

Statement of

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on behalf of

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My name is Carol A. Brook, and I am the Deputy Director of the Federal Defender Program, Inc., in Chicago, Illinois, which provides representation for indigent defendants in the Northern District of Illinois and in the Court of Appeals for the Seventh Circuit. I will present the views of the Federal Public and Community Defenders on the proposed amendments to the Federal Sentencing Guideline Manual published by the Commission last December 31.

There are presently 50 Federal Public and Community Defender Organizations providing representation in 56 of the 94 federal judicial districts. Our offices operate under the authority of 18 U.S.C. § 3006A and exist to provide criminal defense and related services in federal court to persons financially unable to afford counsel. We represent defendants before magistrates, United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

Federal Public and Community Defenders represent the vast majority of defendants in federal courts. Data for the most recent annual reporting period indicates that defender organization attorneys represented over 36,000 persons during that period. We represent persons charged with frequently-prosecuted federal crimes (like drug distribution) and with infrequently-prosecuted federal crimes (like sexual abuse). We represent persons charged with white-collar crimes (like embezzlement) and persons charged with street crimes (like first degree murder).

Federal Public and Community Defenders have a great deal of experience with the guidelines. Our comments on the proposed

amendments are based on our experience, and our desire to see that the guidelines fully implement the statutory purposes of sentencing and that the federal sentencing system is just, fair, and humane.

Since the original creation of the guidelines, the Federal Defenders have been concerned about the paucity of alternative sentences available. The failure to make these alternatives available largely results from a combination of three factors: First, the Commission's merging of the "in-out" decision of whether to incarcerate someone or to place that person on probation with the decision of how long to make the sentence; second, the Commission's reading of 28 U.S.C. § 994(j), which basically makes every offense a "serious" offense and thus eliminates all sentences but prison even for first offenders; and third, the Commission's failure to implement Congress' mandate in 28 U.S.C. § 994(k) that prison not be imposed where the primary purpose of a sentence is rehabilitation.

The Commission's refusal to separate the "in-out" decision from the question of length of sentence is the greatest obstacle to the imposition of alternative sentences. In 18 U.S.C. § 3582(a), which was part of the enabling legislation to the Sentencing Reform Act, Congress clearly expressed its belief that there should be two separate sentencing decisions -- first, whether prison is an appropriate sentence, and second, if so, for how long. This statute comports with the thought process most judges went through in sentencing before creation of the sentencing guidelines.

Section 3582(a) states in part: "The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable and recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation."

Congress' belief in this two-step sentencing process was further expressed in 28 U.S.C. § 994(a)(1)(A), also part of the Commission's enabling legislation, where Congress directed the Commission to promulgate a guideline to determine "whether to impose a sentence to probation, a fine, or a term of imprisonment." Only after that determination is made is the Commission directed to establish a guideline to determine the "appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment." In addition, 28 U.S.C. § 944(e) requires the Commission to "assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant" (emphasis added).

The Commission's failure to heed these directives resulted in a system wherein the only question is "how long." Under this approach, absent a departure, nonprison sentences are authorized in only the lowest sentencing ranges (ten out of 43), requiring even

first offenders with relatively low guidelines to serve prison time.

Yet, in 28 U.S.C. § 994(k), Congress recognized the importance of alternative sentences and required the guidelines to "reflect the inappropriateness of imposing a sentence of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." Thus, under the Sentencing Reform Act, the court should always have the option of determining whether the primary purpose of sentencing is to provide a rehabilitative or educational opportunity (the "in-out" decision), and if that is the case, then the court should have a range of alternative sentences available to it. These alternatives should include everything from intensive supervision to community service to apprenticeships to education to fines and restitution, and should be flexible enough to allow the courts and counsel to mold the alternatives to the needs of the offender, the case and the community.

**Amendments 1, 34, and 35
(§ 1B1.3. Relevant Conduct)**

Amendment 1 would revise the relevant conduct rule to preclude the sentencing court from considering "conduct of which the defendant has been acquitted after trial." In addition, amendment 1 would add a new application note to U.S.S.G. § 1B1.3 that states in part, "In an exceptional case . . . such conduct may provide a basis for an upward departure." Amendment 34 invites comment upon whether the relevant conduct rule should restrict the sentencing

court to consideration of (A) conduct admitted by the defendant in connection with a plea of guilty or nolo contendere, or (B) "conduct that constitutes the elements of the offense of which the defendant was convicted." Amendment 35 sets forth two options. Option 1 would revise the relevant conduct rule to preclude consideration of "conduct of which the defendant has been acquitted after a court or jury trial." Option 2 also would preclude consideration of such conduct, but would permit consideration of such conduct if the government proved the conduct by clear and convincing evidence.

We support revising the relevant conduct rule to preclude consideration of conduct for which the defendant has been acquitted. In our experience, one of the most difficult things for people to understand -- and not just our clients, but attorneys and the general public as well -- is that a court can base a defendant's sentence on conduct of which the defendant has been acquitted. Despite the differing burdens of persuasion rationale that supports using acquitted conduct, people do not perceive using acquitted conduct as just or fair.

We support that option 1 of amendment 35. Amendment 1, although similar to option 1 of amendment 35, would add an application note suggesting a departure based upon acquitted conduct "in exceptional circumstances," an inherently ambiguous standard.¹ There is no sound policy reason to preclude

¹The commentary to the relevant conduct guideline does not make clear what is the norm in cases where a defendant is convicted of some counts and acquitted of others. Thus, the Commission has

consideration of acquitted conduct for the purpose of applying the base offense levels and adjustments of the guidelines -- a structured process -- while at the same time allowing consideration of such conduct for the relatively unstructured process of determining how far to depart. If acquitted conduct is allowed to be considered when determining specific offense characteristics and adjustments, the impact that the acquitted conduct can have upon sentence is regulated by the guidelines. Thus, in a drug offense, possession of a weapon results in a two-level enhancement. A departure, however, need only be reasonable, and what is reasonable to one judge may not be reasonable to another judge. We would support amendment 1 if the departure language were removed.

Amendment 2
(§ 1B1.11, p.s. Use of Guideline Manual
in Effect on Date of Sentencing)

Amendment 2 would amend U.S.S.G. § 1B1.11, p.s., which took effect last November, to provide that where a defendant is convicted of more than one offense and the offenses straddle the effective date of a revision of the Guidelines Manual, the sentencing court is to apply the version of the Manual that is applicable to the most recent offense. Amendment 2 would also

given no guidance to courts about what may be an exceptional case, ensuring that the matter will be litigated. A narrow reading of "exceptional circumstances" would require the acquittal to be, in effect, a jury nullification, i.e., the acquittal must be clearly inconsistent with a count of conviction. A broader reading of "exceptional circumstances" would permit the court to depart if the court found that the defendant engaged in the conduct by clear and convincing evidence.

amend the commentary to U.S.S.G. § 1B1.11 to set forth the rationale behind that policy statement.

Just as we opposed the promulgation of U.S.S.G. § 1B1.11, we oppose amendment 2. Congress has not -- indeed, cannot -- delegate to the Commission the authority to determine what the ex post facto clause of the Constitution may require with regard to the Guidelines Manual. The determination of which Manual to apply is a question of law that must be determined in the context of a case or controversy.

We believe the Commission should reconsider U.S.S.G. § 1B1.1 for two reasons. First, the guideline is inconsistent with advice from the Office of the General Counsel of the Administrative Office of the United States Courts. See T. Slawsky, Ex Post Facto Problems: Changes in Sentencing Guidelines and Statutes and Policy Statements on Revocation of Supervision, 55 Fed. Probation 69 (1991). Second, the guideline is in contravention of Miller v. Florida, 432 U.S. 282 (1977).

In Miller, a unanimous Supreme Court held that a change in Florida's sentencing guidelines which increased the guideline range could not be applied to a defendant whose offense was committed before the change was made. We believe Miller clearly controls here.

Thus, although both the current proposal as well as last year's amendment appear to be attempts by the Commission to reduce the complexity of guideline application, we cannot support these

attempts because we believe they sacrifice the constitutional principle of ex post facto for ease of application.

Amendment 3
(§ 1B1.12, p.s. Persons Sentenced Under the
Federal Juvenile Delinquency Act)

Amendment 3 would add a policy statement to Chapter One, Part B, addressing the Supreme Court's decision in United States v. R.L.C., 112 S.Ct. 1329 (1992), which limits the maximum imposable sentence for a juvenile to the maximum of the guideline range applicable to an otherwise "similarly situated" adult defendant, unless the court finds an aggravating factor sufficient to warrant an upward departure from that guideline range. We do not believe this amendment is necessary.

The Supreme Court's holding in R.L.C. is clear and requires no further comment. In R.L.C., the Supreme Court held that 18 U.S.C. § 5037(c)(1)(B), which limits the sentence of a juvenile to the "maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult," does not refer to the statutory maximum for the underlying offense, but rather to the maximum penalty that could be imposed if the juvenile were being sentenced under the sentencing guidelines. Juvenile cases in the federal system primarily involve Native American children on reservations, and occasionally involve children of military personnel living on base. Since such cases arise infrequently in the federal system we do not feel that further comment by the Commission on the holding in R.L.C. is necessary.

Amendment 4
(§ 2A4.2. Demanding or Receiving Ransom Money)

Amendment 4 would add a specific offense characteristic, a cross reference, a special instruction, and additional commentary to U.S.S.G. § 2A4.2. The proposed specific offense characteristic would increase the offense level using the table in U.S.S.G. § 2B3.1(b)(6) if the amount of ransom exceeded \$10,000. The cross reference would require the application of U.S.S.G. § 2A4.1 (kidnapping) if the defendant was a "participant" in the kidnapping offense. The special instruction would require application of U.S.S.G. 2X3.1 (accessory after the fact) if the defendant's conduct was "tantamount to that of an accessory after the fact to the kidnapping or ransom demand offense."

We oppose this amendment. The amendment attempts to make U.S.S.G. § 2A4.2 a "real offense" guideline. In formulating the guidelines, the Commission found that there was no practical way to construct a pure "real offense" system, and instead "moved closer to a charge offense system." U.S.S.G. Ch. 1, Pt. A(4)(a). This decision is partly reflected by the requirement that the sentencing court apply the offense guideline for the offense of conviction -- not for the acquitted or dismissed counts. The proposed cross reference and special instruction would make this guideline a mere conduit to U.S.S.G. § 2A4.1 and U.S.S.G. § 2X3.1. A person convicted of receiving ransom money, but found not guilty of kidnapping (or who had a kidnapping charge dismissed), would nevertheless be sentenced under the kidnapping guideline. As we

discuss later in connection with amendment 28(C) (pp. 44-46), we oppose the ad hoc creation of a real offense sentencing system.

Amendment 5
(§§ 2B1.1 et al. Theft, Fraud, and Tax)

Amendment 5 would revise the treatment of loss in certain theft, fraud, and tax guidelines, and the treatment of the specific offense characteristic for "more than minimal planning," and use of "sophisticated means to impede discovery" in those guidelines. The amendment would delete the two specific offense characteristics and would gradually incorporate their enhancements into the loss tables for the affected guidelines.

We support the deletion of the specific offense characteristics, especially more than minimal planning. To begin with, the term "more than minimal planning" is not well-defined. Commentary to U.S.S.G. § 1B1.1 states that the term "means more planning than is typical for commission of the offense in a simple form." What is the "simple form" of mail theft in which a defendant takes mail from several mail boxes in an apartment building? What is the standard for comparison, thefts generally, mail thefts, or mail thefts from apartment buildings? The commentary makes matters worse by stating that "more than minimal planning is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." If the defendant took mail on two occasions, the first and fifteenth of the month (when social security checks are scheduled to arrive), has there been more than minimal planning, or were the thefts "purely opportune?"

Last year the Commission noted that the more than minimal planning enhancement "has proven difficult to apply consistently in practice."² We agree. In many districts, the enhancement is routinely applied, especially if there was more than one act. We support deletion of the specific offense characteristics and the gradual incorporation of the enhancements into the loss tables.

