universal, characteristic of many pedophiles. Some of this exchange of photographs takes place in person, a great deal takes place through the mails, and recently a significant amount of the exchange has taken place by the use of computer networks through which users of child pornography let each other know about materials they desire or have available.

In addition to the primarily non-commercial trade in child pornography, there appears to be a commercial network for child pornography, consisting to a significant extent of foreign magazines that receive the very kinds of pictures described in the previous paragraph, and then sell in magazine form collections of these non-commercially produced photographs. These magazines will frequently contain advertisements for private exchange of pictures in addition to publishing pictures themselves.⁷² Although the publication of the magazines, almost exclusively abroad, is itself a commercial enterprise, it does not appear as if most of the contributors contribute for the purpose of commercial gain. And although the publication of these magazines is largely foreign, there is substantial evidence that the predominant portion of the recipients of end contributors to these magazines are American.

Prior to the late 1970s, when awareness and concern about child pornography escalated dramatically, commercially produced and

distributed child pornography was more prevalent than it is now. It was in the late 1970s that this awareness and concern started to be reflected in major law enforcement initiatives, state and federal, against child pornography. When the Supreme Court in 1982 approved of child pornography laws whose coverage was not restricted to the legally obscene, these enforcement efforts accelerated, and the sum total of these enforcement efforts has been to curtail substantially the domestic commercial production of child pornography. This is not to say that it does not exist. There is a domestic commercial child pornography industry, but it is quite clandestine, and not nearly as large as the non-commercial use of and trade in non-commercially produced sexually explicit pictures of children.

Although there now appears to be comparatively little domestic commercial production of child pornography, there remains a significant foreign commercial industry, and much of this material is available in the United States. Some of this material is in magazine form, some are photographic motion picture films, but increasingly, as with much of the adult material, video tapes are dominating the market. None of this material is available openly, however. We received some testimony that commercially produced child pornography was available "under the counter" in some establishments selling adult sexually explicit material. A number of experienced police officers testified to having no actual knowledge that material is available in this way, but others indicated that they had either heard of its availability or had themselves seen its availability in rare circumstances. We have also heard evidence about more surreptitious networks for the distribution of this material, and we have heard some evidence about the way that this material is sold through the mails. We have little doubt that there is some distribution in the United States of commercially produced material, although the extremely clandestine nature of the distribution networks makes it difficult to assess the size of this trade.

Although we note, therefore, that there is some commercially produced material, efforts to deal with the problem of child por-

71. There is also evidence that commercially produced pictures of children in erotic settings, or in non-erotic settings that are perceived by some adults as erotic, are collected and used by pedophiles. There is little that can be done about the extent to which, for example, advertisements for underwear might be used for vastly different purposes than those intended by the photographer or publisher, but we feel it nevertheless important to identify the practice.

72. Some of this private exchange is quite informal, but there is evidence that more formal and elaborate underground networks for the exchange of these pictures exist.

nography will fail if they overestimate the extent of the commercial side of the practice, and underestimate the non-commercial side. The greatest bulk of child pornography is produced by child abusers themselves in largely "cottage industry" fashion, and thus child pornography must be considered as substantially inseparable from the problem of sexual abuse of children. That does not make the problem of child pornography unimportant. On the contrary, to the extent that it is an aid to and a part of a problem that is unfortunately prevalent and plainly outrageous, child pornography, in both its creation and its distribution, is of unquestioned seriousness. But it is different, in virtually every aspect of its definition, creation, distribution, and use. Serious consideration of the issue of child pornography must begin with this fact.

CHILD PORNOGRAPHY, THE LAW, AND THE FIRST AMENDMENT

Because the problem of child pornography is so inherently different from the problems relating to the distribution of legally obscene material, it should be no surprise to discover that tools designed to deal with the latter are largely ineffective in dealing with the former. The problems to which child pornography regulation is addressed are numerous, but four stand out most prominently.

The first problem is that of the permanent record of the sexual practices in which children may be induced to engage. To the extent that pictures exist of this inherently nonconsensual act, those pictures follow the child up to and through adulthood, and the consequent embarrassment and humiliation are harms caused by the pictures themselves, independent of the harms attendant to the circumstances in which the photographs were originally made.⁷³

Second, there is substantial evidence that photographs of children engaged in sexual activity are used as tools for further molesta-

tion of other children. Children are shown pictures of other children engaged in sexual activity, with the aim of persuading especially a quite young child that if it is in a picture, and if other children are doing it, then it must be all right for this child to do it.⁷⁴ As with the problem of the permanent record, we see here a danger that is the direct consequence of the photographs themselves, a danger that is distinct from the harms related to the original making of the picture.

Third, photographs of children engaged in sexual practices with adults often constitute an important form of evidence against those adults in prosecutions for child molestation. Given the inherent difficulties of using children as witnesses, making it possible for the photographs to be evidence of the offense, or making the photographs the offense itself, provides an additional weapon in the arsenal against sexual abuse of children.

Finally, an argument related to the last is the unquestioned special harm to the children involved in both the commercial and the noncommercial distribution of child pornography. Although harms to performers involved would not otherwise be taken to be a sufficient condition for restriction of the photographs rather than the underlying conduct, the situation with children is of a different order of magnitude. The harm is virtually unanimously considered to be extraordinarily serious, and the possibility of consent is something that the law has long considered, and properly so, to be an impossibility. As a result, forms of deterrence of the underlying conduct that might not otherwise be considered advisable may be considered so with respect to photographs of children. If the sale or distribution of such pictures is stringently sanctioned, and if those sanctions are equally stringently enforced, the market may decrease, and this may in turn decrease the incentive to produce those pictures.

As part of the previous justification, it

73 We refer in this regard to our specific recommendation regarding possession of child pornography. We do not believe that a photograph of a child engaged in sexual activity should be part of someone else's "collection," even if that collection remains in the home.

74 We note that there seems to be significant use of adult sexually explicit material for the same purpose. Child molesters will frequently show sexually explicit pictures of adults to children for the purpose of convincing a child that certain practices are perfectly acceptable because adults engage in them with some frequency. We are greatly disturbed by this practice, although we do not take the phenomenon as sufficient to justify restrictions we would not otherwise endorse. Many of the materials used for this purpose are not even close to being legally obscene, and, in the words of Justice Felix Frankfurter, we do not want to "burn the house to roast the pig." *Butler v. Michigan*, 393 U.S., pp. 380, 383. (1957). Nevertheless, we have no doubt that the practice exists, and we have no doubt that it is dangerous insofar as it helps break down the resistance of children to sexual advances by adults. At the very least, we strongly urge that children be warned about the practice in the course of whatever warnings about sexual advances by adults are being employed.

ought to be obvious that virtually all child pornography is produced surreptitiously, and thus, even with vigorous enforcement efforts, enforcement will be difficult. Enforcement efforts against the more accessible product of the process rather than or in addition to the less accessible process itself may enable the realities of enforcement to track the magnitude of the problem.⁷⁵

For all of these, as well as other, reasons, a number of states, including New York, enacted around 1980 laws directed at "child pornography" itself. These laws defined child pornography not in terms of the legally obscene, but rather in terms of any portrayal of sexual conduct by a child, or in terms that were somewhat similar to this. Under these statutes, the sale or distribution of any photographic depiction of a real child engaged in sexual activity was made unlawful, regardless of whether the photograph, or magazine, or film was or could be determined to be legally obscene pursuant to *Miller v. California*.⁷⁶

Because these new child pornography statutes encompassed material not legally obscene pursuant to *Miller*, and therefore encompassed material presumptively protected by the First Amendment, a constitutional challenge ensued. But in *New York v. Ferber*,⁷⁷ the Supreme Court unanimously rejected the constitutional challenges for reasons substantially similar to those discussed just above. The Court noted the undeniably "compelling" and "surpassing" interests involved in protecting children against this variety of exploitation, and also rested its conclusion on the fact that "the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimus*. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work." Given this minuscule amount of First Amendment protection, therefore, the Court determined that

"when a definable class of material, such as that covered (by the New York statute), bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment."

As a result of *Ferber*, virtually every state, as well as the United States, now prohibits by its criminal law the production, promotion, sale, exhibition, or distribution of photographs of children engaged in any sexual activity regardless of whether the material is legally obscene under the *Miller* standards. After *Ferber* these laws are clearly constitutionally sound, and none of us has any quarrel with the constitutionality of these statutes.

ENFORCEMENT OF THE CHILD PORNOGRAPHY LAWS

In Chapter 6 we discussed the enforcement of state and federal obscenity laws, and described what we see as a rather consistent pattern of underenforcement of these laws. We do not reach the same conclusion with respect to the child pornography laws. It is plain to us that every unenforced violation of the child pornography laws is an underenforcement that ought to be remedied. We believe that many cases remain uninvestigated, and we believe that state and federal prosecution of child pornography, commercial and noncommercial, needs to be even more vigorous. Nevertheless, it remains the case that the child pornography laws seem now to be the subject of a substantial amount enforcement efforts on both the state and local levels. The federal statistics are illustrative. From January 1, 1978, to February 27, 1986, one hundred individuals were indicted in the federal system for violation of the federal obscenity laws, and of those indicted seventy-one were convicted.⁷⁸ During that same time period, 255 individuals were indicted in the federal system for violation of federal child pornography laws, and of those 215 were convicted. Although these statistics themselves are highly suggestive of a substantial disparity, we be-

75. As much as we urge the most vigorous enforcement of child pornography laws with respect both to commercial and noncommercial production, possession, and distribution, we recognize that the problem of child abuse is larger than the problem of child pornography. We urge vigorous enforcement of child pornography laws as an important way of fighting child abuse, but if it is treated as the only weapon, or the major weapon, a great deal that needs doing will remain undone.

76. 413 U.S. (1973), p. 15. *Miller* is discussed extensively above in Chapter 3.

77. 458 U.S. (1982), p. 747.

78. See, *supra* note 52.

lieve that, if anything, the statistics understate the disparity. For one thing it is highly likely that in absolute terms there are more violations of the federal obscenity laws than there are violations of the child pornography laws. In addition, it was not until final adoption of the Child Protection Act of 1984 on May 21, 1984, that federal law, following Ferber, finally eliminated the requirement of "obscenity," and of the 255 indictments in fact 183 were secured in the period from May 21, 1984, through February 27, 1986.

This comparatively aggressive approach to enforcement of the federal child pornography laws has been matched by equally vigorous efforts in the vast majority of states. Although we urge even more aggressive enforcement of the child pornography laws at both state and federal levels, we see less systematic under-investigation, under-prosecution, and under-sentencing than seems to exist with respect to enforcement of the obscenity laws.⁷⁹ Child pornography seems to be a matter that judges, prosecutors, and law enforcement personnel have, with few exceptions, taken seriously. We are glad that they do, and we urge them to take it even more seriously.

In terms of taking these matters even more seriously, we note again the inseparable relationship between child pornography and

child abuse. To take child pornography more seriously is to take sexual abuse of children more seriously, and vice versa. It is apparent that as of the date of this Report the sexual abuse of children is being taken increasingly seriously in this country, and we applaud that increased concern for a problem that has long been both largely unspoken and largely avoided. That situation is changing rapidly, and the increased attention to child pornography is part of the increased attention being given to all forms of sexual abuse of children, whether photographs are part of the act or not. We do not hesitate to support further efforts, in public education, in the education of children, and in law enforcement, to continue to attempt to diminish the sexual abuse of children, regardless of the form it takes.

None of us doubt that child pornography is extraordinarily harmful both to the children involved and to society, that dealing with child pornography in all of its forms ought to be treated as a governmental priority of the greatest urgency, and that an aggressive law enforcement effort is an essential part of this urgent governmental priority. Our unanimity of vigor about child pornography does not surprise us, and we expect that it will not surprise others. We hope that society will respond accordingly.

⁷⁹ There are, however, impediments to investigation and prosecution that are specially related to any prosecution involving sexual abuse of children. One is the difficulty we address in our specific recommendations. Another is the fact that on occasion parents have themselves been involved in the illegal activity. And there seems still to be some reluctance to impose stiff sentences upon people who look and act otherwise "normal." To that extent a significant problem in dealing with sexual abusers of children is the mistaken and dangerous assumption that all or most of these people are self-evidently "weird."



Children's Legal Foundation

"protecting the innocence of children"

June 30, 1989

Honorable William W. Wilkins, Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, NW, Suite 1400
Washington, D.C. 20004

Dear Sir:

I serve as Executive Director of Children's Legal Foundation, (formerly Citizens for Decency through Law, Inc.), a national, non-profit legal organization devoted to assisting police and prosecutors to enforce constitutional laws prohibiting obscenity, child pornography and sexual exploitation. Since 1957, CLF has been involved in all aspects of the fight against pornography, but especially in providing expert legal assistance to allow communities, cities, states and the federal government to take effective action against illegal activity involving pornography.

I formerly served as Executive Director of the Attorney General's Commission on Pornography and Chief of the Criminal Section of the U.S. Attorney's Office in Louisville, Kentucky.

Children's Legal Foundation assisted Congress in drafting the federal pornography statutes affected by these guidelines. Indeed, on several occasions CLF provided expert testimony in Congress. Memoranda of law authored by CLF's legal staff were entered into the Congressional Record as bedrock support for these laws on three separate occasions. CLF has submitted amicus curiae briefs in every case before the Supreme Court involving obscenity or pornography for the last three decades. In addition, CLF currently represents a 4-year-old victim of dial-a-porn in a \$10 million lawsuit against the pornographic message provider and Pacific Bell. The child was molested by a 12-year-old boy after he listened to two-and-a-half hours of explicit sex messages. CLF has hundreds of affiliated citizen organizations around the United States with thousands of members, and hundreds of thousands of contributors. These supporters were instrumental in motivating Congress to pass the above legislation.

Honorable William W. Wilkins, Chairman
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June 30, 1989

This letter is in response to your June 2, 1989 request for comment on the proposed temporary emergency amendments to the Sentencing Guidelines regarding distribution of obscene materials. I would first request that you review the April 6 letter of our General Counsel, Benjamin Bull (copy attached), which sets forth in detail our views generally on this matter.

With respect to the proposed temporary, emergency amendments, Children's Legal Foundation renews its objections to several of the guidelines:

(1) The base offense level of (6) is too low to adequately confront a billion-dollar industry controlled almost exclusively by organized crime. When Congress overwhelmingly passed this legislation, it certainly did not intend that it never be used by federal prosecutors. Yet that will undoubtedly be the effect if the penalties remain this low -- prosecutors will recognize that convictions will have little to no impact on the illegal pornography industry.

(2) We oppose any attempt to increase or decrease the penalty depending on the "retail value" of obscene materials transported or whether transported for "pecuniary gain." Obscenity is illegal because it is considered harmful to communities, and to the nation as a whole. The motivation of its purveyors should not be relevant in sentencing. The fact that organized crime controls the industry because of its profitability supports our push for harsher penalties. But we do not seek to suppress obscenity only because organized crime gets rich selling it. We seek to suppress obscenity because it is harmful to our nation. Harsher penalties will deter organized crime, and therefore reduce the harm to our country. But it is the harm caused by obscenity, not its mere profitability, that should be the focus of law enforcement efforts and sentencing guidelines. And the harm flowing from the proliferation of obscenity in the United States exists whether disseminated for proven "pecuniary gain" or not. There is no Congressional intent to the contrary.

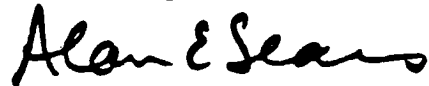
Again, we would ask the Commission to reconsider its proposed guidelines in light of this legislation's overwhelming support in Congress and the nation as a whole. We should point out that the trend in recent state and federal legislation has been to increase, not decrease, penalties for violations of obscenity and child pornography statutes, in recognition of growing evidence of organized crime's control of the industry.

Honorable William W. Wilkins, Chairman
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The Commission's recommendations fall far below the penalties in current law for numerous states for similar intra-state violations. Let us not make the federal law into a paper tiger, to be laughed at by the career criminals who flout it daily with impunity.

Thank you very much for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Alan E. Sears".

Alan E. Sears
Executive Director

AES:kb

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

23-24. NACDL agrees with other commentators objecting to these sections principally on the ground that the Commission cites no empirical research concerning the relationship between sexual abuse and selling obscenity. Moreover, these proposals would constitute a wholesale revision of the obscenity guidelines under which dramatically increased punishment would result without adequate factfinding and research.

FIRST LIFE INSURANCE COMPANY

**805 RYAN PLAZA DRIVE
ARLINGTON, TEXAS 76011**

**JOHN R. BOYD
PRESIDENT**

March 29, 1990

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

Re: Amendments 22, 23, and 24

Dear Sirs,

I am in favor of establishing much tougher sentencing guidelines that increase the penalty for sexual exploitation and abuse of children. The proposed Amendments 22, 23, and 24 before you need to be approved and enforced.

I am strongly urging you to support Amendments 22, 23, and 24, and make our nation a safer place for children.

Sincerely,


**John R. Boyd
President**

JRB/dtr



FOUNDER

REV. MORTON A. HILL, SJ
(July 13, 1917-November 4, 1985)

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Chairman & President

Alma Products, Inc.

MISS LORETTA YOUNG

March 29, 1990

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

Att: Communications Director

Re: Proposed Amendments to
Sentencing Guidelines for
Child Pornography and
Adult Obscenity Offenses

Morality In Media has the following comments:

Proposed Amendment to Section 2G2.1

We support the increase to 4 levels for children under the age of 12 and the increase of 2 levels under the age of 16.

We also support the increase of 2 levels where the defendant was the parent, relative or legal guardian etc.

We further support the proposed Special Instruction.

We support these increases because of the heinous nature of the crime involving as it does the sexual exploitation of children. The existence of the Federal Child Pornography Law and the similar laws of the various states has in our opinion reduced child pornography to a "cottage industry". It is no longer purveyed to our knowledge, in the shops such as the Times Square Porn shops and adult book stores throughout the country. The focus, therefore, should be on this cottage industry production. These amendments further that end.

Proposed Amendment To Section 2G2.2

We believe that the proposed amendments to the Base Offense Level are inadequate and that the Base Offense Level itself should be increased to 15.

We understand that the existence of the Federal Child Pornography Law was bottomed on preventing the sexual exploitation of children following the example of New York whose law had been upheld in the Ferber case. The Supreme Court in that case clearly said that the governmental objective of the State of New York was not to punish "Obscenity", but to dry up the market for child pornography. Certainly the prohibition against possession, receipt or advertising advances that goal. By punishing these offenses, we prevent the sexual exploitation of children. By treating them more leniently than the transportation and distribution of the material, we propose a non-sequitur. It sends a message that you can stimulate the market by advertising for child pornography or receive it through the mail and be treated more leniently. The Ferber Court said:

"The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."

We also object to the use of the word "mere". It should be eliminated. It gives the impression that somehow this is not an important offense.

We further object to the Section relative to "distribution for pecuniary gain", not in its increase to level 15, but for failure to recognize that the term "pecuniary gain" is inadequate and requires that the government prove that a profit was made. We know from examining the cases that much of the child pornography "underground industry" relies on a "swapping" concept. Typically, Pedophiles exchange this material or "swap" it. This peculiarity of the industry should be recognized. It would be difficult in such circumstances to show "pecuniary gain". The word "pecuniary" contemplates an exchange of money and comes from Latin "pecuniarius" or the French "pecunia", both of which are related to money. In fact, Webster defines "pecuniary" as "consisting of or measured in money." If, therefore, the pedophile exchanges child pornography for any thing other than money, enhancement does not apply. In fact, he could swap it for diamonds or gold, or gold bars, or even for a car and there would be no "pecuniary gain". The same is true of anybody who is in the business of dealing in child pornography, provided he doesn't take "money" for his product. This is an obvious hole that should be plugged.

It behooves the Sentencing Commission to check with the National Obscenity Enforcement Unit to determine how many of the convictions obtained under the Child Pornography Statute involved the element of "pecuniary gain". Our guess would be very few, which adds to the requirement that the swapping concept or the exchange for other than money be included at this point.

We applaud the increase of 4 levels for sadistic, masochistic or violent depictions, but suggest that depictions of oral or vaginal or anal sex relations involving a child may be just as heinous. After all, a child could be bound, but not sexually abused and by binding him or her, there is an increase of 4 levels, but no corresponding increase for sexual intercourse. The same is true, if the child were being spanked, since this is a violent act. There is a serious discrepancy here which should be attended to.

Proposed Section 2G3.1

Our first recommendation would be to raise the Base Level from 6 to 8 for reasons outlined in our prior Comments attached in response to your proposed Temporary Emergency Amendment to Section 2G3.1. [See especially pages 7 and 8].

We also bring your attention to our prior comment above, about the inadequacy of the phrase "pecuniary gain" and we ask that this be modified to reflect the fact that any type of payment or exchange of assets, whether in money, property, [real or personal] be included in the phrase "pecuniary gain". In fact, the whole question of "gain" is more or less irrelevant to the governmental interest involved.

At least this move from 11 to 15 is a move in the right direction, but the wording of the phrase "pecuniary gain" needs further elucidation.

We also draw your attention to our Comments on the inadequacy of the the enhancement for retail value of obscene matter. Our comments can be found in the prior document submitted which is attached at pages 8 and 9.

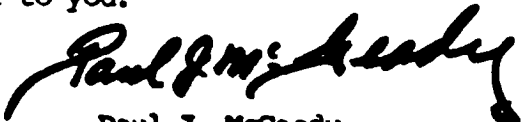
We again point out to you that the enhancement for sadistic, masochistic or violent depictions is inconsistent with the governmental interest involved. The Obscenity Law exists basically because the distribution of these depictions offends the sense of decency and morality of the citizens of the United States. They also tend to break up marriages and stimulate persons, especially children to

commit antisocial acts. If these are the proposals, then "merely" including sadism, masochistic conduct or violence for enhancement is again a non-sequitur. There are many things that should be included under this guideline for enhancement, not the least of which would be bestiality or necrophillia. I now give you a list of items that you might consider for inclusion at this point. These are:

Annalingus
Artificial Vagina Display
Beaver shots
Bestiality
Circus Orgies
Coitus
Coprophagy
Coprophillia
Cum-shots
Cunnilingus
Daisy Chain Copulation
Dildoe Display
Ejaculation
Exhibitionism (of the Genitals)
Fellatio
Fetishism
Flagellation
French Tickler Displays
Frottage
Golden Showers
Incest
Orgasm
Masochism
Masturbation
Necrophillia
Pederasty
Voyeurism
Piquerism
Reaming
Sadism
Sadomasochism
Sapphism
Sixty-Nineing
Sodomy
Triolism
Urolagnia
Zooerasty

We trust that this will be of assistance to you.

