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Stanford Shmukler
Packard Building
24th Floor
Philadelphia, PA 19102
(215) 751-9500

Howard B. Klein
Blank, Rome, Comisky & McCauley
1200 Four Penn Center
Philadelphia, PA 19103
(215) 569-5651

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March 16, 1993

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VIA TELECOPY AND FEDERAL EXPRESS

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

Re: Proposed Sentencing Guideline Amendments
for Public Comment - 1993 Amendment
Cycle

Dear Mr. Courlander:

I am writing on behalf of the Criminal Law Committee of the Federal Bar Association's Philadelphia Chapter. Our Committee consists of federal criminal law practitioners in the Eastern District of Pennsylvania. The Committee has reviewed the proposed guideline amendments for public comment published in the December 31, 1992 edition of the Federal Register. This letter constitutes our comments on the proposed amendments. The Committee has not undertaken to comment on all of the proposed amendments. Rather, we have selected only a few on which to submit comments. They are as follows:

1. Amendment No. 20 - Money Laundering.

The Committee strongly supports the proposed amendment to U.S.S.G. §§ 2S1.1 through 2S1.4 applicable to money laundering offenses. The amendment would tie the base offense level for money laundering violations more closely to the underlying conduct that is the source of the illegal proceeds.

This represents a significant improvement in the money laundering guidelines. Our Committee is aware of cases in this District and elsewhere in which the money laundering guidelines have allowed the government to obtain a

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significantly higher guideline sentencing range than the underlying offense would yield simply by adding a violation of 18 U.S.C. §§ 1956 or 1957 to the indictment. An example in our District is United States v. Brian M. Maier, Criminal No. 91-00235, (E.D. Pa.). This was a fairly simple fraud scheme in which the "loss" within the meaning of U.S.S.G. § 2F1.1 was between \$40,000 and \$70,000. The total offense level for the mail fraud offense was 13, which yielded a guideline prison range of 12-18 months. However, by adding a violation of 18 U.S.C. § 1957, based solely on the defendant's removal of some of the fraud proceeds from the bank account into which they had been deposited, the government successfully increased the total offense level to 19 and the corresponding guideline prison range to 30-37 months. The Commission's October 14, 1992 Working Group Report on Money Laundering has apparently identified numerous other examples nationwide of this form of "count manipulation." The money laundering charges in these cases often involve "monetary transactions" normally not thought of as sophisticated "money laundering."

With the government's increasing emphasis on forfeiture, the number of cases in which violations of 18 U.S.C. §§ 1956 and 1957 are added to fraud and other charges will only increase. This is because violations of 18 U.S.C. §§ 1956 and 1957 are among those for which civil and criminal forfeitures are authorized under 18 U.S.C. §§ 981 and 982, even though forfeiture may not be available as a remedy for the underlying offense.

Proposed Amendment No. 20 is a significant step toward elimination of the unfair treatment that can result from manipulation of money laundering charges. One concern we have arises from proposed § 2S1.1(a). This provision requires that in non-drug cases the greater of the following base offense levels be applied: (a) the offense level for the underlying offense from which the funds were derived; or (b) eight plus the number of offense levels from the table in § 2F1.1 corresponding to the value of the funds. The offense level for fraud offenses is six. Thus, in fraud cases in which the government adds a money laundering charge, the base offense level under § 2S1.1(a) will always be two levels higher (*i.e.*, the difference between eight and six), simply because the government has added the money laundering charge.

The Committee believes this is inappropriate. In many ordinary fraud cases, the conduct giving rise to a violation of 18 U.S.C. §§ 1956 or 1957 does not, in any meaningful way, make the defendant more culpable or deserving of punishment than the defendant who happens not engage in a "monetary transaction" within the meaning of §§ 1956 and 1957. Accordingly, the Committee recommends that § 2S1.1(a)(3) be changed to read: "six

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plus the number of offense levels..." instead of "eight plus the number of offense levels..." Offenses involving relatively sophisticated "monetary transactions" can properly be dealt with through the specific offense characteristics set forth in proposed § 2S1.1(b).