It is difficult to evaluate the revised loss tables in amendment 5. We do not know the consideration that led the Commission to establish the levels in the current tables, and we do not know the considerations that led to the revised table. It appears to us that the biggest problem with the loss tables is the proliferation of levels at low amounts -- i.e., the range in amounts at the lower end of the tables is too small. The result is that a relatively small loss yields too great an increase in the offense level. The tables proposed in amendment 5 are a step towards alleviating that problem. We prefer the tables that the Commission had under consideration last cycle, especially the table in option 1 of amendment 5.³

In the alternative, if the Commission decides not to revise the tables, we believe the Commission should clarify the definition of the term "more than minimal planning." A simple change that would improve the definition would be to delete the sentence in U.S.S.G. § 1B1.1, comment. (n.1(f)) that states that "more than

²57 Fed. Reg. 90, 94 (1992) (amendment 5 reason for amendment).

³See Id. at 95.

minimal planning is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." The more than minimal planning enhancement seems aimed at defendants whose modus operandi indicates that some degree of sophistication of planning was necessary to carry out the offense. Engaging in more than one act does not invariably mean that the defendant's planning was more than minimal. Similarly, we do not believe that the commentary in U.S.S.G. § 1B1.1 should assert that "this adjustment will apply especially frequently in property offenses." If that statement is a factual assertion, we believe that the statement should be deleted because the Commission does not have any data indicating that property offenses are committed in other than a "simple form" any more frequently than are other types of offenses. If that statement is an attempt to encourage courts to apply the enhancement, we believe that it is inappropriate for the Commission to do so.

**Amendment 6, 7, 37, and 65
(§§ 2F1.1 et al.)**

Commentary to the fraud guideline suggests that an upward departure may be warranted when the fraud loss table "does not fully capture the harmfulness and seriousness of the conduct". Amendment 6 would revise that commentary to state that an example of such a case is where "the fraud caused substantial non-monetary harm." Amendment 6 would also add an example of substantial nonmonetary harm. Amendment 7 invites comment on whether to amend the commentary to U.S.S.G. §§ 2B1.1, 2B1.2, and 2F1.1 to suggest that an upward departure may be warranted when some of the harm

caused was nonmonetary; "the offense caused particularly significant emotional trauma to, or consciously or recklessly endangered the solvency of, one or more victims;" knowingly or recklessly endangering the health or safety of one or more persons; and the offense involved the risk or death, or the knowing or reckless risk of serious bodily injury or death to more than one person. Amendment 37 invites comment upon whether the commentary to U.S.S.G. § 2B1.1 should be "conformed" in three respects to the commentary to U.S.S.G. § 2F1.1. Amendment 65 invites comment upon whether U.S.S.G. § 2F1.1 should be amended to include risk of loss "when the amount at risk is greater than the amount of the actual or intended loss."

We do not believe that amendment 6 is necessary, although we do not oppose it. If amendment 6 is adopted, the example should be dropped. It is not clear how the failure to preserve a particular donor's blood might cause substantial nonmonetary harm, and no example is preferable to an unclear example.

We oppose amendment 7 to the extent that it involves modifying the commentary to U.S.S.G. § 2F1.1 beyond the modification of amendment 6. There is no evidence of problems with departures under U.S.S.G. § 2F1.1, and in any event a number of the suggested departure grounds are already covered elsewhere in the Guidelines Manual. If a victim suffers extreme psychological injury, U.S.S.G. § 5K2.3 suggests that a departure be considered. Similarly, U.S.S.G. § 5K2.5 suggests considering a departure if the offense caused property loss not covered by the guidelines.

We believe that the goals of amendment 37 can be achieved through adoption of amendment 28(G). We comment on amendment 28 at pp. 44-47.

We oppose amendment 65. Using a loss-risked approach makes determination of the loss speculative, and in any event, in the absence of any indication that the present guideline is producing unjust results, there is no substantial reason to modify the guideline.

**Amendments 8, 9, 39, 48, and 60
(\$ 2D1.1. Drug Trafficking)**

Amendments 8, 9, 39, 48, and 60 concern a problem that we raised last year -- inappropriately high offense levels for persons who are minimal or minor participants in drug offenses. We support amendment 48 and oppose the other amendments.

Amendment 48

Amendment 48 deals most directly with the problem of the over-punishment of defendants who play a small role in drug trafficking offenses. Amendment 48 would place a cap on offense levels, and the level of the cap would depend upon (1) the type of controlled substance involved in the offense and (2) whether the defendant was a minimal or a minor participant.

Because U.S.S.G § 2D1.1 is quantity-driven, the offense level for a defendant who plays a small role is often so high that the adjustments authorized by U.S.S.G § 3B1.2 do not adequately reduce the offense level to reflect a defendant's lesser role. The Commission's recent amendment to the relevant conduct guideline may

help to some extent to alleviate the over-punishment problem, but the problem should also be addressed more directly.

Amendment 48 reflects the distinctions made by the Commission between types of drugs and type of role. The Commission does not equate heroin and marijuana; distribution of 500 grams of heroin produces an offense level of 28, but distribution of the same amount of marijuana produces an offense level of eight. To maintain the consistency of the guidelines, the cap must maintain the distinction between types of drugs. In addition, the Commission has authorized a greater adjustment for minimal participants (four levels) than for minor participants (two levels). Again, to maintain the consistency of the guidelines, the cap must maintain the distinction between minimal and minor participants.

Amendment 48 maintains both distinctions. Thus, there will be a higher cap for a minor participant in a cocaine offense than for a minimal participant in a cocaine offense. There will also be a higher cap for a minimal participant in a heroin offense than for a minimal participant in a marijuana offense.

Amendment 8

Amendment 8 would provide a single cap of 32 without regard to whether the controlled substance involved was heroin or marijuana. In addition, amendment 8 would also make the cap provision inapplicable to a defendant who "possessed a firearm, had ready access to a firearm, or directed or induced another participant to

possess a firearm in connection with the criminal activity."⁴ Amendment 8 also sets forth several options that would preclude couriers and mules from receiving a mitigating role adjustment. We oppose amendment 8.

A single cap will introduce unwarranted disparity into the guidelines. A minor participant in a marijuana offense will be treated the same as a minor participant in a heroin offense, even though heroin offenses are treated more severely in all other respects. This approach is inconsistent with the structure of the guidelines.

We do not believe that the Commission should take a categorical approach to precluding a mitigating role adjustment. A defendant's role in an offense turns upon the specific facts of the case. A defendant who possessed a gun may nevertheless have been a minor participant. The defendant's possession of the gun, moreover, has already been factored into the defendant's offense level because U.S.S.G. § 2D1.1(b)(1) calls for a two-level enhancement if a firearm was possessed. Whether a defendant possessed a firearm, or directed another participant to possess a firearm, are appropriate factors to consider, along with the other facts and circumstances of the case, in determining whether a

⁴There appears to be a problem in proposed new application note 2, which states that "this section" does not apply to the certain defendants. The referent for "this section" would have to be U.S.S.G. § 2D1.1, but that would not make sense because then the drug trafficking guideline would not apply. The apparent intent seems to be to preclude certain mitigating-role defendants from benefitting from the cap, so we read the term "this section" as meaning "the proviso of subdivision (a)(3)."

defendant qualifies for a mitigating role adjustment. Those factors, however, should not be dispositive, and we oppose making them so.

We also oppose any provision that would limit consideration of a mitigating role adjustment for couriers and mules. Such a categorical approach would view transportation of the drugs in isolation from the rest of the entire offense, thereby ignoring the role of the "kingpin", the person who owns the contraband. This would mean that a courier who is paid \$1,500 to transport \$125,000 worth of cocaine is as culpable as the person who would receive and distribute the cocaine. The Commission has determined that specific offense characteristics and chapter three adjustments are to be made on the basis of relevant conduct. No good reason has been shown to abandon the relevant conduct concept for applying the mitigating role adjustment when the defendant is a courier or mule.

Amendment 9

Amendment 9 would revise the drug trafficking guideline by (1) revising subsection (b)(1) to increase the gun enhancement if a firearm was discharged or a substantial risk of death or serious bodily injury was created (six levels) or if a dangerous weapon was otherwise used (four levels); (2) adding an enhancement based upon the number of participants; (3) adding a downward adjustment of four levels "if the defendant did not own or sell the drugs, did not exercise decision-making authority, did not finance the operation, and did not use relevant special skills;" (4) revising the drug quantity table so that the highest offense level provided

in the table is level 36; and (5) adding a cross-reference subsection calling for the use of the appropriate chapter two guideline "if the offense resulted in death or bodily injury" and if the resulting offense level is greater than the offense level determined under U.S.S.G § 2D1.1. We oppose amendment 9.

No evidence of problems with the current gun enhancement has been presented. Unless there is evidence that the circumstances described in proposed new subsections (b)(1)(A) and (B) cannot be dealt with by departing, or that departures are frequent and result in disparage punishment, we see no need to amend present subsection (b)(1).

We oppose an enhancement based upon the number of participants. To begin with, the number of participants can trigger an aggravating role adjustment for defendants who are organizers or managers. Some drug offenses simply require more participants than others in order to distribute the same quantity. A marijuana offense typically requires more participants than a cocaine offense, for example. This proposed provision would disproportionately increase offense levels in marijuana offenses. We do not believe that the number of participants reliably helps to indicate the seriousness of the offense.

We do not support amendment 9's revision of the drug quantity table. The drug quantity table, as originally promulgated, ended at level 36. The Commission, effective November 1, 1989, increased the top of the table to level 42 because the Commission found under the original table that there was an increasing number of offenses

involving quantities substantially in excess of the quantity that called for level 36. The Commission sought to achieve consistency in the treatment of those large quantities by raising the top of the table to level 42. In light of that, we do not think that restoration of the original drug quantity table is justified. We do, however, support a revision of the drug quantity table as proposed in revised amendment 39.

We also oppose the new cross reference. There is no evidence that the cross reference is needed, and we oppose the ad hoc creation of a real offense sentencing system.

Amendment 39

The Practitioners Advisory Group, at whose request amendment 39 was published, has revised amendment 39. Revised amendment 39 would provide a cap of 32 for heroin and controlled substances of equivalent seriousness, and a cap of 24 for other controlled substances, most notably marijuana. Revised amendment 39 would also provide a four-level enhancement if the defendant, or someone directed or induced by the defendant, "actually used" a firearm. Revised amendment 39 would amend the drug quantity table so that the highest offense level provided would be level 38, and would add commentary to the mitigating role guideline, U.S.S.G. § 3B1.2, that would preclude a defendant from a mitigating role adjustment if the defendant was a courier, sold the contraband, had an ownership interest in any of the contraband, or financed any aspect of the criminal activity.

We support revised amendment 39's approach to caps. It maintains the distinction between heroin and marijuana, as well as the distinction between minimal and minor participants. Our only objection to revised amendment 39 is that the caps are set too high.

Because there is no evidence of any problem with the current gun enhancement, we oppose expanding it. Unless there is evidence that courts are frequently departing for gun use, and those departures are resulting in disparate punishment, or evidence that the circumstances covered by the proposed new enhancement do not provide a basis for a departure, we see no need for revising the gun enhancement.

We would support reducing the top level of the drug quantity table to level 38. At present, a kingpin in a very large scale drug offense has little, if any, reason to accept responsibility. For example, a leader of a level 42 drug offense has an offense level of 46 (offense level of 42 enhanced four levels under U.S.S.G. § 3B1.1). If the defendant does not accept responsibility, life imprisonment is required in all criminal history categories. If the defendant accepts responsibility, life imprisonment is still required in all criminal history categories because the defendant's offense level would be reduced to level 43. However, if the top of the table were reduced to level 38, that same defendant would have an adjusted offense level of 42, which could be reduced to level 39 by acceptance of responsibility.

Level 39 yields a guideline range of 262-327 in criminal history category I and 360-life in criminal history category VI.