PJM:mm
Enc.


Paul J. McGeedy
General Counsel

P.S. We also include our Comments of April 5, 1989 in accordance with the invitation in the last paragraph of your notice and request for comments.

**COMMENTS REGARDING THE PROPOSED TEMPORARY,
EMERGENCY AMENDMENT TO SECTION 2G3.1 (OBSCENITY) OF THE
FEDERAL SENTENCING GUIDELINES**

Prepared by:
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INTRODUCTION

Morality in Media welcomes the opportunity to submit Comments to the proposed Temporary Amendment to Sentencing Guideline 2G3.1, pertaining to violations of 18 U.S.C. Sections 1460-1463, 1465-1466 (obscene matter). Part I of the Comments discusses the policy basis for treating obscenity offenses more severely than the existing Guidelines direct. Part II discusses appropriate base offense levels for these offenses.

I. POLICY CONSIDERATIONS

A. Obscenity Regulation Becomes Dormant

As we noted in our Comments submitted in April 1989, the prosecution and sentencing practices during the period from 1966 - 1986 are not an adequate basis for determining appropriate sentencing ranges for obscenity offenses.

In 1966, the United States Supreme Court handed down its Fanny Hill - Memoirs decision which required, in order to prove obscenity, that the U.S. Attorney show that the material was "utterly without redeeming social value." In rejecting this test in 1973, the Court in Miller v. California said it "called on the prosecution to prove a negative--a burden almost impossible to discharge under our criminal standards of proof." As noted by Morality in Media General Counsel Paul J. McGeady in a statement to the Attorney General's Commission on Pornography (Chicago, Ill., July 24, 1985):

"This Fanny Hill case made it a practical impossibility to convict from 1966 to 1973, and a policy of non-enforcement set in at the U.S. Attorney level. Miller, of course, rejected this

test and gave us a workable definition, but Justice apparently has never recovered from its lethargy."

In 1970, The President's Commission On Obscenity and Pornography issued a report which was accurately described in the Hill-Link Minority Report of the Presidential Commission as a "Magna Carta for the Pornographer." Among other things the Commission leadership and majority recommended repeal of obscenity laws for "consenting adults." In commenting on the work of this 1970 Presidential Commission, the 1986 Final Report of the Attorney General's Commission on Pornography stated:

"[B]y the late 1960's obscenity regulation became essentially dormant. This trend was reinforced by the issuance in 1970 of the Report of the President's Commission on Obscenity and Pornography, which recommended against any state or federal restrictions on material available to consenting adults. Although the Report was soundly rejected by President Nixon and by Congress, it nevertheless reinforced the tendency to withdraw legal restrictions in practice, which in turn was one of the factors contributing to a significant growth from the late 1960's onward of the volume and explicitness of materials that were widely available." (emphasis supplied)

In the 1970's, America also witnessed what has since been described as a "sexual revolution." This "sexual revolution" did indeed prove costly. As New York Daily News columnist Bill Reel put it in a June 16, 1983 article:

"The legacy of liberation is AIDS, herpes, gang rape and sexual abuse of children.

....

The sexual revolution was supposed to liberate society, to provide harmless outlets for repressed urges. The opposite has occurred. An explosion of raw sex in magazines and movies has been accompanied by a scary upsurge of violence.

....

'Who will deny that there is something new and sinister in the air?' Michael Gallagher wrote recently.... 'And is it unfair to indict pornography for some share of the blame?'

....

Gallagher, who works for the U.S. Catholic Conference, urges citizens to demand enforcement of anti-pornography laws. That's a beginning.... The sexual revolution has brutalized many innocent

victims. How many more will follow? Where are our leaders?"

B. Growing Concern

On March 28, 1983, at the behest of Morality in Media President Morton A. Hill, S.J., President Ronald Reagan--along with the Attorney General, Postmaster General, Commissioner of Customs, and FBI Director--met with a group of religious leaders and heads of major anti-pornography organizations. It was estimated that the religious and organizational leaders present represented a constituency of 100 million persons. Of that meeting, President Reagan stated in a July 7, 1983 letter to Fr. Hill:

"I was pleased to have the opportunity on March 28 to meet with you and other leaders in the drive against pornography and to discuss methods to improve enforcement of our federal anti-obscenity laws.

We share a deep concern about the ever more extreme forms of pornography being distributed throughout our land.

In response to the recommendations made at that meeting, I have directed that a working group be established here at the White House to coordinate investigation and enforcement of the Federal anti-obscenity laws."

And, in a May 22, 1985 letter to a conference on pornography sponsored by Morality in Media, President Reagan stated:

"Just two years ago I had the opportunity to meet with Father Morton Hill and other national leaders to discuss the spread of ever more extreme forms of pornography across the land. Our meeting made clear that ... efforts by law enforcement agencies and private organizations to deal with the problem were in need of renewal.

[T]hat renewal is now well under way. Parents, schools, churches and community groups are joining forces to combat pornography and to urge public officials to take the steps within their power to control its production and distribution in their communities. This activity is truly encouraging

... Last week ... Attorney General Meese announced the formation of the Commission on

Pornography.... This Commission will study the full dimensions of the pornography problem.... I look forward to reviewing the work of the Commission when it reports its findings next year."

C. Final Report of the Attorney General's Commission on Pornography Marks Turning Point In Obscenity Law Enforcement

In July 1986, the Attorney General's Commission on Pornography released its Final Report, revealing the explosive growth of pornographic materials in America since 1970, as well as the degenerative change in their content. Pursuant to its Charter Mandate and consistent with "Constitutional guarantees," the Commission made recommendations for both government and private action.

At an October 22, 1986 press conference to announce the Justice Department's response to the Commission on Pornography, Attorney General Meese outlined a seven-point program to curb the growth of obscenity and child pornography, promising to pursue "with a vengeance" and prosecute "to the hilt" those trafficking in obscenity. The seven points of the Justice Department's program included:

- (a) A center for obscenity prosecution;
- (b) A task force of attorneys to work closely with the center;
- (c) An enhanced effort by each U.S. Attorney's office concentrating on interstate trafficking in obscenity;
- (d) An enhanced effort by the Organized Crime and Racketeering Strike Forces against organized criminal enterprises involved with obscenity production and distribution;
- (e) A legislative package to be introduced in the next Congress.

On February 10, 1989 Attorney General Edwin Meese announced the creation of the Obscenity Enforcement Unit within the Justice Department consisting of two components--a Task Force and Law Center. In addition, Mr. Meese stated that all 93 U.S. Attorney's Offices would have at least one lawyer trained in obscenity matters.

On November 10, 1987 President Reagan unveiled the "Child Protection and Obscenity Enforcement Act." In his transmittal message, the President stated that the purposes of the Act were two fold:

(a) To update Federal law to take into account new technologies and ways of doing business employed by pornographers; and

(b) To remove loopholes and weaknesses in the laws "which have given criminals in this area the upper hand for far too long."

On February 2, 1988, the Child Protection and Obscenity Enforcement Act of 1988 was introduced in the 100th Congress, 2nd Session, and on Friday, October 21, 1988, in the closing hours of its legislative session, Congress passed the Child Protection and Obscenity Enforcement Act.

D. Enforcement of Federal Obscenity Laws Now A Priority.

In the brief time since the National Obscenity Enforcement Unit was formed, many milestones in obscenity prosecution have been reached. Although statistics have not yet been released for the 1988 fiscal year, there was an 800% increase in federal obscenity prosecutions in the 1987 fiscal year. In 1987 the Justice Department also obtained the first federal conviction against "dial-a-porn" companies and the first conviction under the federal R.I.C.O. law where the predicate offenses consisted of obscenity violations. In October 1987 a federal grand jury in Las Vegas also indicted Reuben Sturman on RICO/obscenity charges.

In 1988, a federal grand jury in Los Angeles returned a 12-count indictment against two men and two companies for alleged violations of RICO and obscenity laws. The Justice Department and the Postal Service announced that criminal charges had been brought in eight states against 20 persons and 14 corporations for using the mails to advertise and distribute obscene materials. As of May 1989, Project Postporn had resulted in 18 convictions for mailing obscene material in 11 districts.

On March 13, 1989 the Justice Department announced that a Washington, D.C. corporation pled guilty to violating the federal RICO statute where the predicate offenses consisted of obscenity violations.

In another case tried in Nashville, Tennessee, three Chicago men pled guilty on June 1, 1989 to using the U.S. mail to distribute obscene materials.

The above "chronology" of obscenity prosecutions is by no means an exhaustive list of obscenity investigations and prosecutions initiated or completed

since 1986. They do show that enforcement of the federal obscenity laws has become a Justice Department priority since 1986, and the new Justice Department head, Attorney General Dick Thornburgh, has made it clear that obscenity enforcement will remain a priority. President Bush has expressed his full support of obscenity enforcement efforts, and last, but not least, opinion poll after opinion poll show that the American people want obscenity laws enforced.

E. The Child Protection and Obscenity Enforcement Act of 1988 Does Provide a Basis for Providing Stiff Sentences for Obscenity Offenders

Congress' action in passing the Child Protection and Obscenity Enforcement Act of 1988 is the clearest indication that Congress fully shares the concerns of the Reagan/Bush administrations and of parents and decent citizens about the proliferation of hardcore pornographic material in American society and that Congress means business about dealing with those who traffic in such materials.

In the obscenity portions of the Act, Congress expanded the scope of federal obscenity laws to reach the sale of obscene matter on federal lands and the distribution of obscene material on subscription TV. Congress also made it easier to prosecute those who would use the channels of commerce as a "means of spreading [the] evil" of obscene matter [See United States v. Orito, 413 U.S. 139, at 144 (1973)] by:

- a. Punishing those who receive obscene matter shipped interstate;
- b. Punishing those who use a facility or means of interstate commerce to transport obscenity;
- c. Permitting court ordered "wire taps" for obscenity violations;
- d. Creating rebuttable presumptions to show that the channels of commerce have in fact been utilized; and
- e. Facilitating cooperation between the Customs Service and U.S. Attorney's Office when both civil forfeiture of obscene material and criminal prosecution under 18 U.S.C. 1462 may be appropriate.

Congress also increased the penalty from misdemeanor to felony status for making obscene telephone communications for commercial purposes and authorized criminal forfeiture in obscenity cases.

Congress has chosen to exercise its authority to keep the channels of interstate commerce clear of obscene matter, has made all violations of the federal

obscenity laws felonies, has made property constituting or traceable to proceeds obtained from obscenity offenses subject to criminal forfeiture, and has defined "racketeering activity" in 18 U.S.C. 1961(1) to encompass obscenity offenses.

We think the Congressional intent is clear: obscenity offenses are serious offenses and sentences imposed on obscenity offenders should reflect that fact.

II. APPROPRIATE BASE OFFENSE LEVELS FOR OBSCENITY OFFENSES

A. Base Offense Level Where There Is No Distribution For Pecuniary Gain

The existing Guidelines permit a sentence range of between 0-6 months for obscenity offenses not related to distribution for pecuniary gain. This sentence can be satisfied solely by probation. Public comment is now sought as to whether the base offense level should be raised to 8.

There is an important lesson to be learned from the Constitutional analysis in determining whether there is a Sixth Amendment right to a trial by jury for persons charged with a particular offense. In its recent Blanton v. City of North Las Vegas decision (57 L.W. 4314, 3/6/89), the United States Supreme Court wrote:

In recent years ... we have sought more 'objective indications of the seriousness with which society regards the offense.' ... '[W]e have found the most relevant criteria in the severity of the maximum authorized penalty.'

....

Primary emphasis ... must be placed on the maximum authorized period of incarceration. Penalties such as probation or a fine may engender a significant infringement of personal freedom, ... but they cannot approximate in severity the loss of liberty that a prison term entails.

....

Following this approach...a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of six months. (emphasis supplied)

greater than



In the Court's own language, the primary indicator as to the "seriousness with which society regards the offense" is the maximum authorized period of incarceration. Offenses punishable by a maximum

sentence of six months or less are "categorized as 'petty.'"

We think Congress intends all obscenity offenses to be regarded as serious offenses. Raising the Base Offense Level to at least 8, and thereby permitting a maximum sentence of 8 months, is a step in the right direction.

B. Base Offense Level for Offenses Involving Distribution for Pecuniary Gain

Under the existing Guidelines, the Base Offense Level is increased to at least 11 if the offense involved an act related to distribution for pecuniary gain. Public comment is now sought as to whether the Base Offense Level for offenses involving pecuniary gain should be increased to either 12, 13, 14, 15, or 16.

We think the Base Offense Level should be increased to at least 18 for all offenses involving distribution for pecuniary gain, unless enhancements are provided for retailers and for wholesalers, distributors, manufacturers, and producers.

In regard to the seriousness of an offense, there is a difference between the person who sells a "few" obscene videotapes to a neighbor or co-worker and the person who retails obscene matter as a regular course of trade or business. For the former, we would recommend a Base Offense Level of at least 13; for the latter a Base Offense Level of at least 16.

There is also a difference between the retailer, on the one hand, and the wholesaler, distributor, manufacturer and producer, on the other. In New York and Pennsylvania, for example, a retailer who violates the obscenity law for the first time is guilty of a misdemeanor; the person who manufactures, sells or distributes for purpose of resale is guilty of a felony. Accordingly, we would recommend a Base Offense Level of at least 18 for those who sell, distribute, manufacture or produce obscene matter for purposes of resale.

C. Specific Offense Characteristics

(1) Retail Value of the Obscene Matter

As noted in our April Comments, providing an enhancement calibrated to the retail value of the material involved is of little value in most obscenity cases. Because of the requirement that the trier of

fact must make an obscenity determination for each item, prosecutors usually do not base an obscenity prosecution on large numbers of allegedly obscene items. In the recent, well-publicized Pryba case, for example, the RICO charges were based on seven counts of interstate distribution of obscene material and on fifteen prior convictions obtained against the corporate defendant for violating the Virginia obscenity statute. Yet, the dollar value of the obscene videotapes in the instant case was \$105.30.

In obscenity cases, it makes more sense to provide an enhancement if the offender retails obscene matter and a greater enhancement for those who traffic in obscene matter for purposes of resale.

(2) Distribution of Obscene Matter to Minors

Again, we doubt that this enhancement will be of much use in obscenity cases. While youth do seem to have an uncanny ability to obtain pornographic materials, it is doubtful that retailers are an important source of it. Most youth obtain pornographic material "second hand." The one exception to this is "dial-a-porn," but Section 2G3.1 does not encompass dial-a-porn.

Also, it is not clear whether defendant must "knowingly" engage in a pattern of distributing obscene matter to minors.

CONCLUSIONS

Passage of the Child Protection and Obscenity Enforcement Act of 1988 does indeed provide a policy basis for amending Guideline 2G3.1 to increase the Base Offense Level for various obscenity offenses. In passing the Act, Congress responded to a ground swell of concern from the American people about the proliferation of hardcore pornography in the nation. The specific provisions of the Act indicate clearly the Congressional intent that obscenity offenses be treated as serious offenses.

Enhancements for retail value of obscene matter and distribution to minors will not significantly further the Congressional intent. The dollar value of obscene material at issue in an obscenity case is usually small and minors typically do not receive hardcore pornography from retail outlets. It would be better to provide an enhancement where defendant sells at retail obscene matter as a regular course of trade or business and a greater enhancement for those who traffic in obscenity for purposes of resale.



April 5, 1989

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MISS LORETTA YOUNG

William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave., NW, Suite 1400
Washington, D.C. 20004

Attn.: Paul Martin

Re: Proposed Amendments 126-128,
Pertaining To Obscenity

Dear Mr. Chairman:

Morality In Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States.

This organization is now national in scope, and its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and civic leaders. The founder and President of Morality In Media (until his death in 1985) was Rev. Morton A. Hill, S.J. In 1968, Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography" [two copies enclosed].

Morality In Media, Inc. files the attached Comments with a genuine appreciation of the complexity of the task faced by the Commission, but also with deep concern about the impact that the Guidelines and Proposed Amendments 126, 127 and 128 [pertaining to obscenity] will have on the future enforcement of both federal and state obscenity laws.

The Proposed Amendments 126, 127 and 128 are set forth verbatim. Our Comments follow.

Sincerely,

Robert Peters
Attorney

RP/mtb

COMMENTS REGARDING THE
PROPOSED AMENDMENTS 126-128 (OBSCENITY)
TO THE FEDERAL SENTENCING GUIDELINES

Prepared by:
Morality in Media, Inc.
475 Riverside Drive
New York, N.Y. 10115

126. Proposed Amendment to Section 2G3.1 Of the Guidelines
[pertaining to Title 18, Sections 1460-1463 and 1465-1466].

"§2G3.1 Importing, Transporting, Mailing, or Distributing
(Including Possessing With Intent to Distribute) Obscene Matter

Base Offense Level: 6

Specific Offense Characteristics:

(1) If the defendant was engaged in the business of selling or distributing obscene matter, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material but in no event by less than 5 levels

(2) If the defendant distributed or possessed with intent to distribute material that portrays sadomasochistic or other violent conduct, increase by 4 levels."

A. "Base Offense Level: 6"

Comment: The proposed Amendment does not change the Base Level Offense established under the existing Guidelines. The existing Guidelines permit a sentence range between 0-6 months for an Offense Level 6, which may be satisfied solely by probation. Under the existing Guidelines, even repeat obscenity offenders have little to fear, so long as their offenses are not "related to distribution for pecuniary gain."

In contrast Sections 1461, 1462 and 1465 of Title 18 permit a maximum prison term of 5 years for a first offense and Sections 1461 and 1462 permit a maximum term of 10 years for each subsequent offense, irrespective of whether there is a commercial element. In United States v. Orito, 413 U.S. 139 (1973), the United States Supreme Court upheld 18 U.S.C. 1462 as applied to a person who allegedly transported the obscene material (which included 83 reels of film) by private carriage and "solely for the private use of the transporter." The Court stated:

That the transporter has an abstract proprietary power to shield the obscene material from all others...is not controlling. Congress could reasonably determine such regulation to be necessary..., based as that regulation is on a legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure could cause.

In July 1986 the Attorney General's Commission on Pornography released its Final Report—revealing both an explosive increase in the quantity of pornographic materials and a radical degenerative change in their content since 1970. The Commission had access to testimony from victims, victimizers, law enforcement officials, physicians, psychologists and pastoral counselors, as well as social scientists, which showed the destructive impact that substantial, habitual exposure to pornographic materials can have on users. The Commission found that youth, ages 12 to 17, constitute the largest audience for pornographic material in America today. Several Commissioners noted the moral harms of pornography as well as its destructive impact on family life—concerns which the Supreme Court has also raised in its decisions upholding obscenity laws.

The harms associated with obscene material occur irrespective of whether distribution is for pecuniary gain, and we respectfully suggest that the Commission's classification of obscenity offenses at Base Offense Level 6 neither promotes respect for the federal obscenity laws nor reflects the nature and degree of harm caused by the crime.

Of course, if the Proposed Amendment is accepted, the Base Level Offense will be 6 even where the act is "related to distribution for pecuniary gain"—if the defendant is not also "in the business."

B. "Specific Offense Characteristics

(1) If the defendant was engaged in the business of selling or distributing obscene matter, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels."

Comment: The proposed Amendment changes the existing Guideline which reads, in part:

"(1) If the offense involved an act related to distribution for pecuniary gain, increase by...."

The "Reason for Amendment" provided in the Proposed Amendment states:

"The purpose of this amendment is to incorporate the new offenses created by sections 7521 and 7526 of the Omnibus Anti-Drug Abuse Act of 1988..., and to make clarifying changes." (emphasis supplied)

The "new offenses" noted are Sections "1466. Engaging in the business of selling or transferring obscene matter" and "1460. Possession with intent to sell, and sale, of obscene matter on federal property." Section 1466 does include an "engaged in the business" requirement. Section 1460 includes only a "sale" requirement. As stated previously, it is not necessary to prove a commercial element in order to convict under Sections 1461-1465 of Title 18.

Under the existing Guidelines, a showing that the offense "involved

an act related to distribution for pecuniary gain" is necessary to upgrade the Base Offense Level to eleven (11). Such a showing would seldom place an additional burden of proof on the U.S. Attorney. On the other hand, a showing that the defendant "denotes time, attention, or labor to such activities, as a regular course of business, with the objective of earning a profit" may very well add such a burden—a burden Congress placed on a prosecutor only regarding Section 1466.

Further, the Proposed Amendment relegates an offense involving "pecuniary gain" to a Base Offense Level 6, unless it can also be proved that the defendant is, so to speak, "in the business." At the same time, the Proposed Amendment does not increase the Base Level Offense beyond grade 11 even where a defendant is in fact "in the business." Of course, the Base Level Offense can, theoretically, be increased beyond grade 11 if the "retail value of the material" exceeds \$100,000. This, however, will almost never happen in obscenity cases because of the requirement that the trier of fact must make an obscenity determination for each item. Prosecutors will seldom if ever ask a jury to make such a determination for each of hundreds, even thousands, of individual magazines, films, and books.

C. "Specific Offense Characteristics

(2) If the defendant distributed or possessed with intent to distribute material that portrays sadomasochistic or other violent conduct, increase by 4 levels."

Comment: Under the existing Guideline, the offense need only "involve" material depicting sadomasochistic abuse. The Proposed Amendment also requires a "distribution" element. Presumably, the terms "distributed" and "distribute" mean that defendant would have to sell, rent, lend, or give the material to others or intend to do so. Accordingly, if an American travelling abroad returned with boxes of sadomasochistic tapes and magazines "solely for private use" [i.e. no distribution or "intent to distribute"], the Base Level Offense would not be increased—despite the fact that much of the material would almost certainly "find its way" into others' hands—including children's. See United States v. Orito, supra.

But there is a further problem with both the existing Guideline, as well as the Proposed Amendment—to wit, the special treatment accorded material "that portrays sadomasochistic or other violent conduct." It is for the trier of fact to determine what is obscene, and there is no concept of "degrees of obscenity" in the obscenity law field. Nor is it clear that materials depicting "sadomasochistic abuse" per se pose a greater threat of harm to society, or to individual victims, than do materials "portraying," for example:

1. incest;
2. man/boy love—with "performers" who look 14 but are 18 or over;
3. bestiality;

4. sodomy, group sex, or promiscuous sex, in the age of AIDS;
5. adultery, in the age of family breakdown; or
6. excretory activities or products.