2. Amendment No. 5 - Fraud, Theft and Tax - More than Minimal Planning/Use of Sophisticated Means.

This amendment would eliminate "more than minimal planning" as a specific offense characteristic under §§ 2B1.1(b)(5), 2B1.2(b)(4)(B) and 2F1.1(b)(2) and use of "sophisticated means...to impede discovery of the nature or extent of the offense" as a specific offense characteristic in tax cases under §§ 2T1.1-2T1.4. Instead, the amendment would modify the loss tables under the applicable guidelines to incorporate gradually an increase for "more than minimal planning" and use of "sophisticated means."

The Committee strongly opposes this approach. The underlying premise apparently is that offenses involving a certain amount of "loss" necessarily involve these specific offense characteristics. Therefore, they should be uniformly applied through appropriate increases in the loss tables. Thus, for example, offenses involving a "loss" in excess of \$40,000 will have offense levels two levels higher than under the 1992 guidelines.

The Committee believes this premise is seriously flawed. Monetary "loss" does not measure in any meaningful way the degree of planning or sophistication involved in a particular offense. A theft or fraud involving a loss of \$100,000 can often be as simple as a similar offense involving only a few thousand dollars. Good examples are cases in the Eastern District of Pennsylvania in which the government prosecutes relatives of deceased Social Security beneficiaries for receiving and cashing social security checks after the payee's death. These cases usually involve little or no planning. The relative is often surprised to learn that the government continues forwarding Social Security checks, even after the payee's death. The theft continues, and the "loss" increases, as long as the government continues to forward the checks and the relative cashes them. The amounts can often exceed \$40,000. Nevertheless, few would argue seriously that such offenses involve any significant degree of planning or sophistication. There are countless other examples of theft and fraud offenses in which the "loss" may be relatively high and the degree of planning relatively low.

For this reason, the Committee believes the preferred approach to these specific offense characteristics is one

suggested in the "additional issues for comment" accompanying Amendment No. 5. Specifically, the Committee recommends that the Commission change the specific offense characteristic from "more than minimal planning" to one of "extensive or sophisticated planning." This approach would tend to eliminate a disparity which the Committee believes now exists. Section 1B1.1's emphasis on "repeated acts," along with the examples given in Application Note 1, have lead courts to conclude that the "more than minimal planning adjustment" has a relatively low threshold. As a result, individuals engaged in elaborate and sophisticated fraud schemes receive the same treatment as the individual whose planning may be "more than minimal," but is far from extensive or sophisticated. A guideline that defines the planning necessary to establish the enhancement as "extensive or sophisticated planning" would still require subjective interpretation by the courts. However, such an approach would more fairly differentiate those defendants who deserve an upward adjustment based on the degree of planning from those who do not.

The Commission should, at the very least, eliminate the references to "repeated acts." Individuals who engage in repeated acts of fraud or theft are adequately dealt with through increases in the loss tables, because repeated acts almost always result in higher loss.

3. Amendment No. 23 - U.S.S.G. § 3B1.3 - Abuse of Position of Trust.

This amendment would change this role in the offense adjustment to "abuse of position of special trust." The definition of "special trust" makes clear that the two-level upward adjustment in offense level is intended only for individuals in positions of "public or private trust characterized by professional or managerial discretion." The definition further clarifies that the adjustment is not intended for employees whose responsibilities are primarily administrative in nature."

This amendment would substantially improve the operation of this guideline. Under the current guideline, the two level upward adjustment has been applied, even when the abuse of trust involved is little more than a breach of an employee's fiduciary duty to the employer. A good example is United States v. Milligan, 958 F.2d 345 (11th Cir. 1992), in which the court upheld the application of § 3B1.3 to a United States Post Office window clerk convicted of misappropriation and embezzlement of postal funds. The Committee strongly recommends that this adjustment apply only to individuals, who, because of their higher level positions, have significantly more responsibility than the ordinary employee. The amendment goes a long way

towards accomplishing this objective, and the Committee therefore strongly supports it.