We oppose revised amendment 39's changes in the commentary to the mitigating role guideline, for reasons set forth above in our discussion of amendment 8 (see pp. 15-17). Whether a defendant qualifies for a mitigating role adjustment should depend upon all of the facts or circumstances of the case. The Commission has determined that specific offense characteristics and chapter three adjustments are to be made on the basis of relevant conduct. No good reason has been advanced that would justify abandonment of the relevant conduct concept when dealing with a courier.

Amendment 60

Amendment 60, proposed by the Department of Justice, would revise the mitigating role guideline, U.S.S.G. § 3B1.2, to preclude application of the guideline to "a defendant whose offense level is determined in part by reference to the drug quantity table . . . where the relevant conduct for the drug or chemical amounts consists only of the drugs or chemicals in the defendant's actual possession." We oppose this amendment, for the reasons set forth above in the discussion of the courier and mule provision of amendment 8.

Amendments 10 and 49 (§ 2D1.1. Drug Trafficking)

Amendment 10 would revise the commentary to the drug trafficking guideline to state that the term "mixture or substance" does not include

uningestible, unmarketable portions of drug mixtures; i.e., materials that have to be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the creme liqueur in a cocaine/creme liqueur mixture, fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statute, and waste water from an illicit laboratory used to manufacture a controlled substance.

Amendment 49 is similar but would revise the commentary to refer to "portions of a mixture that are uningestible or unmarketable, or that have to be separated from the controlled substance before the controlled substance can be used."

We support both amendments, but prefer amendment 49.⁵ The circuits are split in their treatment of materials covered by amendments 10 and 49.⁶ We believe that the Commission should resolve the split among the circuits in a way that is consistent with common sense and a rational sentencing system.

⁵There would seem to be a typographical error in amendment 10. The comma after "uningestible" should probably be replaced by "or".

⁶The following cases have not counted materials that are uningestible or unmarketable or that have to be separated from the controlled substance before the controlled substance can be used: United States v. Salgado-Molina, 967 F.2d 27 (2d Cir. 1992) (mixture of cocaine and liqueur); United States v. Rodriguez, 975 F.2d 999 (3d Cir. 1992) (cocaine and boric acid); United States v. Jennings, 945 F.2d 129, 135-37 (6th Cir. 1991), modified in other respects, 966 F.2d 184 (6th Cir. 1992) (waste products from manufacture of methamphetamine); United States v. Robins, 967 F.2d 1387 (9th Cir. 1992) (cornmeal and cocaine); United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991) (waste products from cocaine). The following cases have counted such material: United States v. Mehecha-Anofre, 936 F.2d 623 (1st Cir.), cert. denied, 112 S.Ct. 648 (1991) (cocaine bonded to acrylic and shaped into attache case); United States v. Acosta, 963 F.2d 551 (2d Cir. 1992) (cocaine in creme liqueur); United States v. Baker, 883 F.2d 13 (5th Cir.), cert. denied, 110 S.Ct. 517 (1989) (waste product from manufacture of methamphetamine containing some methamphetamine); United States v. Dorrough, 927 F.2d 498 (10th Cir. 1991) (waste product from manufacture of P2P containing some P2P).

The drug offenses and the guidelines both call for using the weight of "a mixture or substance containing a detectable amount of" a controlled substance. Legislative history indicates that Congress believed that "the federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs." H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986). Consequently, the drug penalties are based on "quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level. . . . The quantity is based on the minimum quantity that might be controlled or directed by a trafficker in a high place in the processing or distribution chain." Id. at 12. In our opinion, the decisions that exclude the weight of uningestible or unmarketable substances are more consistent with this legislative intent.

[U]nder a broad application of Chapman, if one could "float a few kilograms of cocaine across the ocean" and "extract the cocaine from the ocean," the weight of the entire Atlantic Ocean would be used to compute that defendant's base offense level. Including [unusable and uningestible substances] in this case as a measure of punishment is no more rational than including the weight of the Atlantic Ocean in sentencing the hypothetical ocean smuggler.

United States v. Salgado-Molina, 967 F.2d 27, 29 (2d Cir. 1992).

Amendment 11
(§ 2D1.1. Drug Trafficking)

Amendment 11, which would revise the manner in which the drug trafficking guideline deals with determining quantity in cases involving a series of drug transactions, sets forth two options. Option 1 would limit the computation of the offense level to the

largest single quantity with which the defendant was involved at any one time, except in cases where any single quantity rose to level 32 or greater. Option 2 would limit the offense level "by the amount with which the defendant was involved at any thirty-day period, using the thirty-day period that results in the greatest offense level," except in cases where "any single amount with which defendant was involved corresponds to offense level 32 or greater."⁷

Both options address the potential for unfairness and lack of uniformity in sentencing that may occur when government agents purposefully delay making an arrest to increase the quantity involved and thereby raise the offense level. Both would help alleviate the lack of proportionality that may occur in cases involving a series of transactions. For example, when authorities delay making an arrest of a street dealer who sells relatively small amounts of drugs on any given occasion, the current method calls for cumulating amounts over a period of time to arrive at an offense level. This can result in a habit-supporting street dealer who makes a number of small sales over an extended period of time receiving the same sentence as a dealer who regularly sells that amount at one time. We realize that it can be necessary to delay making an arrest of a small-time dealer in attempt to get closer to the person's supplier. This understandable law enforcement strategy, however, does not justify one sentence for the small-time

⁷Presumably, the thirty-day period would be continuous rather than thirty non-consecutive days compiled together in one group.

dealer who is arrested immediately and a much heavier sentence for the small-time dealer whose arrest has been delayed because of law enforcement needs unrelated to the defendant's culpability.

We believe that either option would improve the guideline. We prefer Option 1 because it would provide a more accurate reflection of the extent of a defendant's culpability and would more effectively discourage sentencing manipulation by law enforcement officers.⁸ This method of computation would not hinder law enforcement investigations that may require the delay of an arrest.

In our judgment, the thirty-day approach of option 2 would not prevent potential sentencing manipulation and unequal sentences as well as option 1. The proposal's requirement of "any thirty-day period" to define what conduct to take into consideration for determining quantity does not prevent manipulation and lack of uniformity as effectively. Further, the defendant who sells a certain amount of drugs on one occasion cannot be deemed as culpable as an individual who sells the same amount through a number of transactions over a thirty-day period.

**Amendment 12
(§ 2D1.1. Drug Trafficking)**

Amendment 12 would revise application note 12 to the drug trafficking guideline. As revised, application note 12 would state that when the quantity is based upon a negotiated amount, the

⁸See United States v. Barth, 788 F. Supp. 1055 (D. Minn. 1992) ("the Commission has failed to adequately consider the terrifying capacity for escalation of a defendant's sentence based on the investigating officer's determination of when to make an arrest").

sentencing court is to exclude any amount that the court determines the defendant was not reasonably capable of producing, or otherwise did not intend to produce. We support this amendment, which will clarify application of the guideline and ensure a more accurate determination of the actual severity of the offense.

Amendment 13
(§ 2D1.1. Drug Trafficking)

Amendment 13 invites comment on whether § 2D1.1 should be amended to address the calculation of weight under negotiation in those situations when the government sells a controlled substance to a defendant at a price substantially below the market value (a "reverse sting" operation). We would support an amendment to adjust the calculation of weight to reflect the quantity that the defendant could have obtained at the market price to determine the offense level. Such an amendment would promote a more accurate measure of the seriousness of the defendant's crime. Further, by removing the incentive to escalate a defendant's offense level, the amendment would discourage questionable law enforcement activity.

Amendment 14
(§§ 2K1.3 and 2K2.1)

Amendment 14 would amend the commentary to the guidelines covering firearms and explosives possession offenses to state that the number of qualifying prior convictions is to be determined by application of the career offender guideline's standards. We believe that the amendment will clarify the guidelines, and we therefore support it.

Amendment 15
(§ 2K2.1. Unlawful Possession of Firearms)

Amendment 15 revises the commentary to U.S.S.G § 2K2.1 to expand the definition of the term "firearm listed in 26 U.S.C. § 5845(c)." In addition, amendment 15 makes a conforming change to U.S.S.G § 7B1.1.

Because the revised definition tracks the statutory language, we consider this amendment to be clarifying and therefore support it.

Amendment 16
(§ 2K2.1. Unlawful Possession of Firearms)

Amendment 16 would revise the commentary to the firearms possession guideline to state that the enhancement of subsection (b)(4) ["if any firearm was stolen, or had an altered or obliterated serial number, increase by 2 levels"] is applied as a matter of strict liability. We oppose the amendment because we do not believe that those who are ignorant or negligent should be treated the same as those who are deliberate or willfully blind.

Amendment 17
(§ 2K2.1. Unlawful Possession of Firearms)

Amendment 17 invites comment on whether the commentary to U.S.S.G. § 2K2.1 should be revised to clarify whether a departure could be considered based upon "the type or nature of the firearm (e.g., semiautomatic, military-style assault weapon)." Application note 16, which currently addresses this matter, states that an upward departure may be warranted for "multiple National Firearms Act weapons . . . military type assault rifles, [and] non-detectable ('plastic') firearms"

We believe that the present commentary is adequate and that it unnecessary to amend the commentary at this time.

Amendment 18

(§ 2K2.4. Use of a Firearm in Relation to Certain Crimes)

Amendment 18 invites comment upon whether the proviso in application note 2 to U.S.S.G. § 2K2.4 is too complicated and confusing. The explanation in the proviso is, of necessity, technical. We do not find it to be confusing or too complex, however. Absent any specific proposed replacement language to evaluate, we do not support revising the proviso.

Amendment 19

(§ 2K2.5. Federal Facilities and School Zones)

Amendment 19 invites comment upon whether the offense levels of six and eight for violations of 18 U.S.C. § 922(q) (possession of firearm in school zone) and 18 U.S.C. § 930 (possession of dangerous weapon in federal facility) in U.S.S.G. § 2K2.5 are adequate relative to the offense level 12 provided under U.S.S.G. § 2K2.1(a)(7) for certain nonregulatory firearms offenses, or to the offense level six provided under U.S.S.G. § 2K2.1(a)(8) for most regulatory firearms offenses.

We do not believe that any change in U.S.S.G. § 2K2.5 is warranted at this time. That guideline covers a wide variety of conduct. A school teacher who carries a pistol in her car for self-protection purposes is covered,⁹ as is a gang member who keeps

⁹The Washington Post recently reported that a forty-eight year old school teacher in Fairfax, Virginia who carried a pistol in her car for self-protection (legal in Virginia), was arrested and charged with a felony when the pistol was found on the floor of the back seat of her car. The car was parked in a school zone, and

a gun in his locker. The guideline contains a cross reference to deal with cases where the defendant possessed the weapon in connection with another offense, or an attempt to commit another offense. We believe that, absent a showing that there is a need -- and a satisfactory method -- to distinguish among the various ways in which offenses covered by this guideline are committed, the Commission should not act to revise the guideline.

**Amendments 20 and 58
(§§ 2S1.1, 2S1.2, 2S1.3, 2S1.4. Money Laundering)**

Amendment 20 would revise the money laundering guideline by combining present U.S.S.G. §§ 2S1.1 and 2S1.2 into a new U.S.S.G. § 2S1.1, and by combining present U.S.S.G. §§ 2S1.3 and 2S1.4 into a new U.S.S.G. § 2S1.2. Proposed U.S.S.G. § 2S1.1, which deals with the more serious offenses, would link the base offense level to the underlying conduct that was the source of the funds. Proposed subsection (a) would direct the sentencing court to use the greatest base offense level from among three alternatives. Proposed subsection (a)(1) uses the base offense level from the underlying offense that was the source of the funds, if the defendant committed that offense and the offense level for that offense can be determined. Proposed subsection (a)(2) calls for a base offense level of 12 plus the number of levels from the fraud loss table corresponding to the value of the funds, if the

suddenly Ms. Boley, a veteran teacher of 21 years, was faced with a possible maximum term of five years in prison. Wash. Post, Nov. 19, 1992. The Commonwealth of Virginia recognized the absurdity of prosecuting such a case, and permitted Ms. Boley to plea to a misdemeanor, which the court then agreed to dismiss in six months if Ms. Boley stayed on good behavior. Wash. Post, Dec. 2, 1992.

defendant knew or believed that the funds were proceeds of an unlawful activity involving drug trafficking. Proposed subsection (a)(3) calls for a base offense level of eight plus the number of levels from the fraud loss table corresponding to the value of the funds.