In Paris Adult Theatre I v. Slaton, 413 U.S. 49, the United States Supreme Court spelled out the various governmental interests that justify obscenity legislation. These include:

"[T]he interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers...."

The Paris Court continued:

"Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature...could quite reasonably determine that such a connection does or might exist. ...[t]his Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.'" (emphasis supplied)

In Roth v. United States, 354 U.S. 476, at 502 (1957), Mr. Justice Harlan, in a concurring opinion, elaborated:

It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the moral fabric of society.

[E]ven assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the [government] may be protected by the prohibition placed on such materials. The [government] can reasonably draw the inference that over a long period of time the indiscriminant dissemination of materials, the essential nature of which is to degrade sex, will have an eroding effect on moral standards. (emphasis supplied)

Few would quarrel with the assertion that materials depicting sadomasochistic abuse are heinous, but it is a great and tragic mistake to ignore or downgrade the harms associated with other types of hardcore pornography.

Congress has not made distinctions, and we respectfully urge this Commission to also avoid doing so.

127. Proposed Amendment to Section 263.2 of the Guidelines
[pertaining to 47 U.S.C. 223(b)]

*263.2 Obscene Telephone Communications for a Commercial Purpose
(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense involved material that describes sadomasochistic or other violent conduct, increase by 4 levels.

(2) If a person who received the communication was less than 18 years of age, increase by 2 levels unless the defendant took reasonable action to prevent access by persons less than 18 years of age or relied on such action by a telephone company."

A. "(a) Base Offense Level: 6"

Comment: The "dial-a-porn" industry is a multi-million dollar business and a major U.S. distributor of hardcore pornography. Congress in part recognized this by upgrading the penalty from misdemeanor to felony status for making any "obscene communication for commercial purposes." Yet, the Proposed Amendment simply turns a "blind eye" to the commercial aspect of the dial-a-porn industry, relegating all offenses to Base Level 6, unless the communication describes sadomasochism or the person receiving the communication is a child. We think this ignores the nature and degree of the harm caused by the crime, as well as the community view of the gravity of the offense.

Kim Murphy (Staff writer), "Regulators Answer Protests Of Huge 976 Phone Charges," Los Angeles Times, Sept. 28, 1987, at p. 3:

Clester Jones' 15-year-old son hid the...phone bill when it arrived, so Jones did not see it until the phone was shut off for nonpayment of \$5,312 for calls to a 976 number that offered sexually explicit conversation. "The boy didn't realize it was going to cost that much. He got hooked.... He just got so that he couldn't keep from calling," said [the boy's Aunt].... Complaints like the Jones' have drawn the attention of regulators [of] the nation's booming dial-a-message industry, which is expected to expand by 80% this year....

Dr. Victor Cline (psychologist), NPD Journal, Nov. 1985:

With the sponsorship of the U.S. Justice Department, I conducted a pilot field study of the effects of Dial-a-Porn on child consumers in January 1985.... With everyone of the children we studied we found an "addiction" effect in making these calls. In every case...the children (girls as well as boys) became hooked on this sex by phone and kept going back for more.... I next found that nearly all of the children had clear memories of a great deal of the content of the calls they heard.... We also found that almost without exception the children felt guilty, embarrassed, and ashamed.... In nearly all cases there were some problems and tensions generated in the parent-child relationships....

Dr. Cline continues:

When one makes a call to Dial-A-Porn, it is usually answered by a very sexy, seductive sounding female (actually a recording) who talks directly to the caller about how bad she wants to have sex with him now. She then tells the caller all the things she wants to

do to him—oral sex, vaginal sex, anal sex, etc. This is done with a lot panting and groaning suggesting that she is in intense heat. She may discuss the turgid state of her sex organs or that of the caller. There may be a second female on the line and they may talk about having sex together as well as with the caller. They may mention having a sex marathon today will all the explicit details. In some cases bondage is a part of the scenario.... Sex with animals is also included as well as group sex (e.g., five guys at once), lesbianism, anal sex, rape, having sex with a "baby sister," a school teacher having sex with class members, inviting the married male to have sex with the babysitter, inviting the caller to urinate in the woman's face, inviting beatings, torture and physical abuse as part of the sexual activity. The messages keep changing every hour or so and new numbers are given out in order to encourage constant call backs.

From a letter to a public official. Names have been changed:

I must relate to you a terrible incident that happened to our family.... It occurred July 26, 1987. My 13 year old son Tim called the dial-a-porn number.... Tim's friend Edward, aged 15, was over and they were listening to the prerecorded messages. Later when I arrived home from work I immediately made them hang up. Unknown to me Tim's 14 year old brother was listening on another line with his two friends.... Karen, age 10, was also listening on her extension. Within the next 48 hours, Edward and his 11 year old brother molested my daughter Karen. Police were notified and in their investigation revealed that Karen had encouraged the boys by asking them to touch her and "do it with her." She actually used phrases she heard on the "Dial-a-Porn."

From an article in the Daily News (LA), 10/3/87:

"A man who ran up nearly \$38,000 in phone-sex bills has been ordered to spend 180 days in a psychiatric hospital and repay the money he embezzled from a North Hollywood insurance agency to support his habit." (emphasis supplied)

From a May 1987 letter from a Christian ministry to people coming out of homosexuality:

"But there is another matter I would like to address and that is the possibility of proposing and lobbying for legislation that would prohibit the networking of gay telephone sex across this nation.... All I can tell you is that many, many men and women I counsel are being dragged into sexual addiction in this form of perverse activity." (emphasis supplied)

B. "(b) Specific Offense Characteristics

- (2) If a person who received the communication was less than

18 years of age, increase by 2 levels unless the defendant took reasonable action to prevent access by persons less than 18 years of age or relied on such action by a telephone company."

Comment: The Commission is certainly aware that in early 1988, Congress amended 47 U.S.C. 223(b) to prohibit obscene or indecent communication for commercial purposes to any person, regardless of the caller's age, and to abolish the "defense" under the old law for those who complied with FCC regulations intended to restrict access to adults only. Congress did so because it concluded that a "safe harbor" for obscene or indecent dial-a-porn was not constitutionally required for adults or minors.

On July 19, 1988, the United States District Court for the Central District of California upheld the prohibition in 47 U.S.C. 223(b) on obscene commercial messages, but invalidated 223(b)'s prohibition on indecent commercial messages. The United States Supreme Court agreed to hear the appeal of that decision, and oral argument is scheduled for April 19. [Sable Communications of California, Inc. v. FCC, 88-515 & 88-525.]

We fully expect the Supreme Court to uphold Section 223(b), as amended, and urge the Commission to follow the good example of Congress which did away with both the distinction in the previous law between adults and minors and with the statutory "defense" for those complying with ineffective FCC regulations—lest the Commission unwittingly grant dial-a-porn operators what is in effect a "partial immunity" for following its ineffective "rules."

It is to be noted that the Guidelines do not elsewhere make distinctions based on the age of the recipient of obscene (or indecent) matter. There is no reason to do so here.

128. Proposed Amendment: Adding An Additional Guideline, §263.3 [pertaining to Sections 1464 and 1468 of Title 18]

"§263.3 Broadcasting Obscene Material

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic:
 - (1) If the offense involved the broadcast of material that portrays sadomasochistic or other violent conduct, increase by 4 levels."

Comment: Again, the Commission chooses to treat obscenity offenses as "low grade;" again, chooses to turn a "blind eye" to the commercial element in most broadcast and cable TV programming; again, attempts to determine "degrees of obscenity."

Conclusion

We genuinely appreciate the difficulty faced by the United States Sentencing Commission in determining appropriate Sentencing Guidelines for the hundreds of criminal provisions contained in the United States Code. We fear, however, that in determining sentencing ranges for obscenity offences, the Commission has been unduly influenced by a policy of non-enforcement of obscenity laws that existed for approximately 20 years, roughly from the United States Supreme Court's Fanny Hill-Memoirs decision in 1966 (requiring proof that material was "utterly without redeeming social value"—a burden almost impossible to discharge) until the Final Report of the Attorney General's Commission on Pornography in 1986. The prosecution and sentencing practices of the late 1960's, the 1970's and early 1980's are simply an inadequate basis for determining appropriate sentencing ranges for obscenity offenses.

This is not to say that every obscenity offense should be put in the the highest possible offense level. Nor is it to say that noncommercial offenders, those who profit financially from the distribution of obscenity, and those who are "in the business" of distributing obscene material should be treated exactly alike.

It is to say that those who violate the federal obscenity laws, like those who violate federal drug laws, should know that if apprehended, they will not be treated with "kid gloves." It is to say that if a prosecutor expends the office resources needed to investigate and successfully prosecute a major distributor of obscene matter in his or her district—including a "dial-a-porn" provider, he or she can know that the defendant will not get off with a "slap on the wrist" simply because the defendant is a "first offender" or because the dollar value of the materials that formed the basis of the prosecution is relatively small.

We think too that it is not for the Commission to attempt to establish "degrees of obscenity." Hardcore pornography by its very nature reduces human beings to objects for sexual gratification, and, as noted by the United States Supreme Court in its Paris Adult Theatre I v. Slaton, supra, decision:

The sum of experience...affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

Congress passed laws punishing the transportation and dissemination of obscene material, and all obscene materials endanger the social fabric.



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March 28, 1990

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

Attention: Mr. Paul K. Martin
Communications Director

Dear Mr. Martin:

On behalf of the American Family Association and the over 400,000 families it represents, I would like to offer several comments to the proposed changes to the Sentencing Guidelines pertaining to obscenity and child pornography violations.

The amendment of section 2G2.1 would recognize the additional harm that young children face who have been used in sexually explicit material. Children of a young age are aware and able to distinguish between the anxiety of the actual physical abuse and the anxiety associated with the knowledge that photographs or films have been made of the sexual abuse. See, Child Molesters: A Behavior Analysis 21 (National Center for Missing and Exploited Children, April 1987).

The amendment would also provide for enhanced penalties for those defendants who were in a trust relationship with the child. If for no other reason than to attempt to preserve the traditional family structure, this enhancement is necessary. Many parents need to place their children in day care or after school care. In addition, parents entrust their children to school teachers, boy scout leaders and relatives. When the bonds of this trust are broken through the sexual

exploitation of the child, not only is the child physically and emotionally injured, but the child-parent relationship is also damaged. The child is at a loss to understand why his parent placed him in the position to incur such harm.

Third, the amendment would treat each child of a multiple molestation situation as a separate instance of molestation for purposes of sentencing. This provision specifically addresses the problems arising out of child sex rings and the difficulties in prosecution and adequate sentencing of those defendants. While the traditional law enforcement mechanisms that are in place address facets of child sex rings, this type of exploitation has unique characteristics that should be separately addressed. See, Child Pornography and Sex Rings (A. Wolbert Burgess ed. 1984).

Section 2G2.2 has been amended to enhance the penalty for the distribution of child pornography. These enhancements recognize the harm associated with the mere distribution of the material. See, New York v Ferber, 458 U.S. 747 (1982); and State v Meadows, 503 N.E.2d 697 (Ohio 1986), cert. denied, 480 U.S. _____, 94 L.Ed. 2d 771 (1987).

In addition, the amendment recognizes the minimal market value of child pornography. The harm to society is not the evil that results from criminals amassing a fortune from others' weaknesses, but from the pure exploitation of children. The harm of producing child pornography remains with the existence of the material and its use in blackmailing and seducing other children into participating in sexual activities. See, Child Molesters: A Behavior Analysis 21 (National Center for Missing and Exploited Children, April 1987).

This amendment would also specifically consider the prior criminal behavior of the offender. In discussing the unique sentencing problems pedophile offenders present, the Attorney General's Commission on Pornography identified pedophile offenders second in recidivism only to exhibitionists. See, Final Report of the Attorney General's Commission on Pornography 670 (1986).

It should be the immediate goal of the criminal justice system to protect the victims and potential victims of these offenders. Absent treatment programs for pedophile offenders, particularly recidivist offenders, enhanced sentences are essential to adequately protect America's children.

Finally, the Commission is considering amendments to the sentencing guidelines involving the distribution of obscene material. These enhanced levels recognize the basis for

individuals engaged in the transportation of such material. There is a lucrative market for obscene material. These enhancements reflect this fact.

The only negative aspect of this enhancement provision is that as a practical matter, only a few items among tens of thousands available from one distributor will be the subject of a prosecution. As it is the nature of an obscenity prosecution, each magazine or video tape must be viewed, in its entirety, by the jury prior to a finding that the material is obscene. To require a jury to find the entire cache of material from a particular distributor to be obscene would be unwieldy and unreasonable. Consequently, a conviction for a violation of federal obscenity laws is usually a reflection of only a small portion of the overall stock of the distributor.

The enhancement provision should examine whether the defendant was engaged in the business of distributing obscene material as an indicia of the extent of the commercial enterprise. To rely solely on the retail value of the items that were the subject of the prosecution will generally not be an accurate reflection of the extent of the commercial enterprise or the pecuniary gain involved.

Again, I am pleased to have this opportunity to support the proposals of this Commission in calling for enhanced penalties for producers and distributors of child pornography and distributors of obscene material. These current proposals will go a long way in the effort to curb the flow of this illegal and insidiously harmful material. Should the insight of the American Family Association be of value in the future, please do not hesitate to call on me.

Sincerely,



Peggy M. Coleman
General Counsel
American Family Association



March 26, 1990

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

From: Joan Morse
President

We want it to be known to you this day that we do support the new proposed sentencing guidelines that are included in Amendments 22, 23, and 24 for tougher penalties for the sexual exploitation of children.

It is our prayer that this legislation will be passed very soon. Children look to adults for protection and we should do everything in our power to protect them. We must start getting back to being more concerned about the victims rights rather than the abusers.

Our local AFA did not receive this information concerning these Amendments until today so I had literally no time to share this info before the March 30 deadline. This is probably the only letter you will receive from this area because of that.

As president of the Tri-Cities AFA for the past several years it has been my observation that many people are very concerned about how lax our government has become with regards to pornography. There seems to be a lack of confidence in our system. Also, some people feel it won't help to speak out. They feel helpless.

Last November we did have a pro-decency rally in this area of three small cities with a twenty mile radius. We had 200 people in attendance at that rally. People are concerned about this issue.

I personally do not understand why a civilized country such as ours puts up with this pornographic type of exploitation of it's people. We do need tougher laws in dealing with these evil and heartless people that see fit to abuse people in this way. The only thing many of them are sorry for is that they get caught.

Please do what you can to pass these laws.

Sincerely yours,

Mrs. Joan Morse

March 26, 1990

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

Dear Director:

I am writing to express my support
for Amendments 22, 23 and 24 of the
proposed new sentencing guidelines.

I have been combating child molestation,
and obscenity for five years now. These
are major crimes against the American
family and they deserve the proposed
increase in penalty.

Warmest regards,
Frank Wagner
311 Wister Way
Reading, PA 19606



Delmarva Citizens For Decency, Inc.

P.O. BOX 3156

SALISBURY, MARYLAND 21801

(801) 860-1200

March 27, 1990

United States Sentencing Commission
1331 Pennsylvania Ave, N.W.
Suite 1400
Washington, D.C. 20004
Attention: Communications Director

Dear Sir:

Our organization represents 300 members who strongly support Amendments 22, 23 and 24 for sentencing penalties.

The need is great that stronger and tougher sentencing guidelines be enacted for those who are sexually exploiting children.

Please pass our feelings to those concerned with these Amendments.

Sincerely,

Bill Hoffman, President

BH/jh

Joseph Bachtler
Daniel S. Collins
Jerry Gray
David Grier
Joan Hoffman

Bill Hoffman
Donna Propper
Jo Ruark
Dale E. Watson
Carl Webster

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US SENTENCING COMMISSION
1331 PENNSYLVANIA AVE 140
WASHINGTON DC 20004

I AM IN FAVOR OF HEAVIER SENTENCING FOR PORNOGRAPHERS,
DORIS MCGREW

16:57 EST

MGMCOMP

1757 Kent Pl.
Vista, CA 92084
March 27, 1990

U.S. Sentencing Commission
1331 Pennsylvania Ave., Ste. 1400
Washington, D.C. 20004

Dear Commissioners:

We strongly support stricter
sentencing for pornographers and
sex offenders.

Sincerely,

Alice M. Hetz and
William J. Hetz

Mrs. Ron W. Shepelwich
5505 Asbury
Fort Worth, Texas --
March 28, 1990 ---

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

Dear Communications Director:

I would like to be counted in favor of more severe punishment for crimes of sexual exploitation of children.

I am very much in favor of passing Amendments 22, 23 and 24. I do feel it is a deterrant and offers some protection to our children.

Thank you for counting my opinion.

Sincerely,

Mrs. Ron W. Shepelwich

Mrs. Ron W. Shepelwich

Mary & Tim
Muscatine, Ia 5276

United States Sentencing Commission
1331 Pennsylvania Ave NW
Suite 1400
Washington, DC - 20004

Attention: Communications
Director

Dear Sir:

I strongly support Amendment -
ments 22, 23 & 24 on the New
Proposed Sentencing Guidelines.

I am involved in a local
group - Muscatine Citizens Against
Pornography. There is not time
enough to contact all of them -
but I have 200 people (4 of them
their spouses) who would gladly
have sent in similar requests

Sincerely
Rosemary Levinson
510 Chestnut
Muscatine, Ia - 5276

3804 Floyd St.
Fort Worth, Texas
76116
28 March, 1990

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

Dear Communication Director,

I strongly support Amendments 22, 23
and 24.

I cannot believe that we do so little to
keep persons who destroy our children -
to keep them away no matter who they
are!

Sincerely,
Mrs. Alicia L. Lamey

CITIZENS AGAINST PORNOGRAPHY
Concerned Citizens Committee

P.O. Box 331784 76163
6263 McCarr • Fort Worth, Texas 76163 • (817) 294-4199

March 27, 1990

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

Dear Sirs,

I represent 380 people who have been fighting pornography in our area and through the U.S. Legislature. We are shocked by the number of child abusers that seem to get away with terrible crimes against our little ones. Concerning the new proposed Sentencing Guidelines, we strongly support Amendments 22, 23, and 24 raising the current levels of penalties for sexual exploitation crimes.

We believe these new guidelines, if taken into account when sentences are decided, will save children's lives.

Sincerely yours,

Betty Hildebrand
President

(Mrs John W.)

March 27, 1990

Dear Sirs:

We strongly support amendments
22, 23, 24 for increasing the penalty
for sexual exploitation of children.

Our children the hope of our future
are at great risk. Please give this
matter careful consideration.

Sincerely,
Fran & Randy Howe
1025 Orchard Ave.
Muscatine, Iowa 52761

U.S. Sentencing Commission
1331 Pennsylvania Ave., Ste. 1400
Washington, D.C. 20004

WILLIAM GLENWINKEL
2520 MAJELLA RD
VISTA CA 92084-1627

Dear Sirs:

I understand you are inviting public comment on the sentencing of pornographers.

I have experienced injury in my life due to pornography and know the life-long devastation it can cause.

Pornographers are raping America in the name of First Amendment Rights. This is a flagrant abuse of our Constitutional freedoms.

Please take steps to end this major assault on the emotional and mental health of our nation. Give the most severe of penalties to pornographers. Their works are destroying our nation. This is not a victimless crime!

Very sincerely,
Sharon Glenwinkel

4008 Aragon Dr.
Ft. Worth, Texas
United States Sentencing Commission
1331 Pennsylvania Ave. N.W.
Suite 1400
Washington, D.C. 20004

Att: Communication Director

We, the undersigned do urgently
ask you to pass Amendments 22,
23 and 24. Parents and relatives
who abuse their children should
be severely punished! Repeat
offenders should never be re-
leased on society again!!

All of the amendments are
needed. Please stand firm!!

yours truly,

Lloyd H. Shaw

Edna Mae Shaw

Muscatine, Iowa

March 28, 1990

U.S. Sentencing Comm:
1331 Penn Ave N.W.
Attention Comm Director

This note is to inform you that I
strongly support Amendments 22, 23, 24

Please give this action your consideration.

Sincerely,

A. L. Hanson

1311 James Place

Muscatine, Iowa 52761

3/27/90

Dear Commissioners

Thank You for Accepting public
Opinion Regarding Sentencing for
pornography and Sexual Abusers..

my wife AND I ARE IN FAVOR OF
STRICT SENTENCES FOR THOSE ACCUSED OF
Pornography violations especially child
pornographers. We also ARE IN FAVOR OF
Harsher Sentences For Repeat Mentally
Disordered Sex Offenders - We have THREE
Children 1 boy + 2 girls We've taken this time
in An effort to protect them.

Thank You

Dean M Mesa

DEAN M. MESA

Brenda P Mesa

Brenda P. Mesa



March 27, 1990

United States Sentencing Commission
1331 Pennsylvania Ave. N.W.
Suite 1400
Washington, DC 20004
Attn: Communications Director

Dear Sir:

Please we need tougher sentencing
to increase the penalty for sexual
exploitation of children.

Do please support Amendments
Amendment # 22

Amendment # 23

Amendment # 24

Urgently & Sincerely,

Mrs. Jack Hallbrook
5513 Durham
Fort Worth, TX. 76114

my loving family
with children
join me.
Thank you.

March 29, 1990
Ft Worth, TX, :

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

Gentlemen:

We encourage you to vote for tougher sentencing guidelines on the penalty for sexual exploitation of children. We must have support of these three Amendments: 23, 22, and 24.

If we are to stop the increasing exploitation of children we must provide the penalty for those convicted and of those distribution_s of adult obscenity for pecuniary gain.

Thank you.

D & D Cropper

Mr. & Mrs. Dale Cropper

March 29, 1990

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

Attention: Communications Director

Dear Sir:

In reference to Amendments 22, 23 and 24 regarding tougher sentencing for sexual exploitation of children, I heartily concur with each and every one of the proposed Amendments.

I think what has been allowed to happen to the children of this country has been disgustingly approved by not doing anything about it.

Luke 17:1-2

"Then said He unto the disciples, it is impossible but that offences will come: but woe unto him through whom they come! It were better for him that a millstone were hanged about his neck, and he cast into the sea, than that he should offend one of these little ones."

Sincerely,

Scottie L. Spurlock

Scottie L. Spurlock
8644 Stonewood Drive
Fort Worth, Texas 76179

IN APPRECIATION

Melinda Brogan
6057 W. 86th PL
Los Angeles, CA. 90045

Dear Sirs,

I want very much to lend my support to the prospect that pornography will receive stiffest possible sentencing for their contribution to the progressing deterioration of our society. It appears from the onslaught of such materials and the easy availability of it from womb to tomb that they operate quite happily free of any threats to their freedom. Too many people are suffering horribly because no one scares them. It's time we scared them.

