



AMERICAN BAR ASSOCIATION

GOVERNMENT AFFAIRS DEPARTMENT • 500 MONTGOMERY AVENUE, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

**STATEMENT OF
STEVEN SALKY, CHAIRPERSON**

**COMMITTEE ON THE U.S. SENTENCING GUIDELINES
SECTION OF CRIMINAL JUSTICE**

**On Behalf Of
THE AMERICAN BAR ASSOCIATION**

**Before the
UNITED STATES SENTENCING COMMISSION**

**Concerning
SENTENCING GUIDELINE AMENDMENTS**

March 15, 1993

My name is Steven Salky. I appear before you today at the request of ABA President J. Michael McWilliams to convey the ABA's views on proposed amendments to the Sentencing Guidelines. I am the Chairperson of the ABA Criminal Justice Section's Committee on the United States Sentencing Guidelines. Our committee is made up of professionals from every aspect of the criminal justice system - the federal judiciary, federal prosecution, private and public defense bar, law academia and criminal justice planning. We appreciate this opportunity to comment on the proposed 1993 amendments and issues for comment.

THE AMENDMENT PROCESS

As in prior years, we remain interested in the process by which amendments are developed and promulgated.

We once again commend the Commission for its willingness to publish all amendment proposals, including those submitted by parties outside the Commission. While this publication policy has been criticized as diverting the attention of the audience from those few amendment proposals that are being seriously considered, we believe the quality of the Commission's final deliberations will be enhanced by the diversity of viewpoints obtained from a liberal publication policy. Additionally, comments generated by proposals not presently being seriously considered may become useful in future amendment cycles.

We urge the Commission to continue publishing all amendment proposals that any one Commissioner supports. The Commission should, however, prioritize proposals. This could be accomplished in either one of two ways. The Commission could indicate in the

Federal Register which amendment proposals are being seriously considered for passage and which are unlikely to receive serious consideration. Alternatively, the Commission could initially publish all proposals and then grant "certiorari" and subsequently publish the fewer proposals that will be voted upon. Regardless of the method chosen, a priority system would continue to encourage public comment on a variety of matters, but would direct the energy of outside parties (and the Commission staff) to a limited number of proposals each year.

We also commend the Commission for continuing to rely in large part on the working group reports generated by its capable staff. We have encouraged the Commission over the years to act on the basis of empirical data and analysis, to the extent possible. Most of the working group reports submitted to the Commission this year contained recommendations based on an evaluation of the available empirical evidence. The working group reports are most valuable when they not only analyze the data generated from the case files submitted to the Commission, but also consider the manner in which the guideline in question is used in the plea bargaining and sentencing process. By determining how the guideline is applied in "real life," the working group reports can help the Commission and outside commentators fashion amendment proposals that make sense. The Commission carries out its statutory responsibilities most effectively when it carefully reviews such comprehensive working group reports before enacting amendments.

To commend the Commission for establishing working groups to study an area before it considers specific amendments is not to suggest that the Commission should never amend a guideline without a working group report. However, there should be a presumption against any substantive amendment that is not preceded by research and analysis that justifies an alteration.

Our praise should not overshadow our continued criticism of the fact that the amendments, either individually or as a package, do not include any assessment of prison impact. The Sentencing Reform Act explicitly requires that the Commission continually assess the impact of the Guidelines as a whole on the existing capacity of penal, correctional, and other facilities and services. The Sentencing Reform Act further requires that any guideline be formulated to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons. The projections in your 1991 Annual Report and the projections in your Report on the Operation of the Guidelines System and Short Term Impacts on Disparity in Sentencing, Use of Incarcerations, and Prosecutorial Discretion and Plea Bargaining are for significant increases in the use of incarcerative sentences and in the average length of prison sentences. The Commission, however, continues to ignore its responsibility to evaluate the potential impact of any amendment on prison populations, despite the crisis in federal prison over-crowding. In our view, every working group report ought to contain a prison impact analysis. While the effect on the

rate of imprisonment may not be a basis to accept or reject a proposed amendment, it should be considered.