Proposed U.S.S.G. § 2S1.1 has two specific offense characteristics. The offense level would be increased two levels if the defendant knew or believed that the transaction were designed, at least in part, to disguise the proceeds of criminal conduct, or that the funds were to be use to promote further criminal activity. If the defendant knew the transactions were designed to disguise the proceeds, an additional two levels are added if the offense (A) involved placement of funds into, or movement of funds from, a company outside of the United States, or (B) otherwise involved the use of a sophisticated form of money laundering.

Proposed U.S.S.G. § 2S1.2 has three alternative base offense levels, directing the use of the alternative that yields the greatest offense level. Proposed subsection (a)(1) calls for a base offense level of eight plus the number of levels from the fraud loss table corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of unlawful activity. Proposed subsection (a)(2) calls for a base offense level of six plus the number of levels from the fraud loss table corresponding to the value of the funds, if the defendant knew or believed that the funds were proceeds of unlawful activity.

Proposed subsection (a)(3) calls for a base offense level of six. Proposed U.S.S.G. § 2S1.2 also has a cross reference that calls for the offense level from the appropriate tax guideline if the offense was committed to evade taxes and if the resulting offense level is greater than the offense level determination under proposed U.S.S.G. § 2S1.1.

Amendment 58, proposed by the Department of Justice, would consolidate present U.S.S.G. §§ 2S1.3 and 2S1.4. This would be accomplished by adding to the present U.S.S.G. § 2S1.3 an additional base offense level of nine, "for a willful failure to file," and an additional specific offense characteristic. The new specific offense characteristic would increase the offense level by four levels (or to level 13 if the resulting offense level was less than 13) if the defendant knew or believed that the funds were intended to be used to promote criminal activity.

We support amendment 20 because it improves the present money laundering guidelines. Our experience has been that prosecutors often use the money laundering offenses to get higher sentences than they would get if they prosecuted for the underlying criminal activity. For example, a \$20,000 theft with more than minimal planning yields an offense level of 12 under U.S.S.G. § 2B1.1. If the defendant is charged under 18 U.S.C. § 1956, however, the offense level under present U.S.S.G. § 2S1.1 is 20. Under proposed U.S.S.G. § 2S1.3, the defendant's offense level is 12. Amendment 20 would not entirely eliminate the prosecutor's ability to

manipulate punishment by what is charged, but it would certainly curtail that ability.

We oppose amendment 8 because it fails to address the problem of prosecutorial manipulation of charges to get harsher sentences. We also question the assessment of seriousness in amendment 58. An accountant who has a client structure an \$18,000 payment into two payments would have an offense level of 13. Another accountant who receives an \$18,000 payment and willfully fails to report it would have an offense level of nine. We do not view the first accountant's offense as nearly fifty percent more serious than the second accountant's.

**Amendments 21 and 41
(SS 2T1.1 et al.)**

Amendment 21 would consolidate four tax guidelines and adopt a uniform definition of tax loss. In addition, amendment 20 would create two rebuttable presumptions. First, if a return was filed, the tax loss is presumed to be 28% (34% for a corporation) of the unreported gross income (plus 100% of any false credits claimed), or 28% (34% for a corporation) of the amount improperly claimed deductions. Second, if a return was not filed, the tax loss is presumed to be 20% (25% for a corporation) of the gross income, less any tax withheld or otherwise paid.

Amendment 41, drafted by the Internal Revenue Service, would also consolidate four tax guidelines, establish a uniform definition of tax loss, and create rebuttable presumptions. The definitions and presumptions are based upon the tax rate applicable to the defendant.

We support amendment 21 and oppose amendment 41. We find the consolidated guidelines established by amendment 21 clearer and simpler to apply than the consolidated guidelines established by amendment 41. In addition, amendment 41 would increase penalties. For example, under present U.S.S.G. § 2S1.1, an evasion of \$2,500 yields an offense level of seven. Under amendment 41, the offense level would be ten. There is no evidence that the punishment presently called for by the tax guidelines is inadequate. Absent such evidence, there is no justification for an increase.

Amendment 22
(§ 2X1.1. Attempt, Solicitation, or Conspiracy)

Amendment 22 would consolidate the specific offense characteristics of U.S.S.G. § 2X1.1(b)(1), (2), and (3) into a single specific offense characteristic. We believe that the amendment simplifies the structure of the guideline, making it more comprehensible, and we support it.

Amendments 23 and 46
(§ 3B1.3. Abuse of Position of Trust)

Amendment 23 would revise U.S.S.G. § 3B1.3, which provides for a two-level enhancement if a defendant "abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense." Amendment 23 would amend the guideline to require that the defendant abuse a position of "special trust" and would revise the commentary to clarify what "special trust" means. Amendment 23 also invites comment on an alternative to revising U.S.S.G. § 3B1.3 which would add a specific offense characteristic to U.S.S.G. § 2B1.1 and U.S.S.G. § 2B1.2 to

enhance a sentence for abuse of trust in embezzlement cases. When the specific offense characteristic for abuse of trust is applied, there would be no enhancement under U.S.S.G. § 3B1.3. In addition, the example of the ordinary bank teller in the commentary to § 3B1.3 would be deleted.

Amendment 46, drafted by the United States Postal Service, would amend the commentary to U.S.S.G. § 3B1.3 to increase penalties for postal service employees convicted of specified offenses. As revised by this amendment, application note 1 would state that "[t]his enhancement applies to all employees in respect to the following offenses: theft or obstruction of United States mail (18 U.S.C. §§ 1703, 1709); embezzlement of Postal Service funds (18 U.S.C. § 1711); and theft of Postal Service property (18 U.S.C. § 641)."

The present guideline is difficult to apply consistently because neither the guideline nor the commentary defines with enough precision what constitutes an abuse of trust. We support amendment 23, which will clarify what constitutes abuse of trust and revise the commentary to set forth factors that would appropriately describe the kind of relationship necessary to justify a two-level enhancement. This amendment will promote more uniform application of this guideline.

We do not support amending U.S.S.G. § 2B1.1 and U.S.S.G. § 2B1.2 to provide an enhancement for abuse of trust in embezzlement cases. That approach does nothing to clarify what "abuse of trust" encompasses. Indeed, if the "ordinary bank teller" example is

deleted, the enhancement would routinely be applied in every embezzlement case and be nothing more than an increase in the base offense level for embezzlement cases -- even though there has been no showing that the present offense levels are inadequate. Further, this approach would not address the problems that make the abuse of trust enhancement difficult to apply.

We do not support Amendment 46, which would require an abuse of trust enhancement if the defendant is a postal worker convicted of one of the specified offenses, even if no abuse of any trust were involved in committing the offense. For instance, under the proposed amendment, a postal worker convicted of hot-wiring and stealing a mail truck parked on a public street would get the enhancement, while anyone else who did the same thing would not. The proposed amendment is not specific enough to explain why a theft of postal property by a postal employee that did not involve any special access by virtue of the postal employee's position mandates a higher offense level than the same theft committed by someone other than a postal employee.

Amendment 46 raises other problems. There is no meaningful distinction between postal workers and other government workers to justify a blanket application to one group of employees and not to the other. We believe it would be unwise for the Commission to require application of the abuse of trust enhancement based solely on who employs the defendant. To determine whether there should be a two-level enhancement, the focus of inquiry should be on whether there was a unique fiduciary-like relationship as a result of the

defendant's position that substantially facilitated the commission of the offense.

Amendments 24, 31, and 47
(§ 5K1.1, p.s. Substantial Assistance to Authorities)

Amendments 31 and 47 would each remove the requirement of a government motion for downward departures under U.S.S.G. § 5K1.1, p.s. in all cases and would authorize a defendant to move for such a departure. Amendment 24 invites comment on whether to permit the sentencing court, sua sponte, to depart downward for substantial assistance if the defendant were a first-time offender convicted of an offense that did not involve violence. We support the proposed amendments.

To comply with 18 U.S.C. § 3553(a), the sentencing court must consider the defendant's "history and characteristics" when imposing sentence. Section 5K1.1, however, purports to limit the sentencing court's consideration of one aspect of the defendant's history and characteristics -- whether the defendant has assisted law enforcement authorities -- by requiring a government motion before the court can depart. While 18 U.S.C. § 3553(e) requires a government motion before the court can impose a sentence below a minimum term required by statute, 28 U.S.C. § 994(n) does not mandate such a requirement when the departure is below the guideline range but not below the statutory minimum. The Commission, however, determined that U.S.S.G. § 5K1.1, p.s. would call for a government motion. The Commission has never explained why it took this approach, so it is unclear why the Commission does not trust federal judges to determine if a defendant has

substantially assisted authorities absent a motion by the prosecutor.

The government motion requirement creates unfairness. If there is a dispute between the government and the defendant as to the nature and extent of the defendant's cooperation, the government can foreclose the resolution of that dispute by a neutral third party -- the court -- by failing to make the necessary motion.

The available data suggests that the problem of fairness is more than theoretical because of the increase in the number of substantial assistance departures. Indeed, departures under U.S.S.G. § 5K1.1, p.s. have become the growth industry of the Guidelines. The Commission's data indicates that the substantial assistance departure rate in FY 91 (11.9%) was nearly fifty-percent greater than that rate in FY 90 (7.5%). U.S. Sentencing Com'n, 1991 Annual Report table 56; U.S. Sentencing Com'n, 1990 Annual Report table C-5. More recent Commission data indicates that the rate has continued to climb and is presently at about 15.1%. The national data reveals significant variance among federal judicial districts. In FY 91, in 15 districts, the rate of substantial assistance departures was less than half the national rate, and in two districts there were no substantial assistance departures at all. U.S. Sentencing Com'n, 1991 Annual Report table 56. In six districts, the rate in FY 91 was more than twice the national rate (the rate was 41% in the Eastern District of Pennsylvania). Id. The rate can vary quite substantially between adjacent districts.

For example, the rates in the Northern and Middle Districts of Florida are 36.3% and 20.4%, respectively, while the rate in the Southern District of Florida is 8.2%. Id. The Commission's most recent data indicates that this variance between districts continued through FY 92.

In addition, conduct that would qualify a defendant for a government motion in one district may be insufficient in another. For example, in the Central District of Illinois, it appears to have been the policy of the United States Attorney to move under U.S.S.G. § 5K1.1, p.s. only if the defendant agreed to go undercover with a wire. See United States v. Curran, 724 F. Supp. 1239, 1241 (C.D. Ill. 1989), rev'd sub nom United States v. Spears, 965 F.2d 262 (7th Cir. 1992). If two defendants provided equally substantial assistance in that district, only the one who wore a wire would be eligible for a government motion under U.S.S.G. § 5K1.1, p.s.

The policy in the Central District of Illinois, however, does not appear to be the policy in the Eastern District of Virginia, see United States v. Campbell, 704 F. Supp. 661, 663 (E.D. Va. 1989), or in the District of Columbia, see United States v. Roberts, 726 F. Supp. 1359, 1375-76 (D.D.C. 1989), rev'd sub nom United States v. Doe, 934 F.2d 353 (D.C. Cir.), cert. denied, 112 S.Ct. 268 (1991).

Because there are no nationwide standards that govern the exercise of prosecutorial discretion under U.S.S.G. § 5K1.1, p.s. the potential for disparity cannot be adequately controlled.

Further, prosecutorial decisions are generally considered unreviewable, so uniform national standards, were they to exist, would not guarantee consistent applications anyway. See United States v. Chotas, 913 F.2d 897, 905 (5th Cir. 1990) (Clark, J., concurring and dissenting)("it seems to me to be grossly inconsistent with the goal of reducing sentencing disparity to remove sentencing discretion from the judge and place it with the prosecutor whose decisions are not reviewable"), cert. denied, 111 S.Ct. 1421 (1991).