Sincerely,

Melinda Brogan

March 28, 1990

United States Sentencing Commission
1331 Pennsylvania Ave., N.W.
Ste. 1400
Washington, D.C. 20004
Attn: Communications Director

Dear Sir;

I am writing to you in order to give my full support of the new sentencing guidelines, Amendments 22, 23, and 24.

I feel that these amendments will most surely help protect those in our society who are least able to protect themselves. The future of our nation depends on our stopping the pornography that has invaded our homes, our cities and the lives of our children. Those who murder the minds of our youth should be punished as if they had committed physical murder.

Sincerely,

Barbara Ragsdale

3937 Clayton Rd. West
Ft Worth, Texas 76116
March 31, 1990

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

Attention: Communications Director

Dear Sir:

Of all the crimes rampant in our country today, none is as vicious as the sexual exploitation of children, which occurs largely because of the proliferation of adult and child pornography. It is a known fact that obscene magazines are used in connection with crimes of child abuse, as well as other sex offenses.

Please urge your members to support Amendment 22, 23, and 24, requiring tougher sentencing guidelines and much heavier penalties for all sex offenders, in proportion to the number of crimes each has committed against children.

It is time to stop the soft-hearted sympathizing with these criminals, who, in all probability, never can be rehabilitated; instead, empathy should be on the side of the helpless child victims and their families.

In the past, a blanket of protection was thrown around children. Now they are unsafe for one minute out of sight of a parent or other responsible adult. Please encourage your committee members to vote!

Sincerely,
Jane Mueller
(Mrs. Harold E. Mueller)

Concerned Citizens Committee

~~6263~~ ~~McCart~~ • Fort Worth, Texas ~~76133~~ • (817) 294-4199

P.O. Box 331784

76163

March 28, 1990

United States Sentencing Commission
Attention: Communications Director
1331 Pennsylvania Ave. N.W. Suite 1400
Washington, D.C. 20004

RE: Amendments 22, 23, 24

Dear Sir:

My letter comes to advise you of my strong support for three amendments which I understand you are considering as new tougher sentencing guidelines that would increase the penalty for sexual exploitation of children.

I would urge you to strengthen the sentencing guidelines by adopting Amendments # 22, # 23, and # 24. Adults who sexually exploit children need for their own sake as well as for their victims' sake to be stopped from continuing such frightfully damaging practice, and then certainly treated psychologically as well. Repeat offenders are doubtless harder to treat with counselling and discouraging problems facing a judge over and over again, but there is no good reason to refrain from imposing increased sentences to discourage them. The cross reference requirement in Amendment # 23 is very important.

Amendment # 24, providing an increase of almost 50% in the penalty for those convicted of distribution of "adult" obscenity for pecuniary gain could have a decisive effect on those distributors if strictly enforced. Of course, an attack on the pocketbooks of such distributors is intelligent and long overdue. Where money is the motive, remove the source of that money.

Please, please use the power of your Commission to curb the evil, totally hurtful actions of persons who so flagrantly take the lives of others into their own depraved and vicious darkness.

Sincerely,

Priscilla Bradford Holland
Priscilla Bradford Holland

3575 Hamilton St.
Fort Worth, Texas 76107

Jeff and Linda Hitch
247A Virginia Pl.
Costa Mesa, CA 92627

March 28, 1990

U.S. Sentencing Board
1331 Pennsylvania, Ste. 1400
Washington, D.C. 20004

Re: Public Comment

We are writing to express our view that we should have much stiffer penalties for both pornographers and for sex offenders. There are few deterrents to such people but stiffer penalties would certainly help. It would also give their victims a sense that some justice has occurred.

Very truly yours,

A handwritten signature in cursive script that reads "Jeff & Linda Hitch". The signature is written in dark ink and is positioned above the typed names.

Jeff and Linda Hitch



BIRCHMAN BAPTIST CHURCH

"Sounding Forth the Word of the Lord"

Church (817) 244-6590
Home (817) 244-6544

Miles Seaborn
Pastor

9100 N. Normandale
Ft. Worth, Texas 76116

March 29, 1990

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

Attn: Communications Director

Dear Sir:

This letter is to affirm the new tougher sentencing guidelines that increase the penalty for sexual exploitation of children.

I, personally, and we as a church family strongly support Amendments 22, 23, 24.

We prayed about this in our Prayer Service last night, and we want to encourage you to stand firm against all forms of abuse to our precious children and families.

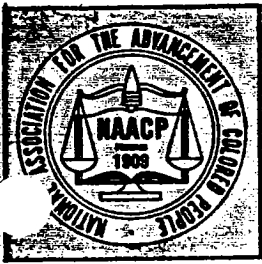
Hopefully, Amendment 24 will help stem the tide of pornography that is engulfing our society on all levels.

Please know that we fully support tougher sentencing guidelines for crime, and especially so against children.

Sincerely,

Miles Seaborn
abm
Miles Seaborn

MS:abm



WASHINGTON BUREAU

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

1025 VERMONT AVENUE, N.W. • SUITE 730 • WASHINGTON, D.C. 20005
(202) 638-2269

March 30, 1990

Mr. Paul K. Martin
Communications Director
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Martin:

The NAACP submits the following comments, on sentencing guidelines in 55 Fed. Reg. 5718 (February 16, 1990).

The NAACP, in its 81st year, is the nation's oldest and largest civil rights organization. From its inception after the infamous 1908 Springfield, IL. race riot, the NAACP has responded to the incidences of lynching and hate crimes against blacks.

The NAACP in 1919 published, at great risk to many of its members, Thirty Years of Lynching in the United States: 1889 - 1918. This study, the first of its kind, chronicled and tabulated one hundred lynchings that took the lives of 3,224 persons. In the 1960's the NAACP's Washington Bureau lobbied Congress extensively for passage of the Civil Rights Acts. Congress was persuaded, in part, by the efforts of the NAACP and the comments of the Justices of the Supreme Court (in two cases

U.S. v. Guest and U.S. v. Price) to provide "... an effective means of deferring and punishing forcible interference with the exercise of federal rights." (Civil Rights Act of 1968, P.L. 90-284, 1968 U.S. Code Cong. and Admin. News 1837, 1841). Consequently, Title I of the Civil Rights Act of 1968 was added to include 18 U.S.C. 245 to the U.S. Code.

The existence of these federal laws, however, has not deterred a very small, but very violent segment of the population from committing hate crimes. Therefore it is timely that concerted attention is paid to proposed guidelines regarding sentencing. The NAACP has carefully scrutinized the proposed guidelines and submits its comments on three provisions of said guidelines:

- (1) Whether an increase (as currently provided) of 2 levels over the offense level applicable to any underlying offense is sufficient to adequately reflect the increased harm such crimes inflict on society when they are used as a means of insidious discrimination or to suppress the exercise or enjoyment of Federal rights; if not, should the Commission amend sections 2H1.1(a)(2), 2H1.2(a)(2), 2H1.3(a)(3) and 2H1.5(a)(2) by deleting "2" and inserting "4" in lieu thereof and by making comparable revisions to section 2H1.4:
- (2) Whether any chapter 3 general adjustment the Commission may adopt for offenses that are not prosecuted as civil rights offenses yet nevertheless involve the infliction, or intended infliction, of any harm motivated at least in part by the victim's status with respect to race, color, religion, alienage, or national origin or by the victim's exercise or enjoyment, of any right of privilege secured under the Constitution or laws of the United States (see proposed amendment 49) should have the same or a comparable structure and/or adjustment levels as the guidelines in part H, subpart 1 of chapter 2.

- (3) Whether the Commission should provide a general adjustment in chapter 3 where offenses have been committed by public officials under color of law or otherwise under the cloak of official duty or authority (in cases other than described above) that is distinct from the provision in § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) and, if so, whether the amount of such an adjustment should be the same as the 4-level increase for public officials contained in the guidelines in part H, subpart 1 of chapter 2.

I. The NAACP believes that an increase (as currently provided) of two levels over the offense level applicable to any underlying offense is sufficient to adequately reflect the increased harm of hate crimes. The numbers of hate crimes have proliferated in recent years. Federal statutes such as 42 U.S.C. 245 are available to be utilized by victims of racially-motivated violence. These federal criminal civil rights statutes, however, need to be strengthened by increasing the penalties of conviction. Hopefully, increased penalties would serve as a deterrent.

Individuals and racist groups, such as the Skinheads, the Order and the Klu Klux Klan must be deterred from racially-motivated violence by stringent terms of imprisonment and fines. Some cases in point:

On March 1, 1990 in Dallas, five Skinheads were found guilty of conspiring to violate the civil rights of minorities. All five were convicted of 13 counts of conspiring to violate the civil rights of blacks, Jews and Hispanics by vandalizing a Jewish synagogue and harassing blacks and Hispanics in a Dallas, Texas park. U.S. District Judge Barefoot Sanders has set

sentencing for April 13, 1990. Each of the charges carries up to 10 years in prison and a \$250,000 fine.

A revitalized federal effort to remedy the effects of racially-motivated violence is necessary to deter these crimes. More stringent terms of imprisonment will help judges to impose harsher sentences.

Kenneth M. Mieske, 23, of Portland Oregon was sentenced to life imprisonment in March, 1989, with no parole for at least 20 years, for beating a man to death because he was black. Mulugeta Seraw, 27, an Ethiopian national was beaten to death with a baseball bat by Mieske on November 13, 1988. Mieske admitted when he pleaded guilty that he killed Seraw "because of his race". (Los Angeles Times, June 6, 1989 at 4, col.4)

Mieske will be eligible for parole in 20 years, however, the state parole board could release Mieske earlier by only a unanimous vote.

The NAACP believes that the federal government must make a strong response to vicious crimes, such as the Seraw ruling.

II. The NAACP believes that the Commission should adopt a comparable structure and/or adjustment levels for chapter 3 general adjustment as exists for part H, subpart 1 of chapter 2.

Crimes that are not prosecuted as civil rights offenses, per se may still involve the infliction or intended infliction of harm, which was motivated by the victim's race, color, religion, alienage or the victim's exercise or enjoyment of any right or privilege secured by the laws of the United States or the Constitution.

In March, 1989, two San Diego, California men were charged with killing two Mexican farm workers with a semi-automatic weapon. The two victims, Hilario Castenada Salagado and Matilde Macedo de la Sancha, legal residents of the U.S., were shot a total of 11 times. One of the two perpetrators, Kenneth Kovzelove was not prosecuted for civil rights offenses.

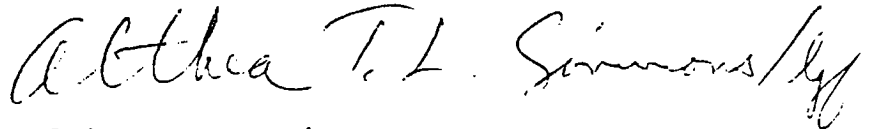
A crime, such as the one mentioned above, wherein the defendants are not prosecuted for civil rights offenses still merits the same or a comparable structure and/or adjustment level as the guidelines in offenses involving individual rights (part H, part 1 of chapter 2.) The NAACP maintains that this rationale will result in more consistent sentencing by judges.

III. The Commission should provide general adjustment in chapter 3 where offenses have been committed by public officials (under color of law) or otherwise under the cloak of official duty or authority that is different from § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

An additional adjustment should be instituted for chapter 3 because an adjustment regarding offenses by public officials under color of law or cloak of official duty may be applied to a wide variety of offenses, e.g., voting fraud conspiracies to bribe voters by precinct registrars and/or intimidation by local election officials.

Although statutes and laws alone cannot eradicate hate crimes, strict enforcement of existing laws and tougher sentencing will indicate to racists that racially-motivated violence will not be condoned in this country.

Respectfully submitted,

A handwritten signature in cursive script, reading "Althea T. L. Simmons". The signature is written in dark ink and is positioned above the typed name.

Althea T. L. Simmons
Director/Chief Lobbyist

ATLS/tnd

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

CHAPTER 2 -- Part H (Civil Rights)

#s 25 and 26, Pages 32 et seq.

We recognize and appreciate the seriousness of these offenses; nevertheless, we question the justification for raising the BOLs in #25.

As to both #s 25 and 26, what is the past experience? How many of these cases have been prosecuted? What sentences? Any departures?

We hope that answers to the above questions, and responsive comments to the Commission will provide the data necessary to provide a comprehensive resolution of those issues.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 25. This amendment is objectionable due to the procedural concerns expressed in the body of the testimony.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 26. Each of the three options set forth in this item is objectionable due to the procedural concerns expressed in the body of the testimony. The third option appears to be especially overbroad and ill-considered.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#27, Page 34 -- §2J1.6

We object the this change that equates failure to report for service of a sentence with escape, a totally disparate and potentially violent offense.

There is no equivalence, and there should not be an amendment.

FEDERAL PUBLIC DEFENDER
ROOM 174, U.S. COURTHOUSE
MINNEAPOLIS, MN. 55401

(FTS) 777-1755
(612) 348-1755

DANIEL M. SCOTT
FEDERAL PUBLIC DEFENDER
SCOTT F. TILSEN
KATHERIAN D. ROE
ANDREW H. MOHRING

March 21, 1990

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

Attention: Communications Director

Re: Proposed Amendment to the Guidelines #27

Dear Communications Director:

I write regarding proposed Amendment #27 which is an amendment to Section 2J1.6. Since I was the defense lawyer in United States v. Sharon Lee, 887 F.2d 888 (8th Cir. 1989), to which this proposed amendment is an obvious response, I hope my comments will be given some attention.

The proposal given here for a method of dealing with failures to report for service of sentence will result in a longer sentence, for example, for failure to report to serve a three month sentence than for a person who fails to appear for trial or sentencing facing 5 to 14 years in prison. This can be readily seen by examining 2P1.1, base offense 13, and the current 2J1.6(b)(2)--6+6=12.

The proposed amendment has the merit of simplicity, but to me appears to be a hasty response to the decision of the Eighth Circuit. I suggest the following is more consistent with the apparent underlying concept behind Section 2J1.6.

Section 2J1.6 commendably tries to follow the congressional intent of increased punishment for failure to appear relating to the severity of the offense. It would be simple, consistent, and appropriate to add a specific offense characteristic (c) which would state that if the failure to appear was for service of sentence for a person given voluntary surrender or a stayed surrender date, that the specific offense characteristic in (b) applicable to the sentence actually imposed is the one used.

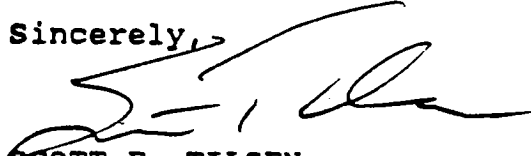
U.S. Sentencing Commission

Page 2

March 21, 1990

Such a method would appear to me, under most examples, to impose harsh but appropriate punishment to the range of offenses under this category.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Tilsen", written over the word "Sincerely,".

SCOTT F. TILSEN
Assistant Federal Defender

SFT/sa

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

27. NACDL opposes the proposed amendment of USSG §2J1.6.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#28, Page 34 -- §2K1.4

We object to this proposal which removes the element of "knowingly" creating a substantial risk. "Knowingly" should be a critical element in raising the BOL. We also object to raising the offense levels.

The "Reason for Amendment" is boilerplate -- "does not adequately reflect the seriousness of the offenses."

Where are the statistics? Where's the data? "Where's the meat?"

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 28. This amendment would result in increased sentences without sufficient explanation. Proposed specific offense characteristic (b)(1) seems especially unclear and unnecessary.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

28. NACDL opposes the proposed amendment to USSG §2K1.4. In particular, since scienter is a measurement of culpability, subsection (a)(1)(A) should relate to a Defendant who has knowingly "created a substantial risk..."



DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

MAR 23 1990

CC-38,342 FE:JBP

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

Dear Judge Wilkins:

This is in response to the Sentencing Commission's request for comments on proposed amendments to the sentencing guidelines published in the Federal Register on February 16, 1990.

Initially, we would express our appreciation for the careful consideration the Commission gave our earlier comments on the guidelines in our letter of December 14, 1989. As a result, the proposed new sentencing guideline on arson is a significant improvement.

With respect to firearms, we strongly support Option 2 for the proposed armed career criminal guideline in section 2K2.6. Under Option 1, the only increase above the base offense level of 34 occurs when in connection with the use of the weapon or ammunition in the instant offense a victim sustained death, permanent or life threatening injury, serious bodily injury or bodily injury. Regardless of the seriousness of the defendant's prior convictions, the base offense level cannot be increased above 34.

In our December 14 letter, we discussed pre-guidelines cases where defendants received sentences of more than 15 years under 18 U.S.C. § 924(e), including the case of Warren Bland who had a long history of vicious and sadistic sexual assaults. He received a sentence of life imprisonment under section 924(e). Attachment B to our December 14 letter shows that a firearm was found in Bland's car, but no injury resulted from his use of the firearm in the instant offense. Under Option 1, Bland's offense level could not be increased

Honorable William W. Wilkins, Jr.

above 34. Under option 2, Bland's brutal attacks upon and torture of his victims would result in a sentence at the offense level of 38.

In Attachment A to our December 14 letter, we discussed a pre-guidelines case, United States v. Gourley, 835 F.2d 249 (10th Cir. 1987). Gourley received a life sentence as an armed career criminal. He pressed a loaded sawed-off shotgun against the throat of an undercover police officer and pulled the trigger but the shotgun malfunctioned. Fortunately, the police officer was not injured. Under Option 1, Gourley's offense level could not be increased above 34. Under option 2, Gourley's use and brandishing of a firearm would result in sentencing at the offense level of 38 which we believe would be appropriate in such a case.

Our letter also discussed United States v. Jordan, 870 F.2d 1310 (7th Cir. 1989), where the defendant used a firearm to fire at an off-duty police officer outside the store where the officer was employed as a security officer. Apparently, the officer was not injured. Jordan was sentenced to 20 years in prison. Under Option 1, Jordan's offense level would only be 34. Under Option 2, the offense level would be 38 because he used and brandished a firearm during the instant offense.

We strongly urge the adoption of Option 2 because it takes into account the circumstances surrounding the defendant's prior convictions and the circumstances involving the defendant's instant offense of possessing a firearm. A review of the cases discussed in Attachment A to our December 14 letter demonstrates that judges based their decisions in pre-guidelines cases on these circumstances when sentencing armed career criminals to more than 15 years imprisonment. Option 1 too narrowly restricts the factors used in sentencing under section 924(e).

Section 2K2.1 of the guidelines provides for the sentencing of persons convicted of violations of 18 U.S.C. § 922(g) (felons and other prohibited persons in possession of firearms) and 26 U.S.C. § 5861(d) (possession of unregistered National Firearms Act weapons). A proposed amendment to this section would provide an increase of 2 offense levels if the defendant possesses a loaded firearm or both an

Honorable William W. Wilkins, Jr.

unloaded firearm and ammunition that could be used in the firearm. We support this amendment. A defendant possessing a loaded firearm or the firearm and ammunition for the firearm obviously poses more of a threat to society. For example, the offense level should be increased to 18 if the defendant possessed a loaded machinegun. Moreover, we recommend an increase of 2 levels where the defendant possessed a loaded firearm to which a silencer is attached or possessed a loaded firearm and a silencer which is capable of being attached to the firearm.

The Commission also requested comment on whether an offender who is convicted of possessing a firearm or ammunition, and has one or two prior convictions for serious drug offenses or violent felonies but is not subject to sentencing under 18 U.S.C. § 924(e), should receive a 2-level increase in the offense level for each such prior conviction. We support the 2-level increase for each such prior conviction. As discussed in Attachment C to our December 14 letter, courts under repealed 18 U.S.C. § 3575 repeatedly enhanced sentences for felons in possession of firearms based on their prior convictions for serious crimes. A defendant who possesses a firearm and who has a prior conviction for manslaughter presents more of a threat of violence to society and should receive a more severe sentence than a defendant whose prior conviction is for larceny. Since a firearm is so easily used to commit crimes of violence and is a tool of the trade for drug dealers, defendants who have prior convictions for such crimes should be deterred from possessing firearms.

In 1988, Congress increased the maximum penalty for a violation of 18 U.S.C. § 922(g) (a felon in possession of a firearm) from 5 years to 10 years. ATF concentrates its prosecutions for this offense on defendants who have prior convictions for violent crimes or drug trafficking offenses. The doubling of the maximum sentence by Congress for the offense suggests that Congress believed the defendants actually prosecuted under section 922(g) were serious offenders. The offense levels in the current guidelines are simply too low to adequately deter serious criminals from possessing firearms.

We suggest that the 2-level increase for a defendant with a prior drug offense apply to defendants previously convicted of a "controlled substance offense" (as defined in section

Honorable William W. Wilkins, Jr.

4B1.2 of the guidelines) rather than a "serious drug offense." A serious drug offense requires that a State offense have a maximum penalty of 10 years imprisonment or more. Under section 11379.5(a) of the California Health and Safety Code, the sale or manufacture of PCP is punishable by imprisonment in State prison for 3, 4, or 5 years. Under section 11370.4(b), a person convicted of selling PCP is subject to an additional term of 5 years imprisonment if the substance containing PCP exceeds 10 pounds by weight or 33 1/3 gallons by liquid volume. Under section 11352(a) of the California Health and Safety Code, the sale of heroin is punishable by imprisonment in State prison for 3, 4, or 5 years. Under section 11370.4(a), a person convicted of selling heroin is subject to an additional term of 5 years imprisonment if the substance containing heroin exceed 10 pounds by weight. The term serious drug offense excludes the great majority of drug trafficking offenses committed in California. The term controlled substance offense includes the sale of PCP and heroin. We believe the offense of selling PCP and heroin and similar offenses in California are serious offenses and should result in a 2-level increase in the offense level.

We recommend that any amendment make it clear that the 2-level increase for having prior convictions for drug or violent crimes applies to those convicted of possessing unregistered National Firearms Act weapons as well as to felons and other proscribed persons unlawfully possessing firearms in violation of 18 U.S.C. § 922(g). Defendants who possess contraband (unregistered) National Firearms Act weapons and have such prior convictions impose a significant threat. These defendants should receive stiffer sentences than defendants who have no such prior convictions.

