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By Federal Express

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United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, DC 20002-8002

Attention: Public Information

Dear Commissioners:

On behalf of the Pennsylvania Association of Criminal Defense Lawyers, I offer the following comments with regard to the proposed amendments to the Sentencing Guidelines.

Our organization is opposed to any intrusion upon the discretion of the sentencing judge. However, given that the Sentencing Guidelines are a reality, we would urge the adoption of the following amendments thereto:

Amendment 1, excluding acquitted conduct as relevant.

Although the position of the PACDL is that that function of the jury within our system of criminal justice is evaded whenever any allegedly criminal conduct not the subject of conviction is utilized for purposes of sentencing, Amendment 1 would at least the ameliorative effect of eliminating conduct from consideration as to which a jury has actually rendered a verdict.

Amendments 8 and 9, placing an offense ceiling level for those defendants found to having a mitigating role, and reducing the upper limit of the Drug Quantity Table from 42 to 36.

The proposed change would better reflect the culpability of low level participants in a drug conspiracy whose knowledge of the scope of the conspiracy would otherwise increase their base offense level.

Amendment 20, tying the base offense levels for money laundering and structuring to the underlying conduct.

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This amendment will eliminate the anomaly that results where there was either no illegal underlying activity or that activity had a base offense level lower than that prescribed for the structuring or money laundering.

Amendment 29, permitting departure where offender characteristics are present in an unusual degree and combined in ways important to sentencing.

The PACDL favors this amendment as allowing for greater discretion in the sentencing judge.

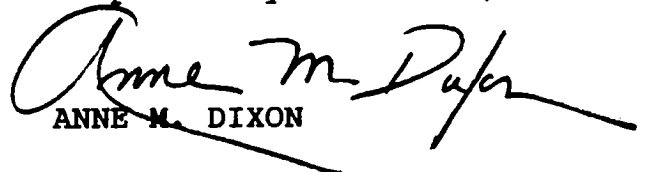
Amendment 47, eliminating the need for government motion under U.S.S.G. Section 5K1.1.

This amendment is favored insofar it will make the issue of whether there has been "substantial cooperation" one for resolution in the way the other factual disputes are resolved, i.e., by a court.

With respect to the issue for comment following proposed Amendment 5, the PACDL would urge that the best approach is to delete the reference to repeated conduct and to better define "extensive or sophisticated planning."

Thank you for your consideration.

Respectfully submitted,


ANNE M. DIXON

AMD/rab

cc: Joshua D. Lock, Esquire
President, Pennsylvania Association
of Criminal Defense Lawyers

STATEMENT OF STEPHEN ROBERT LaCHEEN, ESQUIRE

Before the United States Sentencing Commission

March, 1993

Ladies and Gentlemen:

It is an honor and a pleasure to have been afforded time to speak before you today in support of the proposal to amend the Money Laundering Guidelines, and in particular the Structuring Guideline, in accordance with the proposal of the Commission's Working Group. See 57 Fed.Reg. 62832, 62839 (Dec. 31, 1992). I am the senior partner of a private law firm in Philadelphia which conducts a large part of its practice in federal criminal defense. My immediate impetus for coming down to Washington today is my involvement in a case which I believe illustrates particularly well the need for an amendment of the kind proposed by the Working Group.

My client, Ronald P. Shirk, is a former police officer who went into the licensed gun dealer business in a rural area of upstate Pennsylvania. His business prospered and gradually became largely a wholesale operation. As you may be aware, many of those who buy and sell firearms legitimately are "rugged individualists" by nature, and many of them have a strong libertarian bent which makes them jealous of their privacy and suspicious of governmental involvement in the lives of individual Americans, as well as of established financial institutions.

Such people often deal in cash when the rest of us city types would not. This is also true to a great extent of those who choose to live in that part of central Pennsylvanian, far from either Philadelphia or Pittsburgh. Mr. Shirk, I would have to say, tends to share these tendencies.