We continue to believe that the Commission should amend the Guidelines in accordance with pre-approved administrative rule-making procedures set forth in the Code of Federal Regulations, as was envisioned by the Sentencing Reform Act. Our Committee, in conjunction with the ABA Section of Administrative Law, is in the process of developing suggested rulemaking procedures for the Commission and we recommend that the Commission devote attention to this matter in the coming year.

Finally, we are concerned with a view we have heard expressed that no further amendments should be made to the Guidelines this year. While we have often in the past cautioned against over-amending the Guidelines, we think it equally indefensible to vote against a proposed amendment simply for the sake of avoiding changes to the Manual. Congress empowered the Commission to annually amend the Guidelines because it recognized that experience would constantly point out the need for refinement. While the Commission may one day amend the Guidelines to perfection, we do not believe that day has yet arrived. Especially while the Commission remains a full-time body, we think it important to vote on proposed amendments as if they matter. It would indeed be unfortunate if several of the worthy proposals in this year's amendment package failed because two or more Commissioners decide

simply to vote against all proposals. We urge you to vote on the merits of the amendment proposals.

THE AMENDMENTS

We support several important proposals in this year's package. As detailed further below, we are pleased that there are serious proposals, based upon working group reports, to revise the money laundering offense guidelines and the drug offense guidelines. If the Commission were to pass no other amendments this cycle, the passage of the proposals in these two areas, with modifications we address further below, would significantly enhance the fairness and even handedness of the Federal Sentencing Guidelines.

Before addressing these and other Commission generated proposals, I want to comment upon the one amendment and three issues for comment published at our committee's request.

Proposed amendment 31 would eliminate the requirement that the government make a motion before the court can consider a downward departure on the basis of a defendant's substantial assistance to authorities. The Sentencing Reform Act requires such a motion only in cases governed by a mandatory minimum statute. In our opinion, the Commission's enactment of §5K1.1 finds no support in the Sentencing Reform Act. Moreover, §5K1.1 allows government attorneys, not Article III judges, to exercise critical sentencing authority in a significant number of cases. We recognize that the government attorney is in the best position to advocate to the court whether a defendant's cooperation is deserving of a downward

departure. However, to allow the government to control the court's ability to even consider a departure, completely reverses the normal division of authority and responsibilities between the executive and judicial branches.¹

As expressed in issue for comment 32 and 33, the ABA continues to support the fundamental principle of parsimony in punishment. Sentences authorized by the Guidelines and sentences imposed by judges ought to be no more severe than necessary to achieve the purposes of sentencing. We continue to believe that imprisonment should not be the sanction of choice for all offenders and that alternative sanctions ought to be imposed in a greater percentage of cases in the federal system. While reasonable people can disagree about the proper severity of sanctions to be imposed at various levels within the guideline grid or table, the current Guidelines result in the imposition of imprisonment on more offenders and for greater periods of time than has been the case in the pre-guideline system. We would advocate expansion of the use of alternative forms of punishment.

The issues we propose for comment in Amendments 32 and 33 are not designed, however, to define which offenders should be sentenced to imprisonment and which should be sentenced to

¹ The limited repeal of the government motion requirement in cases involving first time non-violent offenders, as proposed in Amendment 24, appears to be based solely on political considerations. There is no principled distinction between first time non-violent offenders and other offenders with regard to the government motion requirement.

probation. Rather, we advocate that the Commission focus on whether to increase the availability and imposition of non-incarcerative sentences by, on the one hand, providing an additional ground for departure or, on the other hand, increasing the number of offense levels within Zone A and/or Zone B. Increasing offense levels within Zone A or Zone B will preserve uniformity, but may result in certain advantages to white-collar offenders. Authorizing additional grounds for departure may result in more alternative sentences, but increase unwarranted disparity. Our point is to encourage the Commission to seriously consider for future amendment cycles the correct mechanism for decreasing the use of prisons in federal sentencing.