We support the proposed elimination of the reduction in offense level for unlawful possession of National Firearms Act weapons if the defendant "obtained or possessed the firearms solely for lawful sporting purposes or collection." However, we also believe that this reduction in offense level should be eliminated for all other firearms offenses. At a minimum, the provision should be amended to delete reference to the purpose for which firearms were obtained. The fact that the defendant originally acquired the firearm for sporting or collection purposes is immaterial. Rather,

Honorable William W. Wilkins, Jr.

the circumstances surrounding the defendant's possession and use of the firearm should be more significant for purposes of sentencing. This would eliminate frivolous arguments such as that raised by the defendant in United States v. Smeathers, 884 F.2d 363 (8th Cir. 1989), who, having fired a rifle throughout his home after a quarrel with his wife and having been convicted of being a felon in possession of the rifle, argued that his sentence should be reduced because the firearm was obtained for sporting purposes.

On page 5733 of the Federal Register, the Commission seeks comments on several issues relating to the firearms guidelines. Item 5 asks whether existing guidelines that incorporate violent activities or gun possession should provide additional adjustments due to prior violent or serious drug convictions or sentences. We would favor the amendments, however, the guidelines should apply to controlled substance offenses rather than serious drug offenses. Item 3 proposes an amendment to the criminal history guidelines to provide higher adjustments for each prior conviction involving violent or serious drug offenses. We would favor Item 3 if the adjustments would equal or exceed the 2-level increase for defendants having such prior convictions who are convicted of possessing firearms and if the guidelines covered controlled substance offenses rather than serious drug offenses.

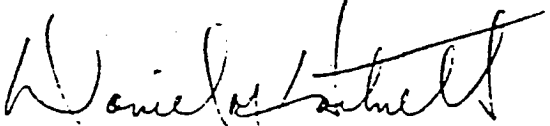
Item 2 asks whether the career offender guideline should be amended to apply to all instant offenses involving possession of a firearm. We recommend that the offense of possession of a firearm by a felon be considered a crime of violence if the circumstances of the offense show that the defendant fired the gun, pointed it at an individual, or otherwise used the gun to threaten an individual. The base offense level as a career offender would be 24 and the criminal history category would be VI, resulting in a sentence of 100-125 months. A felon who in the instant offense used a firearm in a violent or threatening manner and has 2 prior violent felony or controlled substance offenses should receive a substantially longer sentence than a felon who merely possesses a firearm. In United States v. Williams, 892 F.2d 296 (3rd Cir. 1989), the defendant fired a pistol at one person and threatened to shoot another. He was

Honorable William W. Wilkins, Jr.

convicted of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) and was sentenced as an armed career criminal under 18 U.S.C § 924(e) because he had three prior convictions for crimes of violence. The court also ruled defendant's current offense of possessing a firearm a crime of violence because he fired it at a person. The court sentenced defendant as a career offender to 360 months imprisonment.

We appreciate this opportunity to comment on the proposed amendments to the guidelines. If we can be of further assistance to the Commission, please let us know.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Daniel M. Hartnett", with a stylized flourish at the end.

Daniel M. Hartnett
Associate Director
(Law Enforcement)

Chairman, United States Sentencing Commission
1331 Penn. Ave., NW Suite 1400
Wash. DC 20004

Dear Chairman,

The purpose of this letter is to express my concerns regarding inequity in sentencing first time drug offenders to mandatory minimum terms. I write this as a citizen and not as a federal drug specialist. My comments reflect my own feelings and not that of any of my colleagues, supervisors, or chief. Having worked as a federal probation officer for 16 years and a drug specialist during ~~most~~ many of my 16 years, I have ~~seen~~ witnessed many changes in sentencing but none as drastic and punitive as the sentencing guidelines for first time drug offenders.

Most of the "mules" or "couriers" receive substantial sentences while their suppliers with the assistance of paid counsel manipulate the system. "Mules or Couriers" cannot afford expensive ~~attorney~~ counsel which reduces their bargaining power. In most cases, they do not have any information ^{of} the supplier. Unfortunately, this limits their ability to cooperate with the government for a reduction in sentencing.

As a result, the smaller fish receive substantially longer sentences when compared to the supplier. Don't mislead my concern. I am not suggesting mollycoddling drop kickers, but fairness in sentencing.

I suggest the following: No matter the amount of drugs a Five years imprisonment for defendants classified as Couriers or mules are first time offenders, no prior drug related arrest or conviction.

I believe first year incarcerated in federal prison is sufficient sentence for a person never locked up. Also, I believe the five years ~~should be~~ ~~at least~~ imprisonment should have three years supervised release to follow. This will ensure ~~captives~~ ~~corrections~~ ~~officer~~ ~~prison~~ ~~release~~ ~~and~~ ~~community~~ ~~service~~ ~~work~~.

Many of the first offenders aren't aware of the present mandatory minimum sentence & based on the amount of drug seized. I suggest a very strong public information push on sentence imposed in the federal courts. Many court appointed attorneys are simply not aware of the consequences of guilty pleas in any case until the presentence report is completed. Quite frankly, the lawyer simply don't care. However, the offender has paid counsel. This type of attorney challenges every statute in the presentence report.

Finally, the sentencing commission must adopt new sentencing alternatives other than incarceration, probation, supervised release, or home arrest. I strongly suggest half-way house, work release, and community service as a sentencing alternative to be used much more frequently than in the past. Sentencing first time offenders who would normally go to prison to the Peace Corps or Community Service program program seems reasonable if the offender is non-violent.

In addition, changes need to be made in sentencing first time drug offenders who are carriers. However, I must commend the commission on its attempt at trying to balance the system. Although the system may have its flaws but compared to others, it is a start in the right direction.

Sincerely

Sam J. Green II
12809 Peace Dr.
Ft. WASH, MD 20744

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

19613 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PA 19106

JUDGE EDWARD R. BECKER
CHAIRMAN

8-897-8642 (PTS)
213-897-8642 (COMM.)

I. Comments Relative to The Structure of the Sentencing Guidelines

- § 2G2.2: Transporting, Distributing, Receiving, Possessing with Intent to Sell, or Advertising to Receive Material Involving the Sexual Exploitation of a Minor
- § 2K2.6: Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition by Convicted Drug or Violent Felon
- § 2L1.1: Smuggling, Transporting, or Harboring an Unlawful Alien

The organization of the Guidelines Manual designates distinct functions to the chapters. Chapter Two provides guidelines tailored to specific types of offenses, focusing on the offense behavior of the case to be sentenced. Chapter Three addresses universal adjustments common to all offenses. Criminal History determinations are presented in Chapter Four. However, in each of the three proposed amendments listed above, there are specific offense characteristics addressing prior criminal conduct within the Chapter Two guideline. In order to retain the integrity of the structure of the guidelines, it would appear that such prior criminal conduct considerations would be more properly addressed in Chapter Four. Although I am doubtless missing something, in which case you will correct me, save for the Career Offender Guidelines, also contained in Chapter Four, I know of no instance where prior criminal history affects offense level. I fear that the proposals will cause confusion, as well as skew the guidelines structure.

In sum, in developing the procedures to determine a defendant's criminal history score, the Commission decided that points are assigned based upon the sentence imposed rather than the substance of the offense of conviction. The proposed specific offense characteristics in the three referenced amendments incorporate sanctions for the nature of a prior offense(s) or criminal conduct. If the Commission is now seeking to incorporate sanctions for the nature and essence of prior criminal behavior, perhaps a more comprehensive approach can be developed within Chapter Four, rather than piecemeal in certain Chapter Two guidelines.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#31, Page 36 -- §2K2.6 (Armed Career Criminals)

We object to the Commission's response to the Armed Career Criminal Statute.

We propose that the Commission urge Congress to amend the 15 year mandatory minimum statute to restrict the coverage because it is unjustly applied in many instances.

Specifically, we believe that:

(1) the statute should redefine crime of violence to exclude consideration of prior breaking and entering convictions.

(2) the statute should require that the catchment of three prior crimes must have been committed within the past 15 years unless the defendant has been incarcerated for at least 10 of those 15 years.

(3) the statute should limit the prosecution offense to where the defendant uses the gun, or is involved in committing a violent act while in possession of it.

An example of the inequity of the statute: a retired, 60 year old, Chrysler worker living in a high crime area, keeps a rifle at home. As a youth, he was convicted 42 years ago for breaking and entering, 40 years ago for a second B&E, and 25 years ago for possession of marijuana. He was never sentenced to jail, has since raised a family and worked regularly for 25 years. This man must be sentenced to 15 years in jail. This is unjust.

We object to the Commission's proposal to use the 15 year mandatory minimum as a foundation upon which to build even more severe sentences. We believe that any sentence of more than 15 years should require a departure from the Guidelines.

We believe that the Commission should clearly state its objection to mandatory minimum sentence statutes. The essence of Guideline sentencing conflicts with that type of legislation.

We object to both Options 1 and 2. Option 2 offers the scenario of a 46 level BOL--more than life--for an Armed Career Criminal who used a dangerous weapon in his prior convictions or his present conviction.

No "Reasons for Amendment" are provided other than the 15 year statute. We agree; there are no reasons for these proposals.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 31. In this amendment, the Commission seeks to incorporate a mandatory minimum penalty into the guidelines and to establish the mandatory sentence as the floor within the guideline. Mandatory minimum sentences are coming under criticism throughout the federal judiciary on grounds of fairness and because they are understood to be inconsistent with a sentencing guidelines system. The Commission's decision to incorporate such a penalty into the guidelines represents an unwarranted endorsement of the statutory scheme, and will result in unduly harsh sentences above the minimum.

After putting forward two options, both of which are objectionable for the reasons stated above, the Commission asks a series of questions about the sentencing of violent career offenders. It seems more appropriate for the Commission to gather information in response to these important questions before proposing amendments that result in such severe guideline sentences.



Washington, D.C. 20530

STATEMENT

OF

PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

Firearms

The guidelines relating to firearms offenses need strengthening. There is currently no guideline applicable to the "armed career criminal" provision of federal law, 18 U.S.C. §924(e), and the Commission has published two proposed alternative guidelines to cover the provision. Amendment No. 31. We strongly urge the Commission to adopt the second option.

The armed career criminal provision of the federal firearms laws is an enhanced sentencing provision for a violation of the prohibition against possession of a firearm by a convicted felon, 18 U.S.C. §922(g)(1), in the case of a defendant with three previous convictions for a violent felony or a serious drug offense. The provision requires a 15-year minimum prison term and leaves the maximum to the discretion of the court. We believe there should be a guideline applicable to sentences subject to the armed career criminal provision that includes a range of factors and is consistent with the fact that Congress established 15 years as only the minimum sentence available under this provision. In light of the current absence of guidelines



Washington, D.C. 20530

STATEMENT

OF

PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

addressing the armed career criminal provision, the 15-year statutory minimum would normally become the guideline sentence. Higher sentences would be authorized only if a basis for departing from the guidelines existed in accordance with the departure standard set forth in the Sentencing Reform Act, 18 U.S.C. §3553(b).



Washington, D.C. 20530

STATEMENT

OF

PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

The offense to which the armed career criminal statute applies is receipt, possession, or transportation of a firearm by a convicted felon. The enhanced sentencing under the armed career criminal statute is based solely on the number and nature of the past convictions creating the prohibition against possession of a firearm and does not require a current act of violence. It reflects the view that felons with convictions for violent felonies or serious drug offenses should be sentenced to significantly longer terms of imprisonment than other convicted felons in possession of firearms. The former present a special danger to society when in possession of guns and must be deterred from engaging in this form of illegal conduct or incapacitated when not deterred.



Washington, D.C. 20530

STATEMENT

OF

PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

Option two addresses the concerns raised by the statutory provision more fully than does option one. In keeping with the statutory scheme, the second option increases the sentence depending upon the nature and seriousness of the past violent or drug offenses giving rise to the application of the statutory minimum. By contrast, option one increases the sentence primarily on the basis of any current underlying offense that occurs in connection with the unlawful possession of the firearm by a convicted felon and on the basis of the existing criminal history provisions. However, the criminal history provisions in the guidelines are only an approximate measure of past criminal behavior. They do not distinguish between violent and non-violent offenses in the defendant's background, nor do they



Washington, D.C. 20530

STATEMENT

OF

PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

distinguish between particularly heinous and less serious violent offenses. Simply to employ the existing criminal history scoring techniques, which may be acceptable for the average offender, to armed career criminals does not work.

An offender who has committed a heinous murder or a series of particularly violent offenses, one who has used firearms in connection with past violent offenses, or one who has engaged in very large drug transactions should receive a harsher penalty when in possession of a firearm than an offender whose past offenses were brawls resulting in little or no injury. The armed career criminal statute would be given little effect if offenders with particularly violent backgrounds only received higher than the mandatory minimum sentence when caught committing a new violent offense. The statute has a preventive purpose and does not require a new violent offense or use of a firearm in connection with any new offense. Defendants sentenced under the armed career criminal provision are potentially among the most



Washington, D.C. 20530

STATEMENT

OF

PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

dangerous defendants in the federal system. It is important for the Commission to take special care in setting the correct sentences for this group even if extra investigation into the background of these offenders is required.

We would be pleased to offer our assistance to the Commission and expect to provide views on other issues raised by the Commission in its proposed guideline amendments as it addresses these amendments in future deliberations. United States Attorney Joe Brown, Chairman of the Sentencing Guidelines

Subcommittee of the Attorney General's Advisory Committee of United States Attorneys, will address other important areas of concern. Again, I commend the Commission for its important efforts and look forward to working with you in the future.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

31. NACDL does not favor either of the options proposed by the Commission. This is an example of how Congressionally prescribed mandatory minimum sentences are inconsistent with guideline sentencing. While NACDL acknowledges the seriousness of problems posed by "armed career criminals," we have not seen sufficient empirical data to justify such wholesale revisions of the guidelines. Finally, the Commission seeks to take into account the nature of the Defendant's prior convictions by assigning a minimum category III criminal history category. If the Commission

is actually going to consider the nature of the prior convictions, instead of just the number, it must also consider how remote in time such prior convictions are in determining whether and under what circumstances to apply the ancient prior record doctrine.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#32, Pages 40-41 -- §2K2.1(b)(3)

We object to the enhancement for the loaded firearm/available ammunition. We believe this to have been assumed in setting the high BOL.

We also object to double-counting prior drug offenses or violent felonies in §2K2.1.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 32. This proposal is objectionable for the reasons set forth in the body of the testimony. In addition, what is the rationale for providing a base offense level of 16 -- a level corresponding to a guideline sentence of about 2 years imprisonment for a first offender -- for an individual who is acknowledged to have possessed a weapon "solely for lawful sporting purposes or collection"?

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

OF THE

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19613 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PA 19106

JUDGE EDWARD R. BECKER
CHAIRMAN

8-897-8642 (FTS)
213-897-8642 (COMM.)

I. Comments Relative to The Structure of the Sentencing Guidelines

§ 2G2.2: Transporting, Distributing, Receiving, Possessing with Intent to Sell, or Advertising to Receive Material Involving the Sexual Exploitation of a Minor

§ 2K2.6: Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition by Convicted Drug or Violent Felon

§ 2L1.1: Smuggling, Transporting, or Harboring an Unlawful Alien

The organization of the Guidelines Manual designates distinct functions to the chapters. Chapter Two provides guidelines tailored to specific types of offenses, focusing on the offense behavior of the case to be sentenced. Chapter Three addresses universal adjustments common to all offenses. Criminal History determinations are presented in Chapter Four. However, in each of the three proposed amendments listed above, there are specific offense characteristics addressing prior criminal conduct within the Chapter Two guideline. In order to retain the integrity of the structure of the guidelines, it would appear that such prior criminal conduct considerations would be more properly addressed in Chapter Four. Although I am doubtless missing something, in which case you will correct me, save for the Career Offender Guidelines, also contained in Chapter Four, I know of no instance where prior criminal history affects offense level. I fear that the proposals will cause confusion, as well as skew the guidelines structure.

In sum, in developing the procedures to determine a defendant's criminal history score, the Commission decided that points are assigned based upon the sentence imposed rather than the substance of the offense of conviction. The proposed specific offense characteristics in the three referenced amendments incorporate sanctions for the nature of a prior offense(s) or criminal conduct. If the Commission is now seeking to incorporate sanctions for the nature and essence of prior criminal behavior, perhaps a more comprehensive approach can be developed within Chapter Four, rather than piecemeal in certain Chapter Two guidelines.

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JUDGE EDWARD R. BECKER
CHAIRMAN

8-597-8642 (FTS)
215-297-8642 (COMM.)

II. Offenses Involving Unlawful Aliens

While we are concerned about the specific offense characteristic in § 2L1.1 regarding prior criminal conduct, we support the other proposed changes on the particular guidelines. As the Committee has pointed out in the past, the districts bordering Mexico process large dockets with numerous cases involving this guideline. There has been a need to distinguish defendants that smuggle large numbers of aliens and those who endanger the lives of the aliens. To date, the courts have had to depart to distinguish the criminal conduct of such offenders. The proposed modifications to § 2L1.1 in specific offense characteristics (b)(1) and (b)(2) as well as the additions to the application notes, by making the offense level dependent on the number of unlawful aliens transported, and by encouraging departure where safety is endangered, correct this deficiency.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#35, Page 42 -- §2L1.1(b)(2)

We object to using the number of aliens smuggled to increase the B.O.L. We believe that the key law-enforcement issue is, "was the person the organizer?".

With regard to §2L1.1(b)(2)--documents, we contend that the existence of documents which can easily be duplicated into large numbers, is not the issue. The issue should be how many were used. This is not analogous to counterfeiting where all of the money is negotiable on its face. Documents require filling in names, pictures, and additional individualized preparation.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#38, Page 45 -- §2M5.2

We note, with concern, the lack of any research or data to support the staff's Reason for Amendment boilerplate, "serious nature of this type of offense."

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 38. This proposal is objectionable for the reasons set forth in response to Item 4, above. What is "the Commission's view of the serious nature of this type of offense" based on? How have courts sentenced defendants under the current guideline? The Commission explicitly assumes that the heartland conduct under this statute is harmful or potentially harmful to national security. Intuitively, this assumption appears unreasonable. There's only one way to find out: the Commission should produce the needed research.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

38. The proposed amendment to USSG §2M5.2 is based upon a politically unrealistic premise. "This base offense level assumes that the conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States." What about a prosecution brought under this section for licensing or exporting violations to friendly nations? By dealing with this problem through a downward departure, is the base reference point still not too high? Finally, how many prosecutions have been brought under this section to warrant a change in the base offense level. Was the base offense level reasonable in the first instance? On what data does the Commission base this proposal?

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#42, Page 46

Comment will be provided in the March 30, 1990, Final Paper.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 43. The Commission is to be commended for including relevant legal precedents in the explanation of the amendment.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

43. While NACDL has not had sufficient time within which to review the cited caselaw, the inclusion of these legal authorities are helpful to the rulemaking process.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#44, Page 47 -- §2P1.1

We propose a reduction from a level 13 to level 8 when the escape is from non-secure custody, to wit, a CTC half-way house, or a CCC.

We do not believe that the reduction should take into account the offense for which the defendant is confined--that will have already been factored in by his original sentence.

We believe that the 96 hour (4 day) period set forth in 2P1.1(b)(2) should be extended to one week.

We believe that failure to return from a furlough from a secure institution should be distinguished from a non-secure institution. The reduction for failure to return from a furlough should only be from a level 13 to a level 11.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 44. The Commission asks whether distinctions should be made among defendants of different culpability convicted under the same escape statute. The answer is clearly "yes." In particular, the escape guideline should provide less punishment for the defendant who, for example, walks away from a non-secure worksite than for one who escapes from prison. Also, voluntary return should be distinguished from non-voluntary return. One distinction that appears to be irrelevant is the severity of the offense for which the defendant is serving a sentence.

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CHAIRMAN

8-897-8642 (PTS)
213-897-8642 (COMM.)

III. § 2X5.1. Other Offenses

The proposed amendment adds language to this guideline and adds two application notes. The new text in the guideline and Application Note 1, which explains the new text, add important clarification to the guideline. However, Application Note 2 is problematic.

This guideline gives guidance when the court is sentencing a defendant for an offense for which no guideline has been expressly promulgated by advising that the court should apply the most analogous guideline. Where there is no analogous guideline, the provisions of 18 U.S.C. 3553(b) control. Proposed Application Note 2 introduces a new procedure. It provides that when there is no sufficiently analogous guideline:

the Court may find it helpful to estimate a Chapter Two offense level by comparing the seriousness of the instant offense with the offense levels that are listed. This estimated offense level may be used in conjunction with reference to Chapters Three, Four, and Five to provide guidance for the determination of the appropriate sentence.

This note suggests that the court should select an offense level when no analogous guideline exists. In essence, the court takes the responsibility to set the offense level, a procedure which may cause problems, produce anomalous and inconsistent results, and generate appellate issues. I think that it would be better to rest on § 3553(b) until, aided by the monitoring process, the Commission promulgates a guideline for the fact pattern at issue.

One example comes to mind. In the District of Maryland there are federal highways which generate numerous drunk driving offenses under the provisions of the assimilated crimes act. There are no analogous guidelines for drunk driving. If individual judges "estimated" an offense level, one judge may estimate the offense level at 12 and another estimate the level at 26.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#47. Pages 49-50 -- #2x5.1

We object to the proposed amendment and the application notes.

Where the Commission has failed to carefully craft a specific Guideline, after the many years of Guidelines, there is good reason to allow the district judges to return to the implementing statute. The "Reason for Amendment", that it is to "assist the court", is belied by the Application Note 1 that lists over 15 confusing areas that can be applied. We believe that when, as here, it is not critical to add more Amendments, the best resolution is, "When in doubt, leave it out."

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#49, Page 50 -- §3A1.4

While we deplore "hate crimes", we object to this Amendment.

Initially, we object because this proposal permits sentencing for a "hate crime" based on a mere allegation of intention meets the preponderance standard.

This allows a person to be sentenced on rumor and innuendo when there is not sufficient evidence to prosecute an individual for the charge. If there is a case to be prosecuted, the Federal Government has done so in the past and will do so in the future.