4. Amendment Nos. 24, 31, and 47 - U.S.S.G. § 5K1.1 - Substantial Assistance to the Authorities.

The Committee believes amendment 24 is a step in the right direction in that it would allow the district court to make the ultimate determination, in a limited number of cases, of whether or not a defendant has provided substantial assistance in the investigation or prosecution of another person warranting a downward departure. However, the Commission should go further by allowing the district court to make this determination, regardless of whether or not the defendant is a non-violent first offender. Accordingly, the Committee prefers the recommendations by the American Bar Association in proposed Amendment No. 31 and the legislative sub-committee of the Federal Defenders in proposed Amendment No. 47.

Following the Supreme Court's decision in Wade v United States, 112 S. Ct. 1840 (1992), defendants have very limited opportunity to challenge the government's refusal to file a substantial assistance motion under § 5K1.1. The Committee maintains that, as with all other determinations under the guidelines, the district court, not the government, should make the final determination on whether or not a defendant has provided substantial assistance. As a practical matter, the government will, in most cases, be highly influential in the district court's determination. In those cases where the parties disagree, defendants should be entitled to their day in court, just as they are now on the many factual and legal disputes arising under the guidelines. Access to a judicial determination of the issue should not turn on the defendant's criminal history or offense characteristics.

The government would still be protected in two ways. First, as is mentioned above, it will likely be the most influential voice on the substantial assistance question at sentencing. Second, it can appeal an adverse determination.

Finally, this issue implicates very directly the appearance of justice. Under the current regime, both defendants and the public-at-large can legitimately question the fairness of a sentencing system that allows the defendant's adversary to make unilaterally such an important determination in the sentencing process. Elimination of the requirement for the government motion would solve this problem (at least to the extent mandatory minimums are not involved) by making the substantial assistance determination no different than any other sentencing determination, that is, one ultimately for the district court.

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5. Amendment Nos. 8-10, 50 - Drug Offenses.

Amendment No. 8 would provide a ceiling of offense level 32 in the drug trafficking guideline (§ 2D1.1) for defendants who qualify for a mitigating role adjustment under § 3B1.2. Additionally, it would revise the commentary to § 3B1.2 to describe more clearly cases in which the mitigating role adjustment is warranted.

These amendments constitute much needed reforms. As the Commission's synopsis of the proposed amendment suggests, existing drug guidelines have tended to overpunish certain lower level defendants in jointly undertaken activity because the sentence is driven primarily by the quantity of drugs involved in the offense. This problem has been particularly acute in the Eastern District of Pennsylvania, which has seen an increased emphasis in recent years on what are referred to as "neighborhood" drug cases. These have consisted of as many as thirty or forty defendants in one indictment. Typically, certain lower level participants have been sentenced on the basis of extremely high drug quantities because of the manner in which the relevant conduct guideline (§ 1B1.3) has been applied.

The proposed revisions to the commentary to § 3B1.2 (along with prior clarifications of the relevant conduct guideline) will improve the situation. They will help clarify the participants in jointly undertaken activity for whom the mitigating role adjustment is intended. The absence of more expansive commentary and the emphasis upon the defendant's lack of knowledge or understanding of the scope and structure of the enterprise have caused district courts to be unduly restrictive in their application of the mitigating role adjustment. The Committee strongly endorses the Commission's identification of the non-exhaustive list of characteristics identified in proposed Application Note 5 that are ordinarily associated with the mitigating role.