In proposal 34, we encourage the Commission to seriously re-evaluate the initial policy decision it made to require judges to base sentences on the so-called "real offense conduct", instead of conduct that either is admitted by the defendant in a plea or constitutes the offense for which the defendant was convicted after trial. We recognize this is a critical issue that was decided by the Commission at the outset of its tenure. However, after long and serious debate, the ABA, in producing a third edition of its Sentencing Standards, recently resolved that the severity of sentences imposed should be determined with reference to the offense of conviction and not the so called "relevant conduct," where different from the offense of conviction. We, therefore, continue to believe that the issue is worthy of re-evaluation.

We repeat below the current ABA Standard and the relevant portion of the Reporters Note that concerns this issue.

Standard 18-3.6. Offense of conviction as basis for sentence.

The legislature and the agency performing the intermediate function should provide that the severity of sentences and the types of sanctions imposed are to be determined by sentencing courts with reference to the offense of conviction in light of defined aggravating and mitigating factors. The offense of conviction should be fixed by the charges proven at trial or established as the factual basis for a plea of guilty or nolo contendere. Sentence should not be based upon the so-called "real offense," where different from the offense of conviction.

Reporters' Note:

This Standard endorses the "offense-of-conviction" approach to sentencing and disapproves of the practice of "real-offense" sentencing. Under offense-of-conviction systems, the basis for sentence is limited to the charge or charges of conviction, the defendant's history of prior convictions (see Standard 18-3.5), defined aggravating and mitigating factors associated with the current conviction (see Standards 18-3.2 and 18-3.3), and any personal characteristics of the defendant permitted to influence sentence determination (see Standard 18-3.4). . . .

The Standards take the view that conviction, by trial or plea, is a prerequisite for a criminal sanction based on alleged criminal conduct. In offense-of-conviction jurisdictions, sentence may not be based on charges of which defendants were acquitted, charges foregone pursuant to plea agreements, or other alleged offenses that have not culminated in convictions.

Our four proposals, as well as our comments on specific amendments, are informed by the recently promulgated ABA Standards

on Sentencing Alternatives and Procedures and ABA Standards on Appellate Review of Sentences ("Sentencing Standards"). These new Sentencing Standards, the Third Edition of the ABA Standards on these subjects, were recently approved by the ABA's Criminal Justice Section and by the ABA House of Delegates. These new standards are the culmination of several years of extensive work and debate by a balanced committee chaired by the Chief Justice of the Supreme Court of North Carolina, the Honorable James E. Exum, Jr. The Committee was made up of private defense counsel and public defenders, state and federal prosecutors, federal and state judges, respected criminal justice professionals, and distinguished law professors and academicians. While serving primarily as guidance for state legislatures and state policy making bodies, the Sentencing Standards were developed and debated within the "shadow" of the existing federal guidelines and contain standards which differ in significant respects from the current Guidelines manual. The Third Edition Standards represent the ABA's current thinking about critical issues facing this Commission, and we commend them to you for careful consideration. I have today provided your Chief Counsel and your Staff Director with copies of these newly approved Standards. We would be pleased at an appropriate time to meet or discuss with the Commission the significant differences between the system envisioned by the Standards and the current federal Sentencing Guidelines.

Turning now to our comments on several of the other proposed amendments, we set forth our thoughts below.

AMENDMENT 1

We endorse this amendment because it is consistent with the Third Edition of the ABA Standards for Sentencing Alternatives and Procedures. As mentioned, Standard 18-3.6 provides that the severity of sentences imposed and the types of sanctions imposed should be determined with reference to offense(s) of conviction and not upon the so called "real offense", where different from offense of conviction. This Standard would prohibit the enhancement of sentences based on a finding by the court that, despite the defendant's acquittal, he or she committed additional offenses.