We believe this factor may form the basis for a departure in a specific case, rather than become a separate general Guideline.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 49. The Commission's concern about hate crimes is laudable, but a new Chapter Three adjustment does not appear to be warranted at this time. Data should be developed to determine how many of all federal crimes are motivated by the victim's status. If a significant number of such cases exist, perhaps a general adjustment is justified. If not, this factor might be made an explicit basis for upward departure in Chapter Five.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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

B. Amendment 49. The desire to enhance punishment when crimes involve group hatred or denial of constitutional rights is understandable, but I question whether it is appropriate to accomplish this objective by an offense adjustment, rather than by a departure. Again, my concern is to avoid the need for an excessive number of hearings. Whether considered as an adjustment or a departure, I also suggest that the requisite motivation test be "motivated in substantial part" rather than "motivated at least in part." I do not think the intent is to add punishment every time a criminal utters a racial slur in the course of committing a crime. White and Black criminals do that with some frequency. If, as appears, the focus is on "hate crimes," the phrase "substantial part" would better capture the idea and avoid the disparity that would otherwise ensue as some courts added two levels for racial slurs and some did not.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

49. NACDL does not believe that there are enough cases to warrant inclusion of such factors as a victim related adjustment. This would serve to unnecessarily lengthen the guideline calculation process.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#50, Pages 51-54 -- §3B

We object to this Proposed Amendment in its entirety. It is unnecessary. It is confusing. And most of all, it is harsh in its interpretation of the Guidelines.

We object to the narrowing of the potential for comparative conduct in the first full paragraph on Page 52. We believe that relative culpability should take into account the overall criminal enterprise.

On Page 53, #4, re §3B1.1(a), we object to the attempt to pad the number of participants to reach the 5 person level by including "unwitting participants". This defies the plain language of the Guideline.

On Page 54, we oppose proposed Application Note 2 to §3B1.2 which severely restricts eligibility for the mitigating role adjustments. If the defendant "mule", a mere carrier in a narcotics case induced a friend to drive her to the airport, she would not be eligible for a mitigating role reduction, even if it was a one-time trip for a huge drug organization.

Further restrictive is the second sentence in #2 which focuses on the commission of the offense instead of the criminal scheme.

Also, Application Note 6 on Page 55, insofar as it refers to Note 2, acts to cut back on the availability of this provision.

Finally, we believe that the Commentary to §3B1.2 captioned "Background" should not be deleted. It is helpful to understanding the Guideline.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 50. The proposed revision of the Role guideline does not solve the two most pressing problems associated with that guideline. First, the guideline remains complicated and unduly inflexible. Second, the new guideline, like its predecessor, fails to provide a sufficient reduction for the so-called "mule" or "minnow", an individual whose role in the offense is so minor that it is unjust to even consider the full scope of the criminal enterprise at his sentencing.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

50. NACDL strongly opposes the proposed amendment to Chapter 3, Part B. We believe that an offender's role in the offense is frequently significant for purposes of sentencing. However, both the current and proposed methods of analyzing role appear to be inadequate and rigid. Relative culpability should be viewed in the context of the overall criminal activity rather than assessing a Defendant's culpability relative to other participants within the parameters of his or her own relevant conduct. If an individual is merely an offloader, that status should be measured against the relative culpability of the financiers, principals, middlemen, brokers and facilitators. The offloader's culpability should not reflect that individual's culpability in the microcosm of other offloaders. Courts should be granted greater leeway in recognizing mitigating offense factors and characteristics.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 51. There appears to be no justification for altering the relationship between sections 3B1.1 and 3B1.3. Such a change would result in increased sentences and is therefore objectionable for the reasons set forth in the body of the testimony.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#51, Page 55 -- §3B1.3

We believe that this provision should not be piggy-backed on top of §3B1.1.

We do not believe there is any need for specifying types of conduct.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

51. USSG §3B1.3 (Abuse of Trust) should not be amended either to specify the types of conduct which this adjustment covers or to make it cumulative to any adjustment under USSG §3B1.1.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 53. It appears sensible for the Commission to describe with more specificity the contours of the obstruction guideline. It would be useful, however, to have a fuller accounting of experience under the current guideline. Presumably courts have brought their wisdom to bear on this question during the two years the guideline has been in effect, and a summary of the case law would allow for better informed public comment.

That said, it is still possible to offer an opinion of which factors should constitute obstruction and which should not. In our view, items 1-4, 6, 9, 12 and 13 are serious enough to warrant the enhancement.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#53, Pages 55-57 -- §3C1.1

We object to providing these many, creative and wide-ranging examples of what conduct could be included. This matter is best left to the Courts.

We question whether many of these examples are indeed willful obstruction matters that warrant taking account in sentencing.

We have serious objection to #s 7, 8, 9, 11, 13, 14. As to #6, this is prosecuted as a separate offense.

A few specifics.

1. #9 negates the "Exculpatory No" exception recognized by some Court of Appeal.
2. #11 opens up the possibility of turning every one-sided police interrogation into a sentence upgrade.
3. #13 would turn a defendant's forgetfulness about his or her criminal record into a sentence up-grade.
4. #14, as to providing incomplete information, is the best example of the pro-prosecution, one-sided nature of all of these examples.

Finally, we object to a separate guideline for reckless endangerment for flight. Where appropriate, the conduct forms the basis for a separate criminal prosecution.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

53. If any examples are to be included in this section, the Commentary should specifically note that the provision of lawful criminal defense representation and services is beyond the scope of activities proscribed this section.

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

19813 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PA 19106

JUDGE EDWARD R. BECKER
CHAIRMAN

8-597-8642 (FTS)
818-887-8642 (COMM.)

IV. § 3E Acceptance of Responsibility

The Commission has requested comments concerning a number of aspects of this guideline. I have made revision to this guideline an agenda topic for the June 1990 meeting of our Committee, because of the strong and widespread feeling among the district judges all across the nation that there needs to be discretion to reduce the offense level for acceptance of responsibility by more than two levels in order to accommodate a number of rigidities and inequities in the guidelines. Consequently, while we are not prepared to provide comment regarding this provision by the public comment deadline of March 30, 1990, we will be in contact with the Commission after our next meeting with suggestions with respect to acceptance of responsibility and a number of other facets in the guidelines, all with a view to increasing flexibility in their administration.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#58. Page 60 -- Acceptance of Responsibility

We believe that this Guideline may well apply when it is first evidenced after adjudication of guilt.

We believe that there should be a presumptive application of this Guideline when a defendant pleads guilty.

We believe that a minimum of three points should be provided for acceptance of responsibility because of the relevance with regard to future criminal behavior. Further, we believe that where the base offense level is over 20, there should be a five level reduction for acceptance of responsibility to appropriately reflect the impact of the acknowledgment of guilt.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 58. The A.B.A. endorses an acceptance of responsibility guideline that accords more weight to a defendant's decision to plead guilty. At the very least, there should be a presumptive discount for pleading guilty.



Washington, D.C. 20530

STATEMENT

OF

PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

Acceptance of Responsibility

The first area I would like to address is the guideline for acceptance of responsibility, guideline §3E. The Commission has asked whether the guideline should be amended expressly to provide that a reduction for acceptance of responsibility is not warranted when the defendant first evidences such acceptance after adjudication of guilt. Amendment No. 58. We believe very strongly that the guideline should be amended to establish a deadline for acts evidencing an acceptance of responsibility but would establish an earlier deadline than the time at which guilt is adjudicated, as suggested by the Commission. Specifically,



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OF

PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

the guideline should require that a defendant enter a plea or conditional plea of guilty or nolo contendere prior to the commencement of the trial in order to be eligible for the guideline reduction based on acceptance of responsibility.

It is clear to us that there is a pressing need to fine-tune the guideline relating to acceptance of responsibility. From discussions with prosecutors throughout the country, we have learned that too many judges grant the two-level reduction as a matter of course to defendants who proceed to trial, are adjudicated guilty, and then merely state that they accept responsibility for the offense. It is difficult to reconcile an asserted acceptance of responsibility for committing an offense with a defendant's decision to proceed to trial in order to challenge the government's case. For this reason we believe that the guideline authorizing a reduction for acceptance of responsibility should require the guilty or nolo plea before the commencement of trial rather than simply before the adjudication of guilt. To allow a defendant to assess the strength of the government's case during the trial and remain eligible for the acceptance reduction would undermine the intent of the guidelines



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DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

to grant a lower sentence to a defendant for whom the need for punishment and incapacitation is reduced by a sincere acknowledgement of wrongdoing.

The role of the conditional plea of guilty is important in this context. A conditional plea may be entered only with the approval of the court and the consent of the government, and the

plea is subject only to the right to appeal any adverse determination of a pretrial motion and, if successful, to withdraw the plea. Rule 11(a)(2), Federal Rules of Criminal Procedure. It is used to litigate legal issues, such as the constitutionality of a search and seizure, in connection with an offense charged. If a defendant insists upon proceeding to trial in order to litigate such an issue, his or her decision would appear inconsistent with a true acceptance of responsibility. Such a defendant could have availed himself of the conditional plea and thereby have manifested an acceptance of responsibility for the acts charged, subject to the resolution of the legal issue.



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PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

We recognize that there are some situations in which a court may wish to depart from a guideline that requires a defendant to enter a guilty or nolo plea prior to the commencement of the trial in order to be eligible for the reduction for acceptance of responsibility, and the Commission may wish to acknowledge factors relevant to such a departure. However, an asserted acceptance occurring after the commencement of the trial should not simply reflect a calculated decision by the defendant to express regret for the offense after assessing the strength of the government's case and should be consistent with the reduced need for punishment generally reflected by the acceptance guideline. A court may determine that a departure is warranted, for example, when a defendant changes his plea soon after the commencement of the trial upon advice of newly appointed counsel. In general, if the courts authorize departures for acts



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PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

demonstrating acceptance of responsibility after the commencement of the trial, any unwarranted departures by the courts could be appealed by the government, subject to a reasonableness standard. See 18 U.S.C. §3742.

We also believe that assertions of acceptance of responsibility before an adjudication of guilt are distinguishable from those that occur after such an adjudication and that limitations on the reduction, even based on departure, must be more stringent for the latter than the former. We would suggest that the Commission clearly preclude the application of the acceptance reduction, even by way of departure, to a defendant adjudicated guilty except in the rare case of a defendant whose conditional plea is approved by the government but not by the court. In the case of such a defendant who proceeds to trial after rejection of a conditional plea, a downward departure, not to exceed two levels, may be warranted because the defendant accepted responsibility through his attempt to enter a conditional plea.



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PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

The Commission has also asked whether it should more clearly indicate the weight that should be assigned to the entry of a guilty plea. We believe that the entry of a guilty or nolo plea should be considered significant evidence of acceptance of responsibility, and the Commission should so state in its commentary to the acceptance guideline. However, mere entry of a guilty or nolo plea should not guarantee a reduction.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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

C. Amendment 58. My overall impression is that the acceptance of responsibility guideline should not be changed at all, at least not until sufficient experience demonstrates serious defects. If changes are to be made, I think it would be a serious mistake to try to indicate more clearly the weight to be accorded a guilty plea. As the Commission knows, there are serious constitutional issues lurking in this area, and there is little point in precipitating more constitutional attacks on the guidelines by making exercise of the right to a trial a basis for an automatic increase in punishment. Also, I strongly oppose any effort to give different weights to different indicia of acceptance of responsibility, if by this suggestion the Commission means to assign precise weights to particular forms of contrition. The Commission might wish to consider a revision that simply authorizes the sentencing judge to reduce the offense level anywhere from one to three levels, depending on the judge's assessment of the defendant's acceptance of responsibility. This avoids excessive fact-finding and might ameliorate some of the alleged reductions in guilty pleas.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

58. Regarding the adjustment for Acceptance of Responsibility, USSG §3E1.1, the guidelines should not be amended to

preclude such adjustment when a Defendant exercises his or her rights incorporated into the Fifth and Sixth Amendments to the United States Constitution. Clearly, a Defendant may manifest conduct and a contrition of spirit warranting adjustment under this section following a trial. Second, NACDL believes that there should be an automatic adjustment under this section for pleading guilty. Where the base offense level is between 1-24, a 3 level downward adjustment should apply. Where the base offense level is 25 or higher, a 4 level downward adjustment should apply. This would take into account the impact of the sentencing guidelines on an ever increasing prison population. It would also serve to reinforce the values sought to be furthered by this section. Finally, recognizing different indicia of accepting responsibility, post offense conduct, including rehabilitative efforts, should be taken into consideration and rewarded through a graduated scale.

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

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601 MARKET STREET

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JUDGE EDWARD R. BECKER
CHAIRMAN

8-897-9642 (PTS)
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V. § 4A1.2, Unconstitutional Convictions in the Criminal History Computation

We disagree with the amendment to Application Note 6 and the background statement following this note regarding use of uncounseled misdemeanors for which no term of imprisonment was imposed. Note 6 provides:

"Any other sentence resulting from a valid conviction is to be counted in the criminal history score, including a sentence resulting from a constitutionally valid, uncounseled (felony or misdemeanor) conviction."

I observe that a sentence may be constitutionally valid for some purposes and not others, but that distinction is not identified in the note. Moreover, the note, coupled with the new "background statement" (absent the distinction I have just referred to), make it appear that the Commission is making legal determination that belongs to the courts. The caselaw is badly divided as to the effect of uncounseled and other allegedly valid convictions. Toby Slawsky, Esquire, Assistant General Counsel for the Administrative Office of the United States Courts, is working on a memorandum on this subject and we would urge the Commission to withhold action at the present time.

Please note that this subject materially impacts on the work of probation officers. As stated in Appendix F of Presentence Investigation Reports Under the Sentencing Reform Act of 1984 (copy attached), it is our position that whether such an uncounseled misdemeanor can be used to increase the term of imprisonment is a legal issue to be decided by the sentencing judge. Thus, we have instructed probation officers to report such convictions under "Other Criminal Conduct" and indicate how the criminal history score would be changed if such convictions were included in the criminal history score.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#59. Pages 60-61 -- Criminal History

We object to the proposed Background paragraph on page 61 because it contains a one-sided interpretation of Baldasar v. Illinois, 446 U.S. 722 (1980). The sentencing judge should interpret that decision.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#62, Pages 62-64

We believe the Commission should retain the current treatment of expunged convictions.

We object to the deletion of the first sentence of Application Note 6 to §4A1.2. We believe it correctly amplifies the proper approach.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#63, Page 64 -- §4A1.2

We believe that there is no reason to develop a specific guideline enhancement for prior similar conduct.

We believe that the problems in §4A1.2 application are inherent in Guideline application and cannot be corrected by more specific Application Notes.

We do not believe that Note 3 is too inclusive.

We do not believe that §4B1.2 should be amended to provide a separate set of instruction re prior crimes of violence or controlled substance offenses.

Finally, we do not believe that the Commission should develop a specific guideline enhancement for prior similar conduct.



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STATEMENT

OF

JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

Amendment No. 63.

We believe that the guideline containing definitions and instructions for computing criminal history should be amended so that sentences for separate offenses are not artificially treated as one. The current guideline states that prior sentences imposed in "related cases" are to be treated as one for purposes of criminal history. "Related cases" are defined as those that: (1) occurred on a single occasion; (2) were part of a single common scheme or plan; or (3) "were consolidated for trial or sentencing." Guideline §4A1.2(a)(2), Application Note 3. It is this last factor that is problematic because it arbitrarily counts sentences in unrelated offenses as a single prior sentence. The fact that cases were consolidated for trial or sentencing for purposes of efficiency in the administration of justice should not dictate criminal history results. The current



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JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

rule means that defendants whose backgrounds are replete with criminal convictions based on consolidated proceedings benefit from significant undercounting in the computation of their criminal history score.

To cure this problem we suggest that the third category of related cases for purposes of criminal history be limited to those that were consolidated for trial or sentencing if the counts would have been treated as a single group of closely related counts under the multiple count guidelines, guideline §3D1.2. This limitation would require some relationship between the offenses which are the object of the sentencing or a similarity in the type of offense. The Commission has recognized the problem by including it as a basis for departure under the guidelines. Policy Statement §4A1.3, and Application Note 3 to guideline §4A1.2. We believe that the problem should be corrected by a guideline, not a recommendation regarding the appropriateness of departure.



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OF

JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

The Commission has also asked whether the definitions used in connection with the career offender guideline, guideline §§4B1.1 and 4B1.2, should be amended to provide a separate set of instructions for counting prior crimes of violence or controlled substance offenses to allow counting of convictions unrestricted by the time periods set forth in the criminal history definitions and instructions. Under the current guidelines the definitions generally applicable in computing criminal history apply to the career offender guideline. Guideline 4B1.2, Application Note 4. As a result, a sentence of more than one year and one month that was neither imposed nor served during the fifteen years prior to the commencement of the instant offense is not counted. Similarly, a sentence of less than a year and a month does not count unless it was imposed within ten years of the commencement of the instant offense.



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JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

The limitations on career offender scoring imposed by the criminal history definitions are inconsistent with the statutory mandate regarding career offenders. The statute requires the Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for defendants who are convicted of felonies that are crimes of violence or certain drug offenses and who have two prior convictions for such crimes. 28 U.S.C. §994(h). Applying the artificial time limits of the criminal history guidelines to career offenders is simply not in keeping with the career offender provision of law, which was designed to look at the defendant's entire criminal past. The same concerns attach to the development of a guideline for the armed career criminal provision discussed earlier. Beyond these two specific statutory provisions requiring an assessment of the defendant's entire criminal



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JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

past, we believe it would make sense in the future for the Commission to consider exempting violent and serious drug offenses from the time constraints of the criminal history provisions for all offenders.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CHAMBERS OF
JON O. NEWMAN
U. S. CIRCUIT JUDGE
480 MAIN STREET
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D. Amendment 63. I would not favor a specific enhancement for prior similar conduct. The departure authority in § 4A1.3(e) seems adequate. See United States v. Coe, 891 F.2d 405 (2d Cir. 1989).

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#64. Page 64 -- Sentencing Table

We oppose creating an additional more severe criminal history category. We have not found judges hesitant to depart in that very rare case when he or she believe Category VI does not adequately sentence for the particular offense.

The Reason for Amendment does not provide sufficient data to warrant this significant Amendment.



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STATEMENT

OF

JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

Criminal History

The Commission has proposed the addition of a new criminal history category for offenders with high criminal history scores. Amendment No. 64. We urge the Commission to adopt this proposal. Offenders with criminal history scores of more than 13 should not get a free ride, as they do under the current guidelines. Relying on the possibility of departures for this group of offenders is not sufficient, given their serious backgrounds.

Several other revisions are in order for the criminal history guidelines in Chapter Four. We regard this area as one of the most important for amendment because problems in the criminal history scoring potentially affect every case. The Commission's guideline proposals ask how the definitions and instructions for computing criminal history might be improved.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 64. The Commission has not provided an evaluation of empirical data with respect to Criminal History category VI, so it is impossible to know if a new category VII is warranted. It would be useful to know, for example, whether there have been a significant number of upward departures based on 4A1.3 for offenders with lengthy records, and whether defendants sentenced under category VI tend to be sentenced at the high end of the sentencing range.

The amendment would add 43 additional boxes to the current 258 boxes in the sentencing table, increasing the perceived complexity of the guidelines and the illusion of science for which these guidelines have been justifiably criticized. Also, it is hard to see why the Commission addressed the problem of extremely high criminal history scores by creating a category that itself only covers 13 to 15 points. The proposed amendment doesn't solve the perceived problem and should be rejected.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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

E. Amendment 64. I hope the Commission will resist the temptation to increase complexity by adding a seventh column to the sentencing table. There is no reason to think that criminal histories more serious than those in Category VI are not being handled by upward departures where warranted. Furthermore, if the addition of a seventh column means that the sentencing table must appear either on two pages or on one page but in smaller type, the extra column will surely not have been worth it.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

64. Especially in the absence of empirical data indicating the frequency with which USSG §4A1.3 is applied, NACDL opposes such a radical revision of existing policy and guidelines.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#65, Page 66 -- §5E1.1

We object to the proposed amendment that would require (shall) restitution in every case, instead of the present "may" language.

There are already many restrictions and requirements imposed in every case. We believe the Commission can leave it to the judge's discretion.

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8-897-8642 (FTS)
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VI. § 5E1.2, Fines for Individual Defendants

The statutes authorize fines as an optional penalty but the guidelines make fines presumptive in every case. However, in a large majority of cases defendants do not have the ability to pay a fine. Because fines are presumptive according to the guidelines, the judge is required to make a finding as to ability to pay in every case. In order to more accurately reflect the reality of the defendant population and to remove a time consuming proceeding, the Committee on Criminal Law and Probation Administration endorsed a resolution during the January 1990 meeting to urge the U.S. Sentencing Commission to amend the guidelines to remove the presumptive fine requirement and allow the courts to impose a fine when warranted. This resolution was transmitted to the Commission in my letter to you of February 5, 1990. While the proposed amendments to the application notes in the fine guideline provide more flexibility in the requirements to calculate fines, the Committee stands by the resolution, believing that a better amendment would be for the Commission to authorize fines rather than making them presumptive.

On several occasions in the past, the Committee has urged that the required fine calculation for the costs to the government of imprisonment or supervision (§ 5E1.2) should be amended. Few defendants are able to pay these costs. Moreover, this provision requires a second fine calculation, often to very little end. Not only is this provision unrealistic and burdensome, it is confusing to those who have the statutory authority to collect fines. The confusion results from the mistaken belief that "costs" are a separate financial penalty, distinct from a criminal fine, when in fact, "costs" are merely one of the elements that goes into the determination of the fine calculation. We recommend that this requirement be moved to § 5E1.2(d), the list of considerations in determining the amount of the fine. Since only one total fine can be imposed, this provision is actually another consideration that could be added to the seven factors already included in § 5E1.2.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 66. This is a desirable, simplifying amendment. Indeed, the fine guideline could be rendered even more simple and sensible if the "cost-of-imprisonment" add-on were instead incorporated as one of the factors to be considered within the applicable guideline range.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#67, Pages 71 et seq. -- Specific Offender Characteristics

We believe that the Commission should recommend to Congress that it amend 28 U.S.C. §994(e) to permit the Guidelines, in appropriate cases, to take into account family ties and responsibilities, and community ties of the defendant.

We believe that these factors are highly relevant to a humane sentence.

We object to the proposed Amendment to §5H1.1 that limits the relevance of age to the disabled. No data is provided in support of this change.

We object to the Amendment to §5H1.4 on Page 72 that suggests home confinement. The sentencing judge can develop a proper "other than imprisonment" sentence.

We object to the proposed new paragraphs to §§5H1.5 and 5H1.6 because of our previously-stated belief that this information should be relevant with regard to both the sentence and to a sentence within the range.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#68, Page 73 -- #5K2.0

We object to deleting the third sentence in the first paragraph. It is important in the scheme of the Guidelines. We believe that it is important to reaffirm that the controlling decision with regard to departures can only be made by the judge at the time of sentencing.