In addition to the lack of uniform standards, the Commission's study of mandatory minimum sentencing provisions raises the possibility of racial discrimination in the applications of U.S.S.G. § 5K1.1, p.s. The Commission's data suggests that racial discrimination infects prosecutorial decisionmaking with regard to mandatory minimums and substantial assistance departures.¹⁰

If the government-motion requirement reflects a concern about prolonging sentencing hearings because of substantial assistance claims, that concern may already be realized. In addition to litigating whether the prosecutor has acted in bad faith, a defendant can litigate whether the prosecutor has unconstitutionally withheld a motion. Wade v. United States, 112

¹⁰The substantial assistance departure rate for whites, where there was a five year mandatory minimum, was 19.9%. The rates for blacks and hispanics was 13.8% and 6.8%, respectively. Where the mandatory minimum was ten years, the substantial assistance departure rates were: whites, 25%; blacks, 18.3%; and hispanics, 11.8%. U.S. Sentencing Com'n, Mandatory Minimum Penalties in the Federal Criminal Justice System 81 (Tables 23A-23E, 24A-24E)(Aug. 1991).

S.Ct. 1840 (1992). Indeed, in Wade, the government conceded that a defendant would be entitled to relief if a prosecutor's refusal to file a motion under U.S.S.G. § 5K1.1, p.s. was not "rationally related to any legitimate Government end" Id. at 1844.

The removal of the government motion requirement would allow sentencing courts to focus on the relevant issue of whether the defendant provided substantial assistance to authorities. This would eliminate collateral litigation as to whether a prosecutor's decision to refrain from filing the motion was based on an unconstitutional motive or whether the prosecutor was acting in bad faith.

We believe that federal judges can be trusted to decide fairly and justly, and without a government motion, whether a defendant has substantially assisted authorities. We therefore support amendments 31 and 47 which, if adopted, will make the focus of the inquiry whether the defendant actually provided substantial assistance and will eliminate peripheral litigation on why the government did not file a motion.

While we believe that the government-motion requirement should be eliminated altogether, we would support the adoption of the proposed language in amendment 24 if neither amendment 31 or 47 were adopted. Because a provision like that in amendment 24 would apply only in a limited number of cases, adopting amendment 24 would enable the Commission to test the effect on sentencing proceedings of removal of the government-motion requirement.

Amendments 25 and 36
(§ 6B1.2, p.s. Standards for Acceptance of Plea Agreements)

Amendment 25 would revise U.S.S.G. § 6B1.2, p.s. by adding commentary recommending that the government disclose to the defendant information known to the government that is relevant to application of the guidelines "in order to encourage plea negotiations that realistically reflect probable outcomes." Option 1 of amendment 25 would encourage disclosure during "plea discussions." Option 2 would encourage disclosure "prior to the Rule 11 colloquy." Amendment 36 is similar, except that disclosure would be encouraged prior to the "entry of a guilty plea."

We favor option 1 of amendment 25. To make a knowing and intelligent waiver of a trial and plead guilty or nolo contendere, a defendant should be fully aware of the sentencing consequences of the plea. In a guideline sentencing system, those consequences are capable of reasonably accurate determination. At least, the areas of disagreement can be identified so that a defendant can reasonably assess the consequences of a plea.

Because of the scope of the relevant conduct rule, as well as the sentencing court's ability to depart from the guideline range on the basis of factors not adequately accounted for in the guidelines, it is important to know before a plea what matters the government will be bringing to the court's attention. Without such information, a defendant may enter a plea expecting a certain range of punishment and then be confronted with a fight to prevent that range from increasing.

There are benefits to the courts if this amendment is adopted. Sentencing disputes could be identified early on and resolved, or the issues narrowed. Presentence reports could be completed more quickly, and sentencing hearings would go more smoothly, with counsel able to focus on matters in dispute. There would be fewer motions to withdraw pleas and 2255 motions based upon ineffective assistance of counsel. Finally, there would be a greater appearance of fairness, which would enhance the federal criminal justice system not only in the eyes of the defendant but also in the eyes of the public.

**Amendment 26
(Carjacking)**

Amendment 26 invites comment, first, on the most appropriate guideline for the recently-enacted armed carjacking statute, 18 U.S.C. § 2119, enacted by the Anti Car Theft Act of 1992, Pub. L. No. 102-519, § 101, 106 Stat. 3384 (1992). Amendment 26 also invites comment on whether the offense levels in §§ 2B1.1, 2B1.2, and 2B6.1 should be raised for offenses involving stolen vehicles to reflect the increase in the statutory maximum from five to ten years under sections 102 and 103 of the Anti Car Theft Act of 1992.¹¹

We believe that the robbery guideline, U.S.S.G. § 2B3.1, is the most appropriate guideline. At common law, robbery required the trespassory taking of property, by force or fear, from the

¹¹The Notice of Proposed Amendments in the Federal Register refers to "\$ 2B1.6." The reference is probably a typographical error, and the correct reference should be § 2B6.1.

person or presence of another, with intent to steal the property. See 2 W.R. LaFave & A.W. Scott, Substantive Criminal Law § 8.11 (1986). Those elements are present in the other offenses covered by U.S.S.G. § 2B3.1. Hobbs Act robbery, for example, is defined as

the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. 18 U.S.C. § 1951(b)(1).

The definition of carjacking in 18 U.S.C. § 2119(a) contains the elements of common-law robbery and is similar to the other robbery offenses covered by U.S.S.G. § 2B3.1. We therefore believe that U.S.S.G. § 2B3.1 is the appropriate offense guideline.

We do not believe that the offense levels of U.S.S.G. §§ 2B1.1, 2B1.2, and 2B6.1 should be increased for offenses involving stolen vehicles simply because the Anti Car Theft Act of 1992 increased the maximum penalty for such offenses from five to ten years. We do not believe that an increase in a statutory maximum requires an increase in the offense levels of the applicable offense guideline. A statutory maximum sets an appropriately severe penalty for the most aggravated form of the offense. An increase in the statutory maximum means Congress believes the most aggravated form of the offense should be treated more seriously, but does not necessarily mean that the heartland form of the offense should be treated more severely.

**Amendment 27
(Chapter Two)**

Amendment 27 would consolidate several chapter two offense guidelines with other offense guidelines that cover similar offense conduct and that have identical or very similar characteristics. We do not perceive any policy changes in the consolidation. Because this amendment will simplify the guidelines, we support it.

**Amendment 28
(Miscellaneous Sections)**

Amendment 28 would make substantive and technical amendments to numerous sections. We oppose amendments 28(A), 28(C), and 28(F). We do not oppose the other parts of amendment 28.

Amendment 28(A)

Amendment 28(A) would revise the commentary to the first degree murder guideline, U.S.S.G. § 2A1.1, to eliminate a discussion of 18 U.S.C. § 1111 (first degree murder within the special maritime and territorial jurisdiction of the United States). The background note simply states that (1) the discussion in application note 1 regarding downward departures applies to 18 U.S.C. § 1111 only if section 1111 does not mandate life imprisonment, and (2) whether section 1111 mandates life imprisonment is a matter to be resolved by the courts. The background note discussion is accurate and pertinent, and we see no reason to delete it.

Amendment 28(C)

Amendment 28(C) would add real-offense cross-reference provisions to four guidelines, U.S.S.G. § 2A3.1 (criminal sexual

abuse), U.S.S.G § 2B3.1 (robbery), U.S.S.G. § 2B3.2 (extortion by force), and U.S.S.G § 2E2.1 (making or financing an extortionate extension of credit). We have previously expressed our concern that the Commission, apparently inadvertently, is changing the nature of the guidelines from charge-offense with real offense elements, to real offense. Under the mixed system adopted by the Commission, U.S.S.G. § 1B1.2 directs the use of the offense of conviction to determine the applicable offense guideline in chapter two of the Guidelines Manual, and U.S.S.G. § 1B1.3 directs the use of the real offense conduct to determine the base offense level and specific offense characteristics under the offense guideline, as well as the adjustments to that guideline under chapter three of the Manual.

As the Commission itself has indicated, in drafting the initial set of guidelines,

one of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing).¹²

The Commission first attempted to draft a set of guidelines incorporating a pure real offense system. The Commission found, however, that a real offense system was impractical and "risked return to wide disparity in sentencing practice".¹³ The Commission

¹²U.S.S.G. Ch. 1, Pt. A(4)(a), at 4.

¹³Id. at 5.

then opted for the present system, one based on the offense charged but with "a significant number of real offense elements".¹⁴

Amendment 28(C) would alter that system for four guidelines by rendering meaningless the direction in U.S.S.G. § 1B1.2 to use the offense of conviction for determining which chapter two offense guideline to use. We believe that this approach is wrong. The Commission, for good reasons, has rejected a comprehensive real offense system and should not, ad hoc, abandon that decision. If the Commission wants to make a fundamental alteration of the present system, the Commission should tackle the issue head-on and across-the-board. The problems that the Commission identified when it rejected a comprehensive real offense system are only magnified by the creation of a real offense system ad hoc.¹⁵

Amendment 28(F)

Amendment 28(F) invites comment upon whether U.S.S.G. § 2A6.1 (threatening communications) should be amended to preclude grouping together multiple threatening communications to the same victim on different occasions. We do not believe that such a change is

¹⁴Id. See also W. Wilkins and J. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495, 497-500 (1990) ("The Commission ultimately settled on a system that blends the constraints of the offense of conviction with the reality of the defendant's actual offense conduct in order to gauge the seriousness of that conduct for sentencing purposes.")

¹⁵We are not endorsing a real offense system. Indeed, we have strong reservations about a system in which the charge that the government has proved beyond a reasonable doubt would serve only to set a maximum and otherwise would be virtually irrelevant to determining punishment. Rather, we are suggesting that a major alteration of the guideline system ought to be undertaken directly and comprehensively, not inadvertently and on an ad hoc basis.

warranted. In our experience, the vast majority of persons who are prosecuted for sending threatening communications are mentally unbalanced and have no intention of carrying out their threats. There is no evidence that the guideline presently produces sentences for such people that are too lenient. If the defendant took any action indicating an intention to carry out a threat, subsection (b)(1) increases the base offense level by 50%. Absent any evidence that the present guideline produces inappropriate results, we oppose any modification of U.S.S.G. § 2A6.1 along lines suggested in amendment 28(F).

Amendment 29
(Chapter 5, Part H. Specific Offender Characteristics)

Amendment 29, proposed by the Criminal Law Committee of the Judicial Conference, would amend the introductory commentary to Chapter 5, Part H, by adding language stating that a court may depart from the guidelines when factors not ordinarily relevant to a departure decision "are present to an unusual degree and are important to the sentencing purposes in the particular case."¹⁶ We support this amendment. The Commission, in Chapter Five, has specified a number of factors that are "not ordinarily relevant" to determine whether to depart. It follows that there are some situations in which such a factor is relevant, and one of those

¹⁶There appears to be a typographical error in the amendment, which refers to "the Introductory Commentary to § 5H1.1". The introductory commentary is to Chapter 5, Part H, and applies to all of the policy statement in Chapter 5, Part H -- not just to U.S.S.G. § 5H1.1. The reference in the amendment should probably be to "the Introductory Commentary to Chapter 5, Part H", the reference used in the synopsis of the amendment.

situations would seem to be when that factor is present with other factors that also are "not ordinarily relevant." The Judicial Conference language would make this logic explicit in the commentary and prevent any misunderstanding.¹⁷

Amendment 30
(Chapter One, Part A(4)(b). Departures)

Amendment 30 invites comment on whether the language in Chapter One, Part A(4)(b) can be read as overly restrictive of a court's ability to depart. We believe that certain language in Chapter One, Part A(4)(b) can be, and has been, read as overly restrictive of a court's ability to depart. Thus, for example, the Eighth Circuit has stated that "[t]his circuit has determined that departures pursuant to section 3553(b) were intended by the Commission to be allowed only in rare cases." United States v. Johnson, 908 F.2d 396, 399 (8th Cir. 1990). Similarly, the Third Circuit has concluded that "the Guidelines, commentaries and policy statements clearly indicate that departures should be rare." United States v. Uca, 867 F.2d 783 (3d Cir. 1989).