The critics of this amendment argue that because of the different standards of proof at trial and sentencing and because of different rules regarding the admissibility of evidence at the two stages, this amendment advantages defendants without justification. They also claim that the amendment will lead to disparity. We disagree. First, there is a compelling justification for prohibiting enhanced sentences based on acquitted conduct, *i.e.*, promoting fairness and respect for fairness in the sentencing process. In our view, the perceived and actual fairness of the criminal justice system is undermined if persons acquitted of crimes are nonetheless punished for having committed them. Second, it is the uneven consideration of acquitted conduct at sentencing that promotes disparity; the preclusion of its consideration may actually promote uniformity.

The amendment will, of course, affect only a very small number of cases, as it prohibits consideration of only "relevant conduct" for which the defendant "was acquitted after trial." According to the Commission's latest statistics, only a relatively small percentage of federal criminal cases go to trial. In a not insignificant percentage of those cases today, acquitted conduct is not considered at sentencing because: (a) the government cannot demonstrate post-trial that the defendant committed the "relevant conduct" by the requisite standard of proof (preponderance of evidence in most cases); (b) the acquitted conduct is not relevant conduct to the offense of conviction; and (c) the maximum penalty provided by statute for the offense(s) of conviction is lower than the guideline sentence. Thus, the amendment proposal will not, as some have posited, result in a radical shift in policy.

AMENDMENT 2

The so called "one book" rule, Policy Statement §1B1.11, was promulgated during the last amendment cycle in the dead-of-night, without public comment, and without any apparent study. The adoption of the policy statement was indefensible as a matter of procedure. We oppose any amendment which seeks to extend the application of this Policy Statement.

AMENDMENT 5

We oppose this amendment for several reasons. First, the decision to sentence larceny and theft cases exactly the same as fraud and deceit cases is contrary to prior practice and increases disparity by treating dissimilar offenders in a similar manner. Second, the elimination of more than minimal planning (and the related increase in the theft and fraud loss tables) is at odds with the empirical analysis of pre-guidelines sentencing practices that recognized planning, independent of actual harm, was an important factor for judging relative culpability. See U.S.S.G. §2F1.1 comment (background). Indeed, the amendment encourages disparity by treating a sophisticated planned fraud that netted \$100,000 over a lengthy period the same as a single false statement that resulted in the same actual loss. The elimination of the "planning" variable eliminates the court's ability to rationally distinguish between offenders.

AMENDMENT 8

We support the basic thrust of this amendment. As we have argued in the past, the current guidelines for drug trafficking offenses overstate the importance of quantity and understate the importance of a defendant's role in the offense. This amendment would be a significant step toward correcting this imbalance.

There are, however, a few aspects of the proposed version of 3B1.2 that we believe are ill-considered. First, proposed application note 2 appears to us to be unnecessary. The fact that the defendant possessed or had access to a firearm is certainly an appropriate sentencing factor, but it does not necessarily speak to his or her role in the offense. A minor or minimal participant in the offense who possesses a firearm should receive the enhancement contained in 2D1.1, but should not be penalized by losing the offense level cap proposed in this amendment. Adoption of application note 2 would have the odd effect of punishing a minimal participant more harshly than a kingpin for having access to the same firearm.

Second, proposed new application note 7 would limit the court's ability to find that a courier or "mule" played a mitigating role in the offense. These are precisely the defendants who are receiving far too harsh sentences under the current guidelines. Applications notes 5 and 6 would establish appropriate criteria to determine whether a defendant is a mere courier (e.g., no ownership interest in the contraband), and anyone who satisfies those criteria should receive a minimal role adjustment. If the Commission insists on including application note 7, option 1 is preferable.

AMENDMENT 10

We applaud the Commission's effort to establish a common-sense understanding of the term "mixture or substance." A rigid interpretation of the relevant statute and guidelines has led to irrational and disparate sentences for many defendants. We regret that the Supreme Court did not resolve the statutory issue definitively in the Chapman case, but there is nothing in Chapman which prevents the Commission from establishing a rational definition of "mixture or substance" for guideline purposes. We therefore support this amendment.