With regard to Application Note 7 pertaining to transporters of contraband, the Committee opposes option 3. This would prohibit any mitigating role adjustment for that quantity of contraband the defendant transported. This seems unfair to the defendant who, on the facts of a particular case, might otherwise have a strong claim that he or she qualifies for the mitigating role adjustment. As for options one and two, the Committee prefers option one because it is more flexible and easier to understand.

The Committee also endorses Amendment 9, which would restore the upper limit of the drug quantity table to level 36. Prior increases in the upper limit to level 42 reflected an undue

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emphasis on quantity in determining the overall sentence. Moreover, the Committee recommends that the Commission consider further reductions in the quantity table's upper limit, along with an increased emphasis on specific aggravating offense characteristics such as the ones identified in Amendment 9.

Finally, the Committee endorses proposed amendments 10 and 50 pertaining to the definition of "mixture or substance" under § 2D1.1, Application Note 1, and the appropriate method of determining the relevant quantity in cases involving LSD.

6. Amendment No. 2 - Use of Guidelines Manual in Effect on Date of Sentencing (§ 1B1.11).

This amendment reinforces the Commission's so-called "one book rule," and extends it to multiple count cases in which the effective date of guideline revision(s) occur between offenses of conviction. The Committee opposes this amendment. The "one book rule," in our view, violates the Sentencing Reform Act. Specifically, section 3553 of Title 18, United States Code, requires the sentencing court to apply the guidelines "in effect on the date the defendant is sentenced." If the application of a particular guideline in effect on the day of sentencing would violate the ex post facto clause of the United States Constitution, then the district court must resort to the guideline in effect at the commission of the offense. It does not follow, however, that the entire guidelines manual in effect at the time of the offense must also be applied. Rather, under Section 3553, the court must continue to apply all other guidelines in effect at the time of sentencing, as long as their application does not violate the ex post facto clause.

7. Amendments 29 - Specific Offender Characteristics

The Committee strongly supports this proposed amendment by the Criminal Law Committee of the Judicial Conference of the United States. It would reinforce an important point. While a particular offender characteristic may ordinarily be irrelevant in determining whether a sentence should be outside the applicable guideline range, the presence of such a characteristic to an extraordinary degree (and therefore to a degree not adequately taken into consideration by the Sentencing Commission) is an appropriate reason for departure from the guidelines.

More importantly, the amendment would clarify that even though any one offender characteristic may not be present to a degree sufficient to support a departure, two or more characteristics may be present in combination to an extent that warrants a departure. This is consistent with the language of 18 U.S.C. § 3553(b), which contemplates departures based upon an

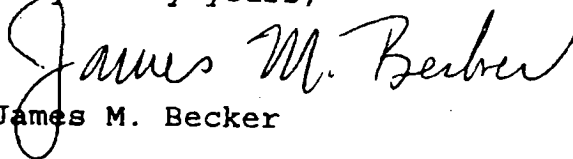
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aggravating or mitigating "circumstance." Moreover, the proposed amendment will better enable district courts to accomplish the statutory sentencing goals identified in section 3553(a).

Amendment 32 calls for the Commission to invite comment on whether it should promulgate an amendment that would allow a court to impose a sentence other than imprisonment in the case of a first offender convicted of a non-violent or otherwise non-serious offense and, if so, whether this should be accomplished either by: (A) providing an additional ground for departure in Chapter 5, Part K; or, (B) increasing the number of offense levels in Zone A in criminal history category 1. The Committee endorses such an amendment. There are still far too many cases involving such offenders where the guidelines require a sentence of imprisonment. The Committee believes that the recent amendments increasing the number of offense levels in Zone A in Criminal History Category I from six to eight constituted a significant improvement. However, the Commission should undertake to identify through a separate ground for departure in Chapter 5, Part K, the relevant factors that would support departures for first-time, non-violent offenders.

Thank you for the opportunity to comment on these important sentencing issues.

Very truly yours,


James M. Becker

JMB/mf/800

cc: Stanford Shmukler, Esquire
Howard B. Klein, Esquire
Co-Chairs