We object to deleting the fourth paragraph. We believe it is very relevant to the issue of departures. The "Reason for Amendment" is pure boilerplate, "deletes surplus language, and improves the clarity of the policy statement." In fact, the Amendment is substantive.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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

F. Amendment 68. My major concern in the entire group of amendments is with the proposed deletion from § 5K2.0 of the fourth paragraph, which now reads:

Harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the limitations set forth in § 1B1.3

In the first place, to say in the "Reason for Amendment" that this is a deletion only of "surplus language" is, in my judgment, highly misleading. This paragraph is what keeps the Guidelines consistent with the "modified real offense" approach that the Commission is using, if anything an approach that, as the Commission says, is closer to a "charge offense" system. Ch. 1, Pt. A(4)(a). I realize that a sentencing judge is authorized to consider any conduct, 18

U.S.C. § 3661, Guidelines, § 1B1.4, but the last paragraph of § 5K2.0 serves the valuable purpose of guiding the exercise of departure discretion so that the focus is on conduct relevant to the offense of conviction. Perhaps the Commission might wish to revise the wording slightly, but it should not be dropped entirely, and surely not dropped without a clear explanation of why this is occurring and what the Commission expects to happen in its absence.



U.S. Department of Justice
United States Parole Commission

Office of the Chairman

5550 Friendship Blvd.
Chevy Chase, Maryland 20815

March 9, 1990

Honorable William Wilkins
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, DC 20004

Dear Judge Wilkins:

Based on my experience in parole and supervision related matters I would like to comment on the two proposed options for handling the revocation of probationers and supervised releasees.

After careful review of the options published I would strongly encourage the Sentencing Commission to reject Option I and adopt Option II in a modified form. Option I would be problematic and circumvent the statutory mission of the Sentencing Commission: incapacitation, reduction of disparity and providing just punishment.

The concept I would like to address is the two classes of violators included: probationers and supervised releasees. Although the process of supervising these clients may be similar, to assume that the individuals who fall in these two categories are also similar is a grave oversight. To ignore the background characteristics of the probationer or a supervised releasee would be an injustice to the client, the supervising probation officer and the community.

OPTION I

I want to emphasize the misguided quest for "simplicity"

proposed under Option I. I recognize that the Probation Officer's duties continue to grow more complex and burdensome however there is a much greater issue at stake. The process of managing a person's freedom and protection of the public have never been a simple process and should never be reduced to one.

The ultimate responsibility for applying any type of revocation guidelines will fall on a court, a Magistrate, or Executive Agency appointed for that task. Determining guidelines for revocation purposes will not be any more complex than determining them for an initial sentencing proceeding. Whenever a personal liberty is at issue we must not simplify procedures merely to keep the job simple or easy.

In view of the administration's policy toward "zero tolerance" and emphasis on fighting drug abuse, I see no emphasis for sanctioning drug users in the community. Under Option I a drug user could receive a maximum of 1-6 months and under Option II 6-12 months. Supervised Release is not unlike the Special Parole Term violator's who receive anywhere from eight to sixteen months under U.S. Parole Commission guidelines. The Sentencing Commission would be perceived as getting "soft" on drug cases if these current options are adopted.

The major problem perceived with Option I is the broad, vague classification of offenses and the total absence of risk factor consideration.

A Class I violator as outlined can include a probationer who is arrested for selling a gram of cocaine or a supervised release violator (who might have a criminal history Category VI) who is convicted of possessing with intent to distribute 100 kilos of cocaine. Under Option I both of these individuals have guidelines of 12-18 or [15-21] months.

Similar examples can be made for Class II violators. It would appear that the system proposed by Option I would generate numerous departures on a regular basis at best. THIS SYSTEM WOULD TREAT DISSIMILAR OFFENSES AND DISSIMILAR OFFENDERS SIMILARLY AND THIS DISPARITY WOULD BE INHERENT.

Under Option I a person serving a 5 year SPT who violates by possession of a controlled substance is required by statute to

serve a minimum of one-third of the term of supervised release.
(18 U.S.C. 3583)

Option I does not incorporate this under the proposed guidelines and instead offers that when the guidelines are in conflict with the statute, obviously the statute controls. The point I make is that in the situation of a violator found in possession of drugs, anyone with a 2 year SPT or more will be outside the guidelines in order to allow for the statutory minimum penalty to be served.

The proponents of Option I argue against a guideline range determination that would require "mini-trials". Option I therefore attempts to merely sanction a violator for breaking the supervision contract regardless of the violation behavior, in hopes that the pending charges will be pursued by a state or local jurisdiction. This is a risk that responsible criminal justice professionals should not be willing to take. The current crisis of overcrowded jails and prisons is a constant inducement for prosecuting agencies to drop their charges in favor of the federal warrants placed as detainers. In instances where the charges are dropped, no review or sanction for new criminal behavior would be attempted under Option I. The violator would simply be sanctioned for breaking his supervision contract. How does this type of policy "enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system?" This directly violates the objective of Congress "to achieve proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." To ignore the content of the violation behavior by broad and vague classifications as well as ignoring the background characteristics of these offenders will undermine the concept of selective incapacitation of violators and defeats the statutory purpose of protection of the public.

Option I also creates a disparate system that treats the initial sentencing decision under a "modified real offense system," but treats probation or supervised release violators by ignoring the "modified real offense" behavior.

Finally under the proposed sanctions for Class III violations, this option allows for Probation Officers to make

their own determination as to when the court should be notified of technical violations. This allows for some 2,000+ Probation Officers to decide how many dirty UA's are acceptable before being reported. For example, it could be 1, 3, 10 or 20. How long can a person be out of contact (absconder behavior) before the Probation Officer reports this to the court, one month, 3 months or 6 months? Again the broad vague categorization would appear to encourage disparity as a result of 2,000+ interpretations of what "undue risk" is, or how one views the public's, perception of what constitutes "respect for the justice system." How does the Probation Officer insure proper interpretation of the original intent of the Sentencing Court? This system would not even promote uniformity within districts let alone the entire country.

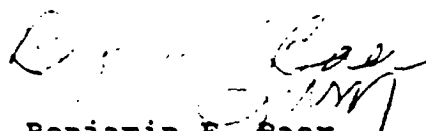
OPTION II

Although this is a more complex option, Option II is a more credible approach to a complex problem. It would achieve uniformity and proportionality, and allow for a consistent application of policy not subject to personal interpretation.

I would urge that the offense level and criminal history be recomputed for all new felony offenses and that all misdemeanor offenses be treated under the proposed 6-12 month guideline range. I would urge the application of the Chapter two guidelines to consider the "real offense" violation behavior. This would be consistent with the Sentencing Commission policy and treatment of all other offenders.

In closing I would again urge the Sentencing Commission to consider the offender's characteristics and recalculate the criminal history score when considering a new offense. I would caution against adopting any proposal that would make revocation guidelines simple or easy if they do not safeguard the objective of truth in sentencing and public safety.

Sincerely,


Benjamin F. Baer
Chairman

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

#69, Pages 74 et. seq.--

Probation & Supervised Release Guidelines

We oppose this proposal to extend the Guidelines to these matters without further study and prior special hearings as was done with regard to Organizational Sanctions.

We believe that this increased Guideline coverage will further overwhelm judges, probation officers, prosecutors and defense attorneys with the highly complicated Guideline system without sufficient corresponding benefit to society.

We suggest a cost-benefit analysis prior to setting forth any specific proposals. In the meantime, we believe that the judges can continue to deal effectively with these matters.



Washington, D.C. 20530

STATEMENT

OF

JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

Revocation of Probation and Supervised Release

The Commission seeks comment on the development of guidelines relating to probation and supervised release revocation and resentencing upon revocation. We believe there is a real need for guidelines in this area because probation and supervised release revocations are taking place without the benefit of any guidelines regarding resentencing.

Two options are proposed for probation and supervised release revocation. Amendment No. 69. The first divides probation and supervised release violations into three categories and



U.S. Department of Justice

Washington, D.C. 20530

STATEMENT

OF

JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

provides for specific ranges of imprisonment for resentencing, with the most serious offenses subject to a resentencing range of 18 to 24 months. Option one is based on the assumption that new criminal behavior will be appropriately sanctioned by the court that has jurisdiction over the underlying offense. Option two determines the resentencing range by applying the sentencing guidelines to the new criminal conduct.

We prefer option two because it more fairly reflects the nature of the violation giving rise to probation or supervised release revocation. A defendant who commits a very serious offense should not be limited to a maximum term of imprisonment upon revocation of only 18 to 24 months. We also disagree with the assumption that the new offense will result in prosecution and conviction since the new offense may be a state violation.



U.S. Department of Justice

Washington, D.C. 20530

STATEMENT

OF

JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

With the pressures of criminal prosecution and prison overcrowding on state governments, we have found that prosecutors are sometimes content to rely on federal revocation proceedings.

While we prefer option two, we believe it should be revised regarding the minimum prison term for resentencing. For some violations warranting a prison term, the sentencing range should provide a minimum prison term of less than the six months proposed. We also question the proposed application of guideline §5C1.1 to supervised release revocation. Guideline §5C1.1 authorizes split sentences (including a term of supervised release) that may not be compatible with resentencing upon supervised release revocation. Conforming changes would also be necessary with regard to this reference to guideline §5C1.1 in light of our recommendation to lower the minimum of the resentencing range to less than six months and should be made to the proposed provisions regarding both probation and supervised release. The Department would be pleased to assist in the Commission's efforts to develop these and other guidelines

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 69. Neither option is entirely satisfactory, and we urge the Commission not to promulgate guidelines for probation and supervised release violations at this time. If compelled to choose between the two options presented, Option 2 is preferable, although the guideline should only apply to conduct punishable by more than one year.

Option 1 is objectionable because it would result in extreme disparity. Dissimilarly situated individuals - for example, individuals who violate supervised release by possessing marijuana and those who engage in violent behavior - will receive similar terms of imprisonment under option 1. This option also results in severe "cliffs": a theft of under \$200 is to be considered a Class III violation and receive no more than 7 months additional imprisonment, but a theft of more than \$200 is a Class II violation and would result in 12 to 18 months imprisonment.

Finally, it is unclear what statutory authority the Commission is relying upon to promulgate binding procedures for probation officers.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
218 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604**

**CHAMBERS OF
CHARLES P. KOCORAS
JUDGE**

March 30, 1990

**Honorable William W. Wilkins, Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004**

Dear Chairman Wilkins:

On behalf of the Committee on Criminal Law and Probation Administration of the Judicial Conference and at the request of the Chairman, Judge Edward R. Becker, I write to provide comments regarding the proposed amendments to the sentencing guidelines pertaining to revocation of probation and supervised release. As you know, supervision of offenders is a critical part of the responsibilities of the United States Probation Office and of fundamental importance to the overall success, or failure, of our criminal justice system efforts. Because our committee has responsibility for the supervision process and, in light of the strain on supervision resources because of the effects of the Sentencing Guidelines, we have a deep interest in the formulation of amendments dealing with the subject of revocation of persons on supervised release or probation.

Guidelines for revocation of probation and supervised release will have a substantial effect on the operation of the courts and the Federal Probation System. Effective supervision of offenders in the community is fundamental to the administration of justice. For these reasons, it is imperative that all preliminary steps necessary to the enactment of amendments be completed prior to their enactment. These preliminary steps include appropriate field testing and adequate input from those most informed, and most affected, by the amendments. We do not believe Option I and Option II have been developed in a way to insure that all of the statutory objectives and other relevant considerations have been accommodated. We also do not think

Honorable William W. Wilkins

March 30, 1990

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there has been sufficient opportunity for evaluation and comment by those with experience in the field. We do not believe Option I and Option II should be enacted as presently drafted.

It is clear that Option I and Option II were developed based on different philosophical approaches. Because the two options are premised in fundamentally different ways -- Option I treating the new offense essentially as a sanction for failure to abide by the conditions of supervision and not as a sanction for the new criminal conduct (although the sanction partakes, in a general way, of the nature of the violation), while Option II essentially treats the new offense as the basis for, and measure of, the sanction to be imposed -- criticisms of the two options need to be separately addressed. Each of the two options, however, contain a common failing.

Both Options I and II treat probation and supervised release in the same way in revocation matters. Because probation and supervised release are neither synonymous terms nor define identical conditions, it is essential to consider the point at which they are found in the criminal justice system. An offender on supervised release will already have served the period of imprisonment that the court imposed for the original offense. The penalty for a violation of supervised release is not determined by the original imprisonment penalty for the underlying offense, but rather by the statutory classification of the original offense.

In contrast, an offender ordered to be supervised on probation has not been sentenced to the full term of imprisonment for the original offense. If the probation term is revoked, the original statutory penalty is available for the court to impose. In addition, following probation revocation and service of a prison term, the same individual may be subject to a period of supervised release. Revocation guidelines must incorporate these appreciable statutory differences. Neither Option I nor Option II address these differences adequately.

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March 30, 1990
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The introductory commentary to Option I states, in part, that "the guidelines envision that new criminal behavior will be appropriately sanctioned by the court that has jurisdiction." Option I, as presently drafted, essentially reflects this belief. In reality, however, in a good many cases the offenders will only face the revocation proceedings and not a separate prosecution for the new offense. There needs to be sufficient flexibility in the choices of the presiding judge to accommodate these possibilities.

Option II, on the other hand, puts the judge in the same straitjacket as when the original sentence was imposed. Recognizing the necessity to treat similarly situated offenders similarly, it is also necessary, however, to afford the judge the ability to give weight to considerations which were not as prominent when the original sentence was imposed or which are not adequately reflected in the guideline calculations. Concerns about reintegration of the offender into the community, the attainment of educational or vocational goals and the pursuit of the most efficacious way of handling drug problems are some, but not all, of the considerations which are common in revocation proceedings. These considerations mandate that a judge should have a full range of options at his command to deal with the variety of situations which will trigger revocation proceedings. Option II does not provide that, and neither does Option I.

We believe guidelines for revocation should address the following matters:

- (1) the nature and severity of the misconduct;
- (2) that persons on probation supervision did not receive the full imprisonment sanction for the underlying offense whereas offenders under

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supervised release supervision have served the period of imprisonment initially imposed;

(3) that reintegration of offenders into the community and risk control while they reside in the community are appropriate correctional goals in revocation proceedings;

(4) consideration of other criminal justice sanctions imposed for the conduct giving rise to the revocation proceeding;

(5) the virtue of not unduly burdening the courts when fairness and consistency do not require it.

While Options I and II of the proposed amendments accomplish some of these goals, neither accomplish all of them. Option I has the desirable quality of being simple to operate; however, to quote Chapter One of the Guidelines Manual, "Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects." Option I does not include considerations of the risk that the offender poses to the community, the harm (or potential harm) caused by the conduct, or the need to incapacitate certain offenders. Although this approach seeks to sanction a breach of the supervision contract, it does not adequately address the complexity and variety of the violations of supervision that the courts process. Using this approach, the courts would thereby treat dissimilar violators similarly.

Option II would entail reapplication of sentencing guidelines for violation matters. In doing so, it would make fine distinctions among violators based upon their criminal history and the conduct constituting the violation. This process would replicate the application procedures of the

Honorable William W. Wilkins

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sentencing guidelines in the violation guidelines and bring with it its attendant complexity and the substantial lack of judicial discretion necessary to revocation matters.

We are not opposed in principle to complexity when fairness and justice demand it. However, the facts of violation conduct are not consistently available for the detailed analysis required under the sentencing guidelines. This is particularly true of allegations of new criminal behavior without a conviction or new criminal behavior investigated by local jurisdictions. In such cases, the information available to calculate the offense level under the guidelines is often unavailable, or to make it available would require a mini-trial at the violation hearing.

In February 1990, Judge Becker conducted a survey of the probation offices in twenty districts. We learned that implementation of the sentencing guidelines appears to be going reasonably well. However, the districts uniformly reported that one effect of the new system has been to increase the length of time between initial indictment and sentencing with notable increases in the length of sentencing hearings. The structure of the sentencing guidelines requires factfinding by the court for the specific offense characteristics, adjustments, criminal history category, and sometimes even regarding the base offense level when it is predicated on quantities. The initial application by the probation officer regarding all of these guideline components may be subject to dispute by the parties, necessitating hearings. Less time-consuming procedures for violations would be preferable.

Individuals serving a term of supervision will eventually reside in the community without criminal justice controls and, as a consequence, an important goal of supervised release and probation is the reintegration of offenders to the community. This objective must, of course, be balanced by the goal of control of offenders when they pose a danger or risk. The guidelines must be sufficiently flexible to allow the judge to impose an

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informed determination. We fear that neither Option I or II meets this standard.

Prior to the enactment of violation guidelines, it would be prudent to address some technical issues. Option II states that if supervised release is revoked and the offender incarcerated, he shall be ordered to recommence supervised release to complete any time remaining on the term of release. Option I is not explicit regarding this issue, but seems to imply that such a procedure is possible. Both options depart on the premise that a second period of supervised release can be imposed after the revocation of the first period of supervised release. We do not find any statutory authority for the imposition of a second term of supervised release after the revocation of the initial period of supervised release imposed at time of sentencing. If this legal issue is not addressed before violation guidelines are promulgated, the courts will face a new problem of disparity in the interpretation of the supervised release statute.

In order to avoid ex post facto issues, it would be prudent to include the effective date of the violation guidelines. Would they pertain to the date of the violation hearing, the violation behavior, the date of sentence, or the date of the original offense?

In summary, we oppose enactment of both Option I and Option II. Because revocation guidelines are analogous to sentencing guidelines in importance, they must only be enacted after studied care. Supervision of offenders is a fundamental part of the criminal justice system and affect greatly the operations of the United States Probation Office. Both Options I and II suffer from inadequate development and analysis and, for the reasons stated above, should not be enacted. While we presently offer no specific alternative proposals, our committee and the probation office stand ready to assist in the rewriting of appropriate amendments. Because of their

Honorable William W. Wilkins

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importance to us, we would willingly accept an invitation to assist you in your efforts.

The members of the Criminal Law and Probation Committee of the Judicial Conference appreciate the opportunity to comment on the proposed amendments. We thank you for your consideration of our views and, as expressed above, stand ready to help you in any way you may wish.



Charles P. Kocoras

United States District Judge

Member, Committee on Criminal

Law and Probation

Administration

cc: Honorable Edward R. Becker

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
PROBATION OFFICE

KEITH A. KOENNING
CHIEF PROBATION OFFICER

668 EUGLIO AVENUE, ROOM 606
CLEVELAND 44114

March 30, 1990

U.S. SENTENCING COMMISSION
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Attention: Paul K. Martin

Re: Proposed Amendments
Chapter Seven

I urge that adoption of the proposed amendments for VIOLATIONS OF PROBATION AND SUPERVISED RELEASE be delayed.

The probation system is procontly pilot testing in select districts a new classification and supervision system. I understand that by the end of this year we will have information on the results of this pilot testing. I recommend that these results be considered before the Commission adopts revocation guidelines.

Respectfully submitted,

Keith A. Koenning

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS
PROBATION OFFICE

PERRY D. MATHIS
CHIEF PROBATION OFFICER

U. S. COURTHOUSE & FEDERAL BUILDING
812 NORTH 7TH
KANSAS CITY 66101-3037
(913) 236-3717
FTS: 757-3717

REPLY TO: Kansas City

444 S. E. QUINCY
TOPEKA 66683-3589
(913) 295-2790
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318 U. S. COURTHOUSE
WICHITA 67202-2011
(316) 269-6194
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March 27, 1990

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

Re: Proposed Amendments
to Sentencing Guidelines

Dear Director:

I write to comment on the proposed amendments to Chapter Seven - Violations of Probation and Supervised Release. I support the adoption of Option 1 over Option 2.

Several items concern me about the implications for Probation Officers and the Court under Option 2.

1. Section 7A1.2(c)(1) will require the USPO to go through the process of determining Relevant Conduct issues of the new criminal conduct. This proves difficult sometimes even when the criminal conduct constitutes a federal offense from the outset. It would prove particularly cumbersome if the new criminal conduct constituted a non-federal offense since the level of investigation and record keeping may be incomplete and important issues would perhaps take even more time to resolve than the original case circumstances.

2. The specific offense characteristics, Victim Related Adjustments, Obstruction issues, Multiple Count issues (if the new violation involved more than one crime), Acceptance of Responsibility issues, Chapter Four calculations, etc. would come into play because "the guideline range of imprisonment shall be the guideline range that would have been applicable if the new criminal conduct had constituted a federal offense - - - -". This is a lot of work to arrive at a calculation which is not called for under Option 1.

3. Option 2 could lead to attempts to re-open objections which were not resolved to the satisfaction of the complaining party in the original sentencing.

4. As I interpret Option 2, Section 7A1.2(c)(1) the USPO would essentially complete another PSI in order to assist the Court in revoking probation or supervised release. Even after going through all these calculations it could be determined that the sentence called for is less than the 6 to 12 months which is mandated under 7A1.3(c)(1) or (2).

5. It appears that sentencing a person by use of 7A1.2(c)(1) would result in a sentence for criminal conduct totally unrelated to the original conviction even though the stated goal in the Introductory Commentary for Chapter Seven is to impose a sentence as to sanction for failure to abide by conditions of supervision and not as a sanction for new criminal conduct. For instance, the original conviction may have been Theft which has a base offense level of 4 under 2B1.1(a). If the new criminal conduct is Possession of 250 Grams of Marijuana the base offense would be 6 under 2D1.1(a)(3). This just does not seem appropriate to me.

It is my opinion that Option 2 presents the potential for creating an enormous amount of work for the USPO and the Court which would be avoided if Option 1 is adopted.

Sincerely,


Perry D. Mathis, Chief
U. S. Probation Officer

PDM:bh

cc: Earl E. O'Connor, Chief
U. S. District Court Judge

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BARBARA MEIERHOEFER
1725 Maxwell Court
McLean, VA 22101
(703) 893-2485

March 23, 1990

Honorable William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, DC 20004

RE: Proposed Revocation Guidelines

Dear Judge Wilkins:

I would like to comment on the two proposed options for handling the revocation of probation and supervised release. My past and current experience includes research and writing in the areas of sentencing and community supervision, development of federal guidelines for parole release and revocation, and membership on the Committee on Criminal Law and Probation Administration's Task Force on Supervision for the last two years. I emphasize, however, that the comments that follow express my personal views rather than the official position of any organization.