Congress viewed departures as a way to avoid mechanistic sentences,¹⁸ and therefore, departures must be based on the

¹⁷For an example of such misunderstanding, see United States v. Sigwart, 916 F.2d 916 (4th Cir. 1990) (case remanded to sentencing judge who mistakenly interpreted U.S.S.G. § 5H1.1 to prohibit departures based on factors deemed "not ordinarily relevant").

¹⁸"The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences." S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983).

particular facts of the case. Further, it is through departures that the Commission is able to refine and improve the guidelines. As the Commission itself has stated, "By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted." U.S.S.G. Ch. 1, Pt. A (4)(b), at 6. Given these concerns, the Commission should scrupulously avoid discouraging departures.

We recommend the following modification to Chapter One, Part A(4)(b). On page six, paragraph two, delete "Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because" and insert in lieu thereof "Second,". On page six, paragraph four, delete "In its view, however, such cases will be highly infrequent."

**Amendment 32
(First Offender Sentencing Options)**

Amendment 32 invites comment on whether the Commission 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 nonviolent or otherwise nonserious offense. If so, amendment 32 invites comment upon whether that objective should be achieved by (A) providing an additional ground for departure in Chapter Five, Part K or (B) increasing the number of offense levels in Zone A in Criminal History Category I.

A major problem with the guidelines, in our opinion, is that they produce overly-harsh punishment, particularly in Criminal History Category I. We therefore encourage the Commission to take steps to allow courts to impose a sentence other than imprisonment in the case of a first offender or an offender with a minor criminal record.

Last cycle, we proposed that the Commission adopt a modified version of one of the amendments then under consideration. We again recommend that proposal, which would enlarge Zone A in Criminal History Category I to level nine. We would not distinguish among various types of offenses because, by definition, all level four offenses, for example, are of the same severity. The violence factor is accounted for in the determining the base offense level.

In order to accommodate our recommendation, the range in offense level nine would have to be changed to 0-6. In addition, the range in other offense levels would have to be modified somewhat in order to address disproportionate increase ("cliff") concerns. The following table indicates how those concerns would be addressed in light of the Commission's modification of Zone A last cycle:

Offense Level	Present Range	Recommended Range
9	4-10	0-6
10	6-12	4-10
11	8-14	6-12
12	10-16	9-15
13	12-18	10-16
14	15-21	14-20
15	18-24	18-24
16	21-27	22-28
17	24-30	26-32
18	27-33	28-34

Last cycle, the commission proposed an amendment that would expand Zones B and C (options 2 and 5 of last cycle's amendment 29).¹⁹ We supported that proposal then, and we continue to support it. That proposal would have expanded Zone B to cover offense levels where the bottom of the range is ten months or less (a two-level expansion for Category I through IV and a one-level increase for Category V and VI). Such a change would be technical in nature, because there is little practical difference between a sentence of probation with a confinement condition and a split sentence. Defendants who would be made eligible for probation with a confinement condition if Zone B were expanded, are presently eligible for a split sentence.

The proposal last cycle also would have expanded Zone C to authorize a split sentence if the bottom of the guideline range was 12 months or less. Such a change would expand Zone C by one offense level at each Criminal History Category, but would not affect a substantial number of people.²⁰ The type of person

¹⁹57 Fed. Register 90, 109 (1992).

²⁰Commission date indicates that had this provision been in place in fiscal year 1990, an additional 248 persons would have been in Zone C under Criminal History Category I. P. Martin et

picked up by expanding Zone C, moreover, is not likely to be the sort of person for whom the Commission would think a split sentence is inappropriate.²¹

**Amendment 33
(Sentencing Options)**

Amendment 33 invites comment upon whether the Commission should increase the availability of the type of sentences provided for in Zones A and B of the sentencing table to more offense levels within all Criminal History categories.

We would support such an amendment for the reasons set forth in our discussion of amendment 32.

**Amendment 38
(\$ 2B1.1. Theft)**

Amendment 38 invites comment upon whether the theft guideline should contain downward adjustments if the defendant did not personally benefit from the theft, and whether offense levels should be capped for minimal and minor participants. We believe that the Commission should study both matters. That study would enable the Commission to determine whether there are sufficient instances of a defendant who does not personally profit from the offense to warrant drafting a special offense characteristic for

al., Preliminary Report to the Commission: Staff Working Group on Alternatives App. A at Table 10, (Oct. 23, 1991).

²¹In fiscal year 1990, there were no homicide, kidnapping, or robbery cases in offense levels 8 through 14, under all criminal history categories. Id. at Table 11. There were 94 drug cases, 21 sex offense cases, and 98 firearms cases in those offense levels, under all criminal history categories, in fiscal year 1990. Id. There were 20,171 cases sentenced in fiscal year 1990. Id. at Table 10.

U.S.S.G. § 2B1.1, and whether the aggregation problems of the drug guideline also infect the theft guideline. In the meantime, we suggest that the Commission add language to the commentary making clear that the heartland of the guideline encompasses personally profiting from the offense, and that consideration a departure would be warranted if the defendant did not personally profit from the offense.

**Amendment 40
("Cocaine Base")**

Amendment 40 invites comment on whether the Commission should ask Congress to "modify or eliminate the provisions that distinguish between punishment for powdered cocaine and cocaine base (crack) at the quantity ration of 100 to 1." We believe that the Commission should request that Congress eliminate this distinction.

The stark fact is that crack offenses are committed overwhelmingly by African-Americans and that powdered cocaine offenses are committed primarily by whites. The Commission's own data shows that from April 1, 1992 through July 31, 1992, African-Americans comprised 92.6% of the defendants sentenced for drug offenses involving crack, and non-blacks accounted for 70.3% of those defendants sentenced for powdered cocaine.

There is no rational basis for differentiating penalties. Indeed, there is no objective scientific data to show that crack is more dangerous than cocaine powder, particularly to the extent Congress has decreed. The disparate levels of punishment only cast doubt on the fairness of the federal criminal justice system and

are inconsistent with the goals of eliminating unwarranted sentencing disparity.

The disparate treatment evidenced, by the Commission's own data, raises constitutional problems as well. Indeed, the Minnesota Supreme Court struck down a similar state penalty provision. *State v. Russell*, 477 N.W. 886 (Minn. 1991). The Minnesota Supreme Court held that the statute violated equal protection because of the lack of a "genuine and substantial" basis for the distinction. We ask the Commission to urge Congress to act promptly to repeal this discriminatory distinction.

Amendment 42
(§§ 3D1.3, 2D1.1, and 2S1.1)

Amendment 42, drafted by the Internal Revenue Service, offers two options for increasing offense levels for drug trafficking and money laundering offenses. Option 1 -- which would affect all offenses, not just drug trafficking and money laundering offenses -- would amend the grouping rules to call for a two-level increase when offenses are grouped together under U.S.S.G. § 3D1.2(c) and the count with the specific offense characteristic that requires such grouping has a lower offense level than the offense level applicable to the group. Option 2 would amend the drug trafficking and money laundering guidelines to call for a two-level enhancement if the defendant failed to report income from drug trafficking in excess of \$10,000 in any year or if the defendant failed to report income in excess of \$10,000 in any year.

We oppose both options. The Internal Revenue Service has not produced any evidence suggesting that punishment under the drug

trafficking or money laundering guidelines is inadequate. Because people who engage in criminal activities rarely report to the IRS that they earned money illegally, and the amount of such money, the IRS proposal amounts to nothing more than an across-the-board increase in offense levels for the drug trafficking and money laundering guidelines.

Amendment 43
(§ 3D1.4. Determining the Combined Offense Level)

Amendment 43, drafted by the Internal Revenue Service, would revise the counting of units for purpose of the grouping rules. At present, U.S.S.G. § 3D1.4 does not assign any unit, or fraction of a unit, to a group that is nine or more offense levels less than the highest offense level of the groups. Amendment 43 would require assigning one-half unit to such a group.

We oppose amendment 43. The Internal Revenue Service has not presented any evidence of the need for a revision. It is not clear why the Commission should require that a defendant whose offense level under U.S.S.G. § 2D1.1 is 32 should receive a two-level increase in that offense level because the defendant is convicted at the same time of a level four trespass. Absent any evidence of a need to revise, we do not believe that the Commission should further increase the complexity of the grouping guidelines.

Amendment 44
(§ 2B1.1. Theft)

Amendment 44, drafted by the Postal Service, would amend the theft guideline by (1) adding a two-level enhancement if undelivered mail was taken and (2) requiring an offense level of at

least 14 if the offense involved "an organized scheme to steal undelivered United States mail." We oppose both parts of the amendment.

The Postal Service has presented no evidence to suggest that present penalties for theft of undelivered mail are inadequate. The second part of the amendment, moreover, would mean that an organized scheme to steal undelivered mail is equated with a loss of at least \$70,000.²² The Postal Service has given no rationale for treating such a scheme as equivalent to a loss of at least \$70,000.

Amendment 45
(Chapter 3, Part A. Victim-Related Adjustments)

Amendment 45, proposed by the Postal Service, would add a new guideline calling for an increase in the offense level "if the offense affected more than one victim." We oppose the amendment.

There has been no evidence presented that there is a need for such an enhancement. While the proposed enhancement might seem straight-forward, there are problems in application. For example, if a thief steals a bundle of 200 Sears catalogs addressed to "occupant," is there one victim (Sears), 200 victims (the "occupants" at the addresses on the catalogues), or 201 victims (Sears plus the 200 "occupants") -- or some lesser number that

²²Under U.S.S.G. § 2B1.1, the base offense level is four. Because there is an organized scheme, the two-level enhancement of subsection (b)(5) would apply, yielding an offense level of six. To get to level 14 requires an eight-level enhancement, which in turn requires a loss in excess of \$70,000.

accounts for those "occupants" who do not want the catalog, do not care if it is delivered, or throw it away immediately upon receipt?

Amendment 50
(§ 2D1.1. Drug Trafficking)

Amendment 50 would revise the commentary to the drug trafficking guideline, U.S.S.G. § 2D1.1, by adding language to the asterisk footnote to the drug quantity table to specify that the weight of LSD means the "actual weight of the LSD itself", and excludes the weight of any carrier. We support amendment 50.

LSD, unlike marijuana, for example, is sold by the dose, not by weight. The weight of the typical dose of LSD, as set forth in the commentary to the drug trafficking guideline, is 0.05 milligrams. In other words, one gram of LSD will produce 20,000 doses.

Because the typical dose of LSD is minuscule almost to the point of invisibility, the dose must be consumed with the aid of a carrier, typically a paper called "blotter paper." The weight of the blotter paper is more than 100 times the weight of the LSD it contains.²³ If the carrier is something other than blotter paper, such as a sugar cube, the weight differential can be even greater. Thus, in an LSD case, the defendant's offense level will be driven

²³The Seventh Circuit calculated that blotter paper with 100 doses of LSD weighs about 110 times the weight of the LSD alone. United States v. Marshall, 908 F.2d 1312, 1315 (7th Cir. 1990), aff'd sub nom Chapman v. United States, ___ U.S. ___, 111 S.Ct. 1919 (1991).

mainly by the weight of the carrier medium, not by the weight of the LSD.²⁴

The vast disparity between the weight of the carrier and the weight of the LSD produces results that are inequitable, incompatible with the purposes of sentencing, and inconsistent with a market-oriented approach to drug penalties.²⁵ A drug manufacturer who makes enough LSD for 10,000 doses and is apprehended with the LSD in liquid form, before it is inserted into a carrier, will have an offense level of 20 because the weight of the LSD is 500 milligrams. A defendant with 100 doses in blotter paper -- one percent of the number of doses that the manufacturer's LSD would produce -- would also receive an offense level of 20. As Judge Posner has observed, "To base punishment on the weight of the carrier medium makes about as much sense as basing punishment on the weight of the defendant."²⁶

Congress has decided, for purposes of determining criminal liability and maximum punishment, that the weight of a "mixture or

²⁴For example, 100 doses of liquid LSD weighs five milligrams and carry an offense level of 12. Using the Seventh Circuit's formula, 100 doses of LSD on blotter paper weigh about 550 milligrams and carry an offense level of 20. See n. 23 supra. If sugar cubes are used for the carrier, 100 doses of LSD weigh about 225 grams and carry an offense level of 36.