AMENDMENT 13

Because we believe that quantity, especially where the quantity is controlled in whole or in part by government agents, is overvalued, we support an amendment addressed to reverse sting operations. To determine an appropriate amendment, it is necessary to realize that the problem is actually broader than stated by the request for comment. The problem exists not only where government agents set a below-market price, but whenever agents, in a reverse sting operation, create artificial market conditions that increase a defendant's purchasing power. Two recent cases reviewed in the comments of the Practitioner's Advisory Committee illustrate the problem.

In our opinion, the guidelines should provide that in a reverse sting case, where the government sets or agrees to artificial market conditions which have the effect of increasing the defendant's purchasing power, the court should determine the defendant's offense level on the basis of the amount of drugs that he or she could have actually purchased based on the agreement.

AMENDMENT 20

The ABA strongly supports the proposed amendments to §§ 2S1.1 and 1.2, pertaining to money laundering offenses and structuring violations.²

The most important aspect of the proposed amendments is that they remove the potential for actual or threatened sentence manipulation through charging practices. We agree with the Working Group that where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially

² The ABA opposes amendment 58 which would amend § 2S1.3. This proposal would significantly increase base offense levels for currency reporting violations. We believe the proposed changes would be inconsistent with the advances proposed in amendment 20.

the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same for the underlying offense."

Although we support the amendment, we are concerned that the proposal does not address the pervasive use of government stings in money laundering cases. Sting operations provide continued opportunities for sentence manipulation. Under that section, the crime is completed if a defendant with the intent (1) to promote specified unlawful activity; (2) to conceal or disguise property believed to be the proceeds of specified unlawful activity; or (3) to avoid a CTR requirement, engages in a financial transaction with property represented by a law enforcement official to be the proceeds of specified unlawful activity. This section has been used in an ever increasing number of undercover sting operations in which federal agents attempt to engage in money laundering activities and represent that their money comes from unlawful sources. As in drug sting operations, the agents control the amount of money laundered. Accordingly, there is increased risk of prosecutorial manipulation of the guidelines by government agents increasing the amounts of tendered funds to increase the guideline range.

More importantly, in sting cases there will never be commission of the underlying offense by the defendant. Thus, under proposed § 2S1.1(a)(1), the defendant in a sting operation (who engages only in the laundering offense) will receive a potentially higher sentence than those defendants that both launder money and commit the underlying offenses. Accordingly, we recommend that the amendment be adopted with a lower base offense level for violations of 18 U.S.C. § 1956(a)(3).

AMENDMENT 21

Amendment 21 proposes a consolidation of the tax guidelines and a unified definition of tax loss. The guideline includes a rebuttable presumption of tax loss based on a percentage of the unreported gross income. The percentage varies depending on the type of tax offense involved. To our knowledge, this the only guideline that has sought to use a rebuttable presumption.

We believe that a rebuttable presumption improperly relieves the government of its burden to establish by at least a preponderance of the evidence that the guideline base offense level applies. While we know of no case specifically considering the validity of a rebuttable presumption in the sentencing context, we believe the presumption is misconceived. Criminal tax cases are complex in origin and often voluminous in their documentation. Documentation available to the government may not be released to the defense since, for example, in an evasion case the government

need not prove a specific dollar amount, but only a substantial additional tax due and owing. The probation officer is, even without the presumption, unlikely to "second guess" the government's tax computations. To increase the government's advantage by, in effect, totally relieving it of its burden of proof, is both unwise and unjustified.

AMENDMENTS 25 AND 36

The Sentencing Reform Act was designed in part to promote honesty in sentencing. The current guidelines often result in the opposite by requiring the court to consider "relevant conduct" beyond the offense of conviction without imposing any requirement on the government to honestly notify the defendant of the "relevant conduct" it will raise at sentencing. While the requirements of Rule 32 are a partial remedy, encouraging the government to disclose the "relevant conduct" earlier in the process will not only promote honesty, but will eliminate the litigation that inevitably results when the government seeks a sentence based upon relevant conduct not revealed prior to defendant's entry of a plea.