In my opinion, neither option as presented captures all of the elements necessary for a purposeful, fair, and workable set of revocation guidelines. Option 1 distinguishes poorly among the types of revocation behavior to be sanctioned or deterred, it does not consider the risk the offender presents to the community, and it neither differentiates between probation and supervised release nor provides for intermediate sanctions. Its only merits are a workable number of violation types and ease of application.

Option 2 makes too many distinctions among offense behaviors. Many allegations of new criminal conduct will be considered on revocation prior to a conviction and/or based on non-federal arrests. Obtaining the detailed, reliable information necessary for a full recalculation of the offense level under these circumstances will surely be more difficult than it is when reports from U.S. Attorneys and case agents more familiar with guideline-information needs are available. I believe that offense level calculation is an unnecessarily onerous approach given that reflecting the seriousness of the offense is not one of the statutory purposes for either imposing or responding to violations of supervised release.

Number of Violation Behavior Categories

I recommend that the number of categories to describe violation behaviors be kept to around five. Not having been a probation officer, I do not feel competent to describe the nuances that should be captured in the

classifications. I strongly recommend, however, that the Commission form a working group of knowledgeable officers to devise a realistic set of violation categories.

Assessing Offender Risk

I strongly recommend that any set of revocation guidelines include an assessment of offender risk. Protection of the public is a statutory purpose to be served in responding to violations of both probation and supervised release. Such an assessment could be easily accomplished by a recalculation of the Offender History Score as proposed in Option 2.

Consecutive vs. Concurrent Service of Violation Terms

I endorse the Option 2 approach. The Commission should avoid the disparate overall treatment of similar violators based on the prosecutorial and sentencing practices of criminal justice systems beyond its control.

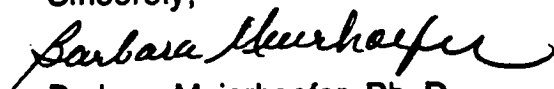
Over-reliance on Imprisonment

Neither option adequately allows for graded, "half-way back" responses to violations. Although Option 2 allows the substitution of community and home confinement under the same conditions as allowed in the initial guideline application, it does not provide a broad enough array of intermediate sanctions or attend sufficiently to the purposes to be accomplished by community supervision.

We need a system of supervision that is designed to assure compliance with the conditions imposed, protect society in the short-term by providing adequate methods of detection and control, and strive for long-term protection of society through the provision of necessary correctional treatment. What has been referred to as the simplistic "tail 'em, nail 'em, and jail 'em" philosophy, with its resulting over-reliance on prison, is unlikely to accomplish these goals and gives too little attention to statutory directives to impose the least restrictive sanction necessary to accomplish the purposes. Attempts can and should be made to bring offenders into compliance with the conditions of their supervision while keeping them in the community under controlled conditions that afford adequate public protection. I would go even further and suggest that the Commission break with precedent and define a category of offender risk and type of violation behavior for which a community sanction is the normally appropriate response, with incarceration as the "outside guidelines" decision.

In short, I think that more thought should be given to this important area, and would encourage at least one more round of modification and comment prior to promulgation. Thank you for the opportunity to express my views.

Sincerely,


Barbara Meierhoefer, Ph. D.



FEDERAL PROBATION OFFICERS ASSOCIATION

Dear Judge Wilkins:

This will serve as written recordation of my testimony on behalf of the Federal Probation Officers Association on March 15, 1990 regarding the proposed amendments and additions to the Sentencing Guidelines, Policy Statements and Commentary.

The primary concern of the FPOA relates to guidelines for revocation of probation and supervised release, Chapter Seven, "VIOLATIONS OF PROBATION AND SUPERVISED RELEASE." The Commission has set forth two options for the proposed revision of Chapter Seven.

First of all, the FPOA believes that a much more expansive Chapter Seven than currently exists is required, given the intent of Congress in the Comprehensive Crime Control Act of 1984.

Secondly, although there is much good language in Option Two, the FPOA supports Option One of the proposed Chapter Seven amendments, primarily based on structure. We believe that Option One is more clear and unambiguous than Option Two. More importantly, Option One expresses a philosophy which will enhance respect for the supervision process. By that we mean supervision of federal offenders in the community, either instead of incarceration, or after incarceration. Option One's clear separation of new criminal conduct which may form the basis of a violation from the separate and distinct failure to abide by the conditions of supervision, establishes a more rational basis for accountability than Option Two as well as mirroring the reality of the situation as perceived by the community and probation officers in general. In other words, the "bargain basement" or "two for one" approach to violative behavior will no longer be acceptable and the criminal will pay a price for his or her new infraction as well as a separate penalty for the earlier conviction which resulted in a suspension of part or all of the possible prison term available at that time.

We believe that the violator who is on federal supervision when the new criminal violation takes place commits two breaches. First, there is the new violation of the law. Secondly, there is a violation of the terms and conditions of supervision whether that be probation or supervised release or whatever it may be called. We view the terms and conditions of probation or supervised release, etc., as a contract between the Court and the defendant. Violation of the terms and conditions of supervision requires an informed sanction. Proposed Option One calls for two separate considerations of sanctions for the two legally separate actions that we have just mentioned. Option Two does not, in our judgment, do so or, at least, with clarity.



FEDERAL PROBATION OFFICERS ASSOCIATION

In this respect, and in general, Option One is subject to less interpretation than Option Two. As a result, it is the opinion of the FPOA that more consistent application of violation sanctions will result from Option One than from Option Two.

Option One also provides appropriate latitude to the Court in cases involving so-called technical violations or violations involving new criminal conduct which is deemed petty or relatively minor.

We do suggest that in proposed Guideline 7A1.4(c)(1)(A) of Option One that for consistency as well as a better opportunity for the Court to order an appropriate sanction, the range be from one to twelve months instead of one to seven months as in the Commission's proposal. This would provide for an unbroken continuum of sanctions addressing increasingly more egregious violations. The least of the sanctions available in Option One equals zero time in custody. This is followed by a sanction range of from one to seven months which we are recommending see twelve months at the top of the range. The next most serious violation behavior has a range of twelve to eighteen months, with eighteen to twenty-four months being at the top of this particular ladder.

Regarding Guideline 7A1.4(d)(1) of proposed Option One, we are not clear as to the Commission's intent. For instance, in conjunction with Guideline 7A1.5(a) of Option One, it could be seen as providing that a given defendant be on supervision for life, on the installment plan. If so, we think that to be ill advised and, perhaps, punitive of the probation officer rather than the defendant. At any rate, we think that the Commission should clarify its intent here.

Guideline 7A1.5(b) in proposed Option One makes very clear and enhances the underlying philosophy of Option One that a sentence based upon revocation is a sanction for failure to honor the conditions of supervision and quite separate from any sanction which may be imposed for new criminal conduct. The FPOA endorses this.

Briefly, Option Two would require much more interpretation and calculation than Option One. We see this as unnecessarily complicating the violation procedure as well as prolonging the process without ensuring any greater fairness than Option One.

In summary, although Option Two has some language to recommend it, Option One is the preferred starting point in this area of our concern and, after sufficient experience with application of Option One, any deficiencies can be resolved in the amendment process which is available to the Commission.



FEDERAL PROBATION OFFICERS ASSOCIATION

The FPOA has also looked at other areas of the proposed amendments, including the areas of fines, obstruction of justice and role in the offense. Although the FPOA does not have complete position statements as to each of these areas, we do offer some preliminary commentary.

As to the fines section, the proposed amendments to Guideline 5B1.2 appears to clarify fine computation and, therefore, wards against errors in this area. In that respect it is a good amendment. The FPOA also likes the attention given to restitution and the "escape hatch" relating to the possible complication and prolongation of the sentencing process as is set forth in Paragraph 65 which is found on Page 66 of the Commission's proposed amendments.

A major concern in the area of proposed amendments to Chapter Five, Part E (Restitution, Fines, Assessments, Forfeitures) is in the area of comprehension and ease of calculation on the part of the practitioner. In other words, if these amendments result in a better understanding of this section of the Guidelines and make the probation officer's calculation easier, they are to be wholeheartedly supported. We are continuing to examine this aspect.



FEDERAL PROBATION OFFICERS ASSOCIATION

Regarding the Commission's proposed amendment to Section 3C1.1, Chapter Three, Part C (Obstruction) of the Guidelines, the FPOA believes that the proposed amendment more accurately describes this section and is therefore good. We are curious about one

matter, however. The word "wilfully" is taken out of the title of the Guideline in the proposed amendment but left in the Guideline itself. We wonder why this was done and whether or not this will lead to confusion. We are also concerned that there might be some message in this. Having heard the staff response to Your Honor's question during the hearing that, basically, the word "wilfully" was left out of the title for economy purposes, is reassuring. On the other hand, it is perhaps better to deal away economy in a matter such as this to be absolutely sure that clarity reigns supreme.



FEDERAL PROBATION OFFICERS ASSOCIATION

The FPOA chooses not to make any comment at this juncture regarding "Role in the Offense." With this, as with the proposed amendments relating to fines and "obstruction," the FPOA hopes to have completed positions in the hands of the Commission before the end of the commentary period.



FEDERAL PROBATION OFFICERS ASSOCIATION

The FPOA wishes to alert the Commission to something that has emerged as a discussion item, viz., it appears that some enhancements in Chapter Two of the Guidelines such as "Prior Similar Conduct" may more properly be addressed in Chapter Four, which deals with prior record considerations. For example, Guideline 2L1.1, "Smuggling an Unlawful Alien," has as a specific offense characteristic a two-level increase if the defendant had previously been convicted of smuggling an unlawful alien. Again, while we have no concrete position on

this we have begun discussing whether or not an obvious prior record consideration should not more properly be in Chapter Four instead of Chapter Two to preserve logic and the integrity of the Guidelines.

The Federal Probation Officers Association has been working with the Commission since before the first set of Guidelines was promulgated and have relished every minute of it. We are very grateful for the continuing opportunity to provide our input. This is the fourth consecutive year that the Commission has allowed me on behalf of the FPOA to testify on proposed amendments and we believe that it is very important for the Commission to hear the perspectives of the primary field practitioners, probation officers. We applaud the Commission for always having had an open door policy for us.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PROBATION OFFICE**

**CARLOS JUENKE
CHIEF PROBATION OFFICER**

**364 U.S. COURTHOUSE
P.O. BOX 012559
MIAMI, FL 33101-2559**

March 8, 1990

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

RE: PROPOSED REVOCATION GUIDELINES

Dear Judge Wilkins:

On March 5-6, 1990, a working group of probation officers met with commission staff to discuss two options in reference to proposed revocation guidelines. It was suggested to the group that correspondence describing the findings and recommendations of the group be directed to your attention. This is the purpose of this letter.

A detailed description of both options for revocation was distributed to the invitees prior to the group meeting. As a consequence, all of the officers were able to apply three actual revocation cases to each of the two options. This proved to be very valuable in terms of evaluating the two options. The group was able to not only discuss the philosophical and theoretical aspects of the options, but the practical aspects of application as to each option as well.

Option Two was examined first. A detailed presentation was made to the group describing the theory as well as the application principles for Option Two. However, the group unanimously recommended that the commission not adopt Option Two. This was based upon the philosophy behind Option Two as well as application and reality concerns. Essentially, the group found Option Two to be far too complex and demanding for the courts to effectively utilize for purposes of revocation. The translation of revocation behavior into a guideline sentence appeared to be not only unrealistic but unworkable. One of the group members felt that the complexity and demands of Option Two were so severe that the judges in that district would simply ignore the guideline. After unanimously reaching an agreement as to Option Two, the group undertook an evaluation of Option One.

Honorable William W. Wilkins, Jr.
March 8, 1990
Page Two

RE: PROPOSED REVOCATION GUIDELINES

Once again, the theory and application principles were examined. The group felt that the categorization of revocation behavior was a reasonable approach for the courts to utilize. This provided a means to differentiate between types of revocation behavior while not making the determination so complex that application would be overwhelmingly difficult. Nevertheless, the group did recommend some changes in the ranges for incarceration, the classes of offenders and application. A report reflecting those recommended changes is being prepared and will be submitted to the commission members for evaluation.

It was a pleasure to work on this project. All of us enjoyed it. On behalf of the members of the group, please do not hesitate to call upon any of us in the future if you feel that we may be of additional service to the commission.

Sincerely,



John M. Shevlin, Supervising
U. S. Probation Officer

JMS:mhd

cc: Jerry Denzlinger, SUSPO, SD/TX
Patricia Hardage, USPO, ED/AK
Tim Kitch, USPO, D/ID
Joe Napurano, SUSPO, D/NJ
Nancy Reims, DCUSPO, CD/CA
William H. Tugwell, SUSPO, ED/VA
Sharon Hennigan, U.S. Sentencing Comm.

United States District Court
Eastern District of California
650 Capitol Mall
Room 8558
Sacramento, California 95814

Charlie E. Varnon
Chief Probation Officer

March 20, 1990

Telephone
(916) 551-2644
FJS 460-2644

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

Attention: Mr. Paul K. Martin
Communications Director

Dear Mr. Martin:

I write in response to the Commission's request for public comment on the proposed amendments and additions to the sentencing guidelines. I have not had the opportunity to review all of the proposed amendments; so, I will limit my comments to the proposed amendments to Chapter Seven (Violations of Probation and Supervised Release) at this time.

The "Introductory Commentary" states: "The sentence imposed upon revocation is envisioned as a sanction for failure to abide by the conditions of supervision and not as a sanction for new criminal conduct that may be the basis for the violation." It appears both proposed guidelines which follow this commentary would do otherwise. Also, the commentary is inconsistent with general practice of sanctioning violations of conditional release in our courts.

I believe, in practice, the sanction for violation of probation is generally based on the seriousness of the original offense for which probation was imposed as may be modified to some degree by the severity of the violation behavior. In both proposals, the original guideline is disregarded in determining the sanction for violation. This would result in the same treatment of two offenders who may have committed similar violations without regard for the seriousness of the original offense. For example, one offender may be on probation for an offense which carried a guideline of 0-6 months, and the other may be on probation by way of a departure for an offense which had a 12-18 month guideline. Under both proposals, if the violation behavior is the same, both of these offenders would receive the same violation term.

Proposal One would be easy to apply but it would be driven by the violation behavior without consideration of the original

offense. The second proposal would present a variety of complex issues which may require more litigation than computation of the original guidelines.

- * Base offense levels and adjustments would have to be litigated, unless the court is willing to wait months or even years for conviction in another jurisdiction. We have a parole violator who was arrested 17 months ago, and she has not yet had her preliminary hearing in the state court.
- * Local prosecutors may be reluctant to release evidence to the Federal Court for processing violations before the case is tried in the state court.
- * Basing the violation guideline on the new offense conduct will produce excessive sanctions for minor offenses. If the offender is on probation for an offense level 3 crime and commits an offense level 24 violation, there would be an enhancement of almost five years or 10-fold in the sanction for the original crime. I realize the violation term may take into account the term imposed by another court, but, in appearance and in fact, we would be sanctioning, primarily, the new state offense. This will aggravate the problem we already have with local jurisdictions waiting for our revocations and then dismissing the local charges if our violation term satisfies the local prosecutor.

I recommend the violation guidelines truly provide for sanction of the original offense with limited consideration of the nature of the violation behavior. The new crime should be sanctioned by the court having jurisdiction. In discussions in this district, we have attempted to articulate the difference between probation violators and supervised release violators as follows. The probation violator owes principal and interest on the original guideline term, i.e. he has not served the term, and he has violated the court's order. The supervised releasee owes only interest, i.e. he has served the term, and he should be penalized only for violating the order of the court. I suggest such a system could be accomplished as follows.

The classes of violations could be collapsed into two classes, one for felony crimes and one for misdemeanors and technicals or petty offenses and technicals as the commission may prefer. This would reduce the need to argue over definitions and would provide for significant sanctions for serious violations.

For Class I probation violations, the violation term could be determined by adding three points to the original criminal history

score. This will account for principal and interest as discussed above. The addition of three points takes into account the fact the defendant was on probation and would count the original crime in the revised Criminal History Category. The court would then sentence within that new guideline. This would differentiate between the minor and more serious original crime in a rational way.

For Class II probation violators, the court would sentence within the original guideline. This procedure would differentiate between the serious and less serious violators while still relating the violator term to the original guideline. The probationer does not get credit for "street time," so there is some additional sanction for the violator over the offender sentenced to imprisonment in the first place.

Supervised Release violators could be sentenced to not less than one-half of the supervised release term for Class I violations and not more than one-half for Class II violations.

Such a system, or something akin to it, would provide for differential sanctions depending on the nature of the original offense and the nature of the violation. It would be less complex than the second option proposed in the current amendments, and it would reduce the amount of litigation required to process violations.

I agree that the guideline should require a written report of all Class I violations, and I think the guideline should be strengthened by indicating that report should be made as soon as the officer has reason to believe such a violation has occurred. This would provide for more consistent practice regarding when a violation is reported. In some courts, a new offense is not reported until after conviction. Such a practice seems to delegate the responsibility for supervision of conditional release by our courts to courts of other jurisdictions.

I also agree a term of imprisonment is appropriate for felony violations, but I am just as convinced community custody, home detention, etc, are necessary as alternative sanctions for lesser, Class II violations. In the case of probation violators, the original offense is not serious, or the defendant would not be on probation, so less-serious sanctions may be effective as punishment and as a means to bring the defendant into compliance without the costly use of limited prison bed space.

I assume departures for stated cause will be permissible in violation proceedings, and if so, maybe that should be stated in the commentary. Also, if something like these proposed guidelines were adopted, violation terms should be served consecutive to any new term unless the result would be silly, e.g. six months consecutive to 50 years.

I believe guidelines for violations are necessary and that they should address when violations are reported, when supervision should be revoked, and what sanction should be imposed at revocation. There is probably greater disparity in this area than in sentencing in general. I just hope the final guidelines are not so complex as to impose an unnecessary burden on an already overburdened court and prison system.

On another matter, I had an opportunity to read the testimony of the General Accounting Office on its review of the work of the Commission. I was amazed that given the unprecedented accomplishments of the Commission in such a short time, GAO found it necessary to spend the bulk of its time commenting on the organization and communication of the Commission. I guess, in the opinion of GAO, you really should try to rearrange the furniture on the deck of the Titanic. Those of us who use your product every day do appreciate your excellent performance of an impossible task.

Respectfully submitted,

Charlie E. Varnon

CHARLIE E. VARNON
Chief U. S. Probation Officer

Connie Dumont

109 Lisa Ct.

Santa Cruz

CA. 95060

Feb. 20 1990

Dear Mr. Martin,

I spoke with you a couple of times in the last month concerning the guidelines and how they apply to L.S.D. I have enclosed a letter written by my son who is in jail awaiting trial. Please see to it that the chairman and those on the commission read this letter.

Because they have chosen to weigh the "carrier" (blotter paper) in my son's case he is being charged with in excess of 400 grams of L.S.D. He will most likely be sentenced to 30 - years in Federal prison. He is 19 YEARS OLD! Most of his time will be for blotter paper. Something must be done and it is the Sentencing Commission's job to get it done. Please help.

Sincerely,

Connie Dumont

To The Honorable William W.
Wilkins Jr.,

I am writing to you concerning a
gross unfairness currently occurring with
in the federal court system. I am
speaking of the LSD carrier trials.

In your letter to Senator Biden you
address the discrepancies. A sugar cube
weighs more than 40,000 times the weight
set forth in the table, a piece of
blotter paper more than 200 times the
liquid or crystal LSD. Someone with a
gram of crystal LSD, is identified as equal to

20,000 hits, gets off easier than someone with 100 paper ~~doses~~ or one sugar. Your letter makes a false comparison, when heroin is 'cut' with sugar, the sugar is identified as heroin and the total amount of the sugar and the heroin is being sold together as a certain weight i.e. a kilo of heroin, 90%⁰ sugar, is identified, sold & consumed as a kilo of heroin. An agent who is purchasing LSD might ask for a gram thus he is asking for 20,000 doses, which might come in the form of a gram

of crystal separate from but along with
20,000 pieces of blotter paper, or it might
come already impregnated on that paper.
Either way it is identified as a gram,
sold as a gram and, since it is likely
the paper would be sucked on and spit out
we can say consumed as a gram. Among
dealers or agents, LSD carrier is not identified
in the weight, when someone wants to
purchase a gram, they don't mean 75
pieces of 'blotter paper' or $\frac{1}{2}$ a sugar cube
or whatever carrier might weigh a gram.

they mean to purchase that gram of LSD, whether impregnated or not. Obviously a gram of crystal or liquid is not carried around in your hand, thus it is packaged to be carried, someone can carry the paper in their hand, like someone may hold a bag of heroin, the bag is not weighed. A lab makes and sells crystal, a smaller dealer packages and sells this crystal, thus a lab has $\frac{1}{200}$ that of a small dealer with paper and $\frac{1}{200}$ the amount someone who chooses sugar

Levon Dumont
717 Wis Ave
Racine Wis 53403

Cubes, for the same LSD. The Lab can
laugh, a man with a carrier must cry.
Don't let the Lab off, they are the
older ones who intise the younger ones. D
it by numbers!

Please put in your proposal in by the
May 1st deadline. You know what is right.
This is wrong and so simple to change. Do
someone care? The number of doses is
how someone must be punished: and
you know it. There can be no excuse!

Sincerely,
Levon Dumont

MARCH 12, 1990

CHARLES LARSEN

REG NO 03616-091
F.C.I. ENGLEWOOD, U/E
9595 West Quincy Avenue
LITTLETON, CO 80123

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, N.W., SUITE 1400
WASHINGTON, DC 20004

RE: PUBLIC COMMENT ON GUIDELINES
CONCERNING LSD PACKAGED IN UNIT DOSES.

Dear Sir:

The amendments made to the guidelines that took effect on November 1st of 1989 were not real clear if the Commission had addressed the issue concerning the carrier excipient used in the conduct of packaging doses. The Courts are erroneously including the carrier, blotter paper, as quantity. The published cases concerning this issue are considering the weight of the excipient along with the LSD because it is ingested. Packaging often times serves more than one purpose. This does not make it net quantity weight. All the Courts have agreed that the Carrier and LSD combined are a gross weight determination. Gross weight always infers that the weight of the packaging is included. The very name Carrier infers packaging. When you base the amounts in these guidelines on quantity you are inferring net weight. Net weight is always quantity weight. A cut/adulterant adds net quantity weight. They add quantity, a carrier acts as a vehicle or gross weight.

The excipient used in the conduct of packaging doses should not be included in quantity, it is gross weight.

Sincerely,
Charles Larsen