²⁵The Attorney General's designee on the Commission has agreed that there is potential for disparity if the carrier is weighed. See R. Scotkin, The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses, 26 Crim. L. Bull. 50, 56 n.19 (1990).

²⁶United States v. Marshall, 908 F.2d 1312, 1333 (7th Cir. 1990) (Posner, J., dissenting), aff'd sub nom Chapman v. United States, ___ U.S. ___, 111 S.Ct. 1919 (1991).

substance containing a detectable amount of" LSD should be used. See 21 U.S.C. § 841(b). The Commission has adopted this approach in U.S.S.G. § 2D1.1 for purposes of determining the relative severity of offenses,²⁷ and the Supreme Court has affirmed that 21 U.S.C. § 841(b) and U.S.S.G. § 2D1.1, as presently written, call for counting the weight of the carrier medium.²⁸

Congress, however, has not mandated that the Commission require counting the weight of the carrier. The Commission is free to use a different method. The weight of the LSD itself not only is a better measure of offense seriousness than the combined weight of the LSD and the carrier, but is also more consistent with a

²⁷The asterisk footnote to that table states that "unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance."

²⁸Chapman v. United States, ____ U.S. ____, 111 S.Ct. 1919 (1991).

market-oriented approach to drug penalties.²⁹ We urge the Commission to adopt amendment 50.

Amendment 51
(§ 2D1.1. Drug Trafficking)

Amendment 51 would revise the asterisk footnote to the drug quantity table to specify that the term "cocaine base" means "the lumpy, rock-like form of cocaine base usually prepared by processing cocaine HCl and sodium bicarbonate. 'Crack' is the street name for this form of cocaine base." We support the amendment.

All forms of cocaine derive from the cocoa plant, which is grown mostly in South America. The leaves of the cocoa plant are mashed together to form a paste, which is treated with chemicals to form cocaine base. The cocaine base is then usually transported to Columbia, where it is refined, using acetone and hydrochloric acid,

²⁹In Chapman v. United States, ___ U.S. ___, 111 S.Ct. 1919, 1925 (1991), the Supreme Court stated that "Congress adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence". The purity of LSD is not affected by the carrier, whether it be blotter paper, a sugar cube, or a glass of orange juice. The carrier serves only to make it possible to consume a dose of LSD. While one carrier (say, a sugar cube) may be more appealing than another (say, blotter paper) on grounds of taste, the carrier does not dilute or weaken the LSD. As Judge Posner has observed, counting the weight of the carrier "would be like basing the punishment for selling cocaine on the combined weight of the cocaine and of the vehicle (plane, boat, automobile, or whatever) used to transport it or the syringe used to inject it or the pipe used to smoke it. The blotter paper, sugar cubes, etc. are the vehicles for conveying LSD to the consumer." United States v. Marshall, 908 F.2d 1312, 1332 (7th Cir. 1990) (Posner, J., dissenting), aff'd sub nom Chapman v. United States, ___ U.S. ___, 111 S.Ct. 1919 (1991).

into cocaine hydrochloride, an acid. This acid, when dried, is the white powder form of cocaine.

"Crack" is made by converting the acid form into a base form. That is accomplished by dissolving the powder in water and baking soda (or ammonia) and heating the solution. After the acid is removed, the substance is hardened into a block, which can be broken into smaller pieces for sale to the consumer. Because the crack form of cocaine has a significantly lower melting point than the powder form, the crack form can be smoked.

Smoking gets the cocaine absorbed into the blood stream faster than snorting. Crack produces a shorter, more intense high than cocaine powder.³⁰

Congress has established a 100 to one ratio between "cocaine base" and cocaine.³¹ The Commission's drug quantity table is based upon this statutory ratio.³²

While Congress used the term "cocaine base" in the statutory language, the legislative history indicates that Congress was concerned with "crack", the street term for the rock form of

³⁰For a general description of the differences among cocaine powder, cocaine base, and crack, see S. Henegan et al., Report of the Drugs/Role Harmonization Working Group 22-24 (Nov. 10, 1992); Drug Enforcement Administration, U.S. Dep't of Justice, Drugs of Abuse 37-40 (1988 ed.).

³¹While distribution of five kilograms of cocaine is required to trigger a ten-year mandatory minimum term of imprisonment, distribution of only 50 grams of "cocaine base" will trigger the ten-year mandatory minimum. 21 U.S.C. § 841(b)(1)(A)(ii), (iii).

³²R. Scotkin, The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses, 26 Crim. L. Bull. 50 (1990).

cocaine base that can be smoked, and not with other forms of cocaine base. See, e.g., 132 Cong. Rec. S27180 (daily ed. Sept. 30, 1986) ("title I addresses the widespread emergence of crack cocaine in this country I am very pleased that the Senate bill recognizes crack as a distinct and separate drug from cocaine hydrochloride" (remarks of Sen. Chiles). Certain characteristics of crack were seen as justifying greater penalties: Crack's rock-like form makes it marketable in small quantities at a relatively low price and therefore more attractive to purchasers. Crack's high purity and method of ingestion (smoking) produces a more intense high and was perceived to make crack more addictive than the powder form of cocaine. See, e.g., 132 Cong. Rec. S14822 (daily ed. June 20, 1986) ("Because crack is so potent drug dealers need to carry much smaller quantities of crack than cocaine powder") (remarks of Sen. D'Amato).

A consequence of Congress' use of the term "cocaine base" instead of the street term "crack" is that courts have wrestled with the question of whether forms of cocaine base other than "crack" should receive the greater penalties applicable to "crack." See, e.g., United States v. Shaw, 936 F.2d 412 (9th Cir. 1991) (enhanced penalties apply only to "crack"); United States v. Lopez-Gil, 965 F.2d 1124 (1st Cir. 1992) (enhanced penalty applies to cocaine base that was not crack and that was bonded to suitcase). The legislative history behind the enactment of enhanced penalties for "cocaine base" indicates that Congressional concern was focussed on the rock form of cocaine base -- "crack". The

Commission, too, seems to be concerned with crack because the drug equivalency table in U.S.S.G. § 2D1.1, comment. (n.10), provides that "1 gm of Cocaine Base ("Crack") = 20 kg of marihuana". Amendment 51, therefore, will bring the guidelines closer to what Congress intended, and we urge the Commission to adopt it.

Amendment 52
(§ 5B1.1. Imposition of a Term of Probation)

Amendment 52 would revise U.S.S.G. § 5B1.1 to require the sentencing court, if a defendant is eligible for straight probation, to impose a nonincarcerative sentence unless the court finds that imprisonment is necessary to serve the purposes of sentencing. In addition, amendment 52 would revise U.S.S.G. § 5B1.1 to require the sentencing court, if a defendant is eligible for probation with a confinement condition, to impose the minimum period of confinement permitted unless the court finds that a greater period is necessary to serve the purposes of sentencing.

We support amendment 52, which will implement the Sentencing Reform Act's mandate to sentencing courts to impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. This provision also carries out the Act's directive to the Commission to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" in the guidelines, and the directive to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or other serious offense."

Amendment 53
(§ 4A1.2. Definitions for Computing Criminal History)

Amendment 53 would amend the related case rule in U.S.S.G. § 4A1.2 to require the court to count sentences separately if the offenses from which the sentences resulted were separated by an intervening arrest, and to count them as one sentence if they were not separated by an intervening arrest. We believe that the amendment will simplify the guideline, making it easier to apply, and we support the amendment.

The criminal history score does not measure the number of prior convictions, and was not intended to do so, see U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 41-44 (June 18, 1987). Criminal history points are assigned for other than prior convictions (for recency of release from imprisonment, U.S.S.G. § 4A1.1(e), for example), and some prior convictions are not counted at all (stale convictions, see U.S.S.G. § 4A1.2(e), for example).

The basic rule is that, for purposes of assigning criminal history points, "prior sentences imposed in unrelated cases are to be counted separately." U.S.S.G. § 4A1.2(a)(2). Prior sentences are unrelated "if they were for offenses separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense)." U.S.S.G. § 4A1.2, comment. (n.3). Prior sentences for related offenses "are to be treated as one sentence" for assigning criminal history points. U.S.S.G. § 4A1.2(a)(2). When sentences are related, the court is to use the longest term of imprisonment if the sentences

were concurrent and the aggregate term of imprisonment if the sentences were consecutive. Id.

The related case doctrine as presently formulated not only is complicated and difficult to apply, but it also produces unjustifiably disparate treatment of similarly-situated defendants. For example, a defendant steals goods from a parked truck on day one, passes a forged check on day two, steals a car on day three, and is arrested for the three offenses on day four. If all three offenses were committed in one jurisdiction, the cases against defendant usually are consolidated for trial and sentencing. Assuming that the defendant is sentenced to concurrent 18 month terms of imprisonment, the defendant will receive three criminal history points. If the defendant commits the offenses in three different jurisdictions (Virginia, Maryland, and the District of Columbia, for example), the cases cannot be consolidated for trial or sentencing. If each jurisdiction sentences the defendant to 18 month terms of imprisonment, to run concurrently, the defendant will receive nine criminal history points (because there is no single common scheme or plan). The difference between three and nine points is two criminal history categories. Thus, defendants with the same prior criminal conduct receive substantially disparate criminal history scores, and the only reason is the artifact of where they were prosecuted.

The related case doctrine, when parsed, really turns on whether there was an intervening arrest. The same-occasion provision is unnecessary because, by definition, offenses occurring

on the same occasion cannot be separated by an intervening arrest and will therefore always be related. The single common scheme or plan provision is overridden by the intervening arrest provision. Even if the offenses were part of a single common scheme or plan, the sentences are counted separately if there was an intervening arrest. The related case doctrine can be simplified and made easier to apply -- and disparate counting reduced -- by adoption of amendment 53.

Amendment 54
(§ 4A1.2. Definitions for Computing Criminal History)

Amendment 54 would amend the commentary to U.S.S.G. § 4A1.2 to clarify the meaning of the term "instant offense." We support the amendment.

A defendant is assigned criminal history points for a prior sentence only if the sentence results from a conviction "for conduct not part of the instant offense." U.S.S.G. § 4A1.2(a)(1). To avoid double counting, and to insure consistency with the multiple count rules of U.S.S.G. § 5G1.3, the term "instant offense" has to include "relevant conduct". Cf. U.S.S.G. § 4A1.1, comment. (n.4) (the term "instant offense" in U.S.S.G. § 4A1.1(d) includes "any relevant conduct"). The Fifth Circuit, however, adding an unnecessary level of complexity to the guidelines, has held that the inquiry is not whether the prior sentence is for conduct that is "relevant conduct", but rather "whether the prior conduct constitutes a 'severable, distinct offense' from the offense of conviction." United States v. Thomas, 973 F.2d 1152, 1158 (5th

Cir. 1992)). We believe that the Commission should clarify the matter by adopting amendment 54.

Amendment 55
(§ 4B1.1. Career Offender)

Amendment 55 would amend the career offender guideline to require the court, if the defendant is found to be a career offender, to impose a sentence that is at the top of the guideline range for Criminal History Category VI and the offense level otherwise determined. We support the amendment.

The Sentencing Reform Act requires the Commission to assure that certain career offenders receive a sentence "at or near the maximum term authorized". 28 U.S.C. § 994(h). The Sentencing Reform Act also amended 18 U.S.C. § 5037(c)(1)(B) to authorize a court to sentence a juvenile to the "maximum term that would be authorized if the juvenile had been tried and convicted as an adult". The Supreme Court has held that this phrase in section 5035(c)(1)(B) refers to the maximum sentence that the juvenile could have received by application of the sentencing guidelines. United States v. R.L.C., 112 S.Ct. 1329 (1992). We believe that the strikingly similar language of 28 U.S.C. § 994(h) should be interpreted similarly, i.e., to refer to the maximum of the applicable guideline range.