I was therefore both interested and surprised to see the October 14, 1992, Working Group report on money laundering offenses, which states that "representatives of [the Department of Justice] reported [to the Working Group] that, as far as they knew, prosecutors did not bring cases involving structuring of lawfully derived funds." Report and Initial Findings of U.S. Sentencing Comm'n Money Laundering Working Group (Oct. 14, 1992), at 24. I know, from my representation of Mr. Shirk over the past several years, that that assurance is utterly false.

Mr. Shirk came under investigation several years back by the Internal Revenue Service on suspicion of tax evasion; I believe they thought he was skimming cash from the business and underreporting his income. In any event, those charges came to trial and with my help and that of an honest jury, he was acquitted of the tax charges. At the same time, however, he was convicted of structuring currency transactions. During the years in question, Mr. Shirk's business took in an average of several thousand dollars a day in cash, but not as much as \$10,000 per day. He accumulated these cash receipts (after removing the hundreds, which for his own reasons he "collected" in a safe) and then took them to the bank. The structuring charges were premised on an analysis of his banking records,

which showed that after his bank revoked a CTR exemption he had formerly enjoyed (in the mistaken belief that a CTR exemption was not available to a business which was primarily wholesale, not retail), the frequency of these banking trips increased from weekly to every few days, with the average size of the deposits kept below the reportable threshold.

The U.S. Court of Appeals for the Third Circuit recently upheld these convictions, on the theory that Mr. Shirk's intent to avoid the necessity of filing CTR's could be equated with the statute's prohibited intent to "evade" the bank's reporting requirement. Since the Third Circuit disagrees with the First on the question whether this conduct is even criminal, we are hopeful of being vindicated in the Supreme Court. But in the meantime, we are presented with the sentencing issue that is of interest to the Commission and which is the subject to the Working Group's recommendation: the appropriate punishment for "currency structuring" consisting entirely of the cash receipts of a legitimate business, involving no ulterior criminal intent, or at least none other than to facilitate tax evasion; that is, where the funds are not criminally derived.

I have no doubt in my own mind that such cases as ours do not fall within the "heartland" of what is currently classified under Guideline § 2S1.3 at offense level 13 (plus an enhancement when the total amount exceeds \$100,000). Thus, I certainly agree with the Working Group's conclusion that structuring, per se, is not an aggravating circumstance warranting that base offense level. Report and Findings, at 4. And I wholeheartedly

endorse the concern, in this context, that offense levels now demanded for structuring "lawfully derived funds" may properly be viewed as "not reasonable." Id. at 24. The change would assist judges in fulfilling their obligation to impose sentences which are not "greater than necessary" to achieve the statutory purposes of punishment. 18 U.S.C. § 3553(b). The comment appended to the proposed change, as published, correctly states that the amendment would "assure greater sensitivity to indicia of offense seriousness." Our trial judge, William W. Caldwell of the Middle District of Pennsylvania, agreed, and departed downward to a nine month sentence. The government appealed, however, and the Third Circuit reversed the departure, remanding for the imposition of a guideline sentence which would presumably fall in the range of 24 to 30 months.

Ironically, under the proposed amendment, the guideline sentence for Mr. Shirk's conduct would not exceed six months, with a sentence as lenient as straight probation being within the range. Thus, even the downward departure granted by Judge Caldwell would be classified as unduly severe. Again, there is perhaps some hope for Mr. Shirk on certiorari, or if we come up with a different departure theory at resentencing on remand. But the facts of this case -- and others like it around the country, where overzealous IRS agents find support in a Department of Justice that cannot resist the thought of demanding forfeiture of a multimillion dollar concern on the ground that the business itself was used to "facilitate" the offense --

demonstrate the inadequacy of relying on the departure mechanism.

For these reasons, I am in full support of the Working Group's conclusion that the guidelines must be amended to differentiate these cases of mere regulatory noncompliance (if that) from cases where the structuring of currency transactions is undertaken as a technique of money laundering. And when that amendment occurs, please do not forget to add it to the list in § 1B1.10(d), so that if the effective date comes too late to help Mr. Shirk at his resentencing, the cases of manifest injustice, such as ours, that may exist in the system as a result of the prior wording of the guideline may be corrected by a motion under 18 U.S.C. § 3582(c)(2) to reduce the sentence.

Respectfully submitted,
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By:



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