Amendment 56
(§ 1B1.10, p.s. Retroactivity of Amended Guideline Range)

Amendment 56 would revise U.S.S.G. § 1B1.10, p.s., which, implementing 18 U.S.C. § 3582 (c)(2), provides that a court may reduce a sentence of a defendant sentenced to imprisonment if the

guideline range applicable to the defendant has been reduced, after defendant was sentenced, as a result of an amendment listed in subsection (d) of the policy statement. Amendment 56 would add amendment 459 to the list of amendments in subsection (d) and also would revise subsection (a) to provide that the court, when the reduction is due to an amendment not listed in subsection (d), can reduce the defendant's sentence if the court finds that such a reduction would be consistent with the purposes of sentencing.

We support the amendment. Under 18 U.S.C. § 3582(c)(2), a court can resentence a defendant based upon a subsequently-lowered guideline range "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." The Commission, in U.S.S.G. § 1B1.10, p.s. has indicated that a court may reduce a defendant's sentence only if the reduction in the guideline range is the result of a guideline amendment specified in subsection (d) of that policy statement. The Commission has specified eleven numbered amendments in subsection (d).

We believe that amendment 459, which revised the acceptance of responsibility guideline, should be added to the list in subsection (d). That amendment affects a considerable number of persons, and at a time when prison resources are stretched to the maximum, it would be desirable, as well as fair, to authorize the courts to adjust sentences of persons sentenced under the former acceptance of responsibility guideline.

We also believe that the sentencing court should be able to modify the sentence of a defendant when the guideline range has

been reduced because of an amendment other than an amendment listed in subsection (d), if the reduction would serve the ends of sentencing. Such a provision would implement the Sentencing Reform Act's directive in 18 U.S.C. § 3553(a), which requires the court to impose a sentence "sufficient, but not greater than necessary, to comply with the purposes" of sentencing.

Amendment 57

(§ 4A1.2. Instructions for Computing Criminal History)

Amendment 57, drafted by the Department of Justice, would revise the commentary to U.S.S.G. § 4A1.2 that addresses collateral attacks on prior convictions. The amendment would delete, "The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction." The amendment would also add language stating that "The Commission does not intend this guideline or commentary to confer any right to attack collaterally sentencing a prior conviction or sentence beyond any such right otherwise recognized in law"

We oppose this amendment. The present language makes clear the Commission's intention, and there is no evidence that courts have misunderstood the language. Absent such evidence, we do not believe any change is called for.

Amendment 59

(§2F2.1. Computer Fraud and Abuse)

Amendment 59, proposed by the Department of Justice, would add a complex new guideline to Chapter Two, Part F to deal with computer fraud and abuse. We oppose amendment 59.

We are unaware of very many prosecutions for computer fraud and abuse. Because a court can depart from the fraud guideline if the monetary loss "does not fully capture the harmfulness and seriousness of the conduct," U.S.S.G. § 2F1.1, comment. (n. 10), there is no urgent need for a separate guideline to cover a handful of cases. Given the complexity of the proposed guideline, we suggest that the Commission set up a working group to study whether the Commission should take action.

Amendment 61

(§ 4B1.2. Definitions of Terms Used in Section 4B1.1)

Amendment 61, proposed by the Department of Justice, would expand the definition of crime of violence to include possession of a firearm by a felon and nonresidential burglaries. We oppose this amendment because it would dramatically increase the number of defendants who will be sentenced as career offenders, when there has been no demonstration that the present definition is inadequate.

The Commission consciously chose to limit the definition of the term "crime of violence" for purposes of the career offender guideline to include those crimes that have as an element "the use, attempted use, or threatened use of physical force against the person of another." In 1991 and again in 1992, the Commission specifically excluded from the definition of the term "crime of violence," the unlawful possession of a firearm by a felon, a possessory offense that does not present the same risk of harm as crimes of an assaultive nature. We see no reason for the Commission to reverse its two previous determinations.

Similarly, by specifying that burglary of a dwelling is a crime of violence, the Commission determined that nonresidential burglaries should not be considered as a "crime of violence" for determining career offender status. A nonresidential burglary does not present the same level of risk to another person that residential burglary presents. Equating the two would mandate identical punishment for a defendant who had broken into an occupied home and a defendant who had broken into an unoccupied car.

Amendment 62
(§§ 2B1.1 et al. Theft, Bribery, and Fraud)

Amendment 62, drafted by the Department of Justice, invites comment on whether theft, bribery, and fraud guidelines should be revised to require a four-level enhancement for all offenses involving a financial institution. We oppose the amendment.

We perceive no reason to increase the offense level simply because a financial institution is involved. The Justice Department's rationale is that in recent years Congress has increased the maximum term of imprisonment for financial institution offenses.

We disagree with the Justice Department's unstated premise that any increase in a statutory maximum requires an increase in the offense levels of the applicable offense guideline. A statutory maximum sets an appropriately severe punishment for the most aggravated form of the offense. An increase in the maximum means that Congress believes that the most aggravated form of the offense should be treated more severely, but does not necessarily

mean that Congress believes that the heartland form of the offense should be treated more severely.

We believe that in enacting the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and the financial institutions provisions of the Crime Control Act of 1990, Congress was concerned with high level officials -- such as chief executives and controlling investors -- who caused substantial losses to the institutions that they directed or controlled. Under amendment 62, the theft, fraud, and bribery guidelines would provide four-level enhancements whether the loss to the financial institution was \$10,000 or \$10,000,000. We do not believe that Congress substantially increased penalties in the Financial Institutions Reform, Recovery, and Enforcement Act and in the financial institution provisions of the Crime Control Act of 1990 so that tellers who embezzle a few thousand dollars could be punished more severely. The obvious Congressional concern was with the directors and senior officials of financial institutions who caused enormous losses to the institutions with which they were associated.³³

³³For example, Congress directed the Commission to "promulgate guidelines, or amend existing guidelines, to provide for a substantial period of incarceration for a violation of, or a conspiracy to violate, section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of title 18, United States Code, that substantially jeopardizes the safety and soundness of a federally insured financial institution." Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 961(m), 103 Stat. 501 (emphasis added). To comply with that directive, the Commission added what is now subsection (b)((7)(A) of U.S.S.G. § 2B1.1. U.S.S.G. App. C (amend. 317).

Similarly, Congress in 1990 directed the Commission to act to make sure that the guidelines ensured that a defendant convicted of any of the above offenses receive an offense level under chapter 2 of not less than 24 "if the defendant derives more than \$1,000,000

Congressional attention was not directed at low- and mid-level officials whose crimes involved relatively modest sums of money, and whose punishment would be substantially increased by amendment 62.

**Amendment 63
(\$ 2D1.1. Drug Trafficking)**

Amendment 63, submitted by the Department of Justice, requests comment upon whether the caps on base offense levels for distribution of Schedule III, IV, and V controlled substances and Schedule I and II depressants should be removed or raised so that violations involving very large quantities of these drugs will result in greater sentences. Because there has been no showing that the present guidelines call for inappropriately low sentences for offenses involving those controlled substances, we do not believe that an amendment by the Commission concerning those controlled substances is called for.

The amendment also invites comment upon whether the definition of a "unit" of anabolic steroid in the last paragraph of U.S.S.G. § 2D1.1 should be changed from "a 10 cc vial of injectable steroid or fifty tablets," to "a one cc vial of injectable steroid or five tablets," and whether "fewer" than five tablets should be equivalent to a one cc vial of injectable steroid. The recommended changes would result in a substantial increase in the base offense level for persons charged with trafficking in anabolic steroids.

in gross receipts from the offense." Crime Control Act of 1990, Pub. L. No. 101-647, § 2507, 104 Stat. 4862 (§ 2507 is captioned "Increased Penalties in Major Bank Crime Cases").

The provision on steroids took effect only 17 months ago³⁴ and was the result of careful study by the Commission. The Justice Department has given no rationale for the proposed change, and there is no evidence to indicate that the current provision results in unjustifiably low sentences. We do not believe that the Commission should amend the steroid provision.

Amendment 64
(§ 2K2.1. Unlawful Possession of Firearms)

Amendment 64, drafted by the Department of Justice, invites comment upon seven proposals for revising offense levels under U.S.S.G. § 2K2.1: (1) increasing from 18 to 22 the base offense level for offenses involving National Firearms Act firearms; (2) increasing from 12 to 22 the offense levels for offenses involving semiautomatic firearms; (3) increasing by four levels the base offense level for offenses involving prohibited persons; (4) increasing from 18 to 22 the minimum offense level for possession or use of a firearm in connection with another felony; (5) deleting the level 29 cap on the offense level for adjustments under subsections (b)(1) through (b)(4); (6) increasing from 12 to 16 the base offense level for distributing a firearm to a prohibited person; and (7) increasing more rapidly the enhancement under subsection (b)(1) for the number of firearms.

We do not believe that the significant increase in offense levels called for by amendment 64 is warranted. The Commission substantially increased offense levels under U.S.S.G. § 2K2.1 in

³⁴U.S.S.G. App. C (amend. 369).

two consecutive years, 1990 and 1991. We are unaware that the impact of those changes has been measured; indeed, given the ex post facto clause, it is unlikely that the impact can be measured yet. Until the impact can be measured, we think Commission action would be premature.

**Amendment 66
(Gang-related Crime)**

Amendment 66, proposed by the Department of Justice, invites comment on whether the guidelines should provide for a four-level enhancement for "felonies committed by a member of, on behalf of, or in association with a criminal gang." The proposed amendment would define a criminal gang as "a group, club, organization, or association of five or more persons whose member [sic] engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or serious drug offenses."

We believe the Commission should not provide such an enhancement. The report of the Commission's own working group on violent crime reveals the many difficulties involved in establishing suitable definitions of "gang"³⁵ and "gang-related crime." Neither the law enforcement nor the academic communities have reached a consensus about how to define those terms. The difficulty in coming up with a definition may explain why not one

³⁵"For example, someone, somewhere, would have to decide whether a group 1) had an identifiable leadership; 2) claimed control over a particular territory; 3) recognized itself as a 'denotable group'; 4) was a distinct aggregation; or 5) had been involved in a sufficient number of unlawful activities to create a consistent negative response from the community." S. Winarsky et al., Violent Crimes/Firearms/Gangs Working Group Report 52 (Oct. 14, 1992).

of the twenty-one states surveyed by the working group presently has gang affiliation or related activity as a specific factor in its sentencing guidelines.

The difficulty in coming up with a definition is compounded by the proof problems that would arise from trying to apply the definitions of "gang" and "gang-related."³⁶ As the working group points out, "[i]dentifying a crime as a 'gang crime' may require subjective judgments regarding crucial issues such as motivation of the perpetrator."³⁷ Experts do not agree on the extent of the connection between gang membership and violence, and "some researchers have found spurious relationships between the two."³⁸

The proposed definition has not overcome the difficulties. It would allow for a gang enhancement for simple membership in a group that happened to have members who had committed "a series" of violent crimes or serious drug offenses. This definition would seem to cover a member of the Roman Catholic Church because there are other members of the church who have committed violent crimes or serious drug offenses. The proposed definition would require that a sentencing court impute knowledge of the other group members' activities. Indeed, the larger the group and the more diverse its membership, the more likely the group would be

³⁶"Even if a definition of gang could be agreed upon, some system of accurately operationalizing the criteria (e.g., determining that wearing colors is an accurate indicator of collective identity) would have to be developed." Id. at 52.

³⁷Id. at 53.

³⁸Id. at 54.

considered a "gang" under the suggested definition. Applying such a broad definition poses serious constitutional problems as well.³⁹

³⁹The working group report discusses three of these problems, including conflicts with the "void for vagueness" doctrine, the "overbreadth" doctrine and unconstitutional restrictions of the right of freedom of association. Id. at 58.