two-year probation period expired. To conclude that the issuance of the warrant extends the term of probation into infinity is clearly illogical and contrary to law. Therefore, Mr. Husband did not commit this offense while serving a term of probation. Simply stated, the two-point upward adjustment pursuant to §4A1.1(d) does not apply here. Accordingly, Mr. Husband's cirminal history category is level III, rather than the level IV suggested in the presentence report.

Respectfully submitted

Terence F. MacCarthy
Executive Director,
Federal Defender Program

BY: John F. Murphy
John F. Murphy
Attorney for Defendant Husband

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John -

FYI

STATEMENT

OF

JOE B. BROWN
CHAIRMAN
SENTENCING GUIDELINES SUBCOMMITTEE
ATTORNEY GENERAL'S ADVISORY COMMITTEE

BEFORE

THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

SENTENCING GUIDELINES

ON

APRIL 7, 1989

Mr. Chairman and Members of the Commission:

I greatly appreciate the opportunity to appear before the Commission as a member of the Attorney General's Advisory Committee's Subcommittee on Sentencing Guidelines. As you know, this Subcommittee, comprised of ten United States Attorneys, has met periodically over the last couple of years, generally with members of the Commission staff and often with Commission members to discuss problems and solutions to those problems under the Sentencing Guidelines. At our most recent meeting following the training seminar in Phoenix, we discussed the proposed amendments to the Guidelines in detail.

We will be submitting through the Department's ex officio member of the Commission, Steve Saltzburg, our comments on these very shortly. The members of the Sentencing Subcommittee feel that they do have a good perspective of the Sentencing Guidelines and the problems that do arise from time-to-time, since the United States Attorneys in the field are the ones most directly affected by the Guidelines.

In the time allotted to me this morning, I would like to address a few of the more important issues remaining after Ed Dennis' very thoughtful comments.

BANK ROBBERY (AMNEDMENT 50)

Bank robbery is an issue that has generated a number of comments to members of the Subcommittee. Our belief that the Guidelines as currently written are too low for bank robbery is borne out by the January 12 report to the Commission Research and Development Program by Mr. Baer, Chairman of the United States Parole Commission. From that study, the Parole Commission concluded that 57% of the robbery cases currently under the Guidelines would end up serving less time than they would have under the old parole guideline range. Of the 21 cases making up this study, it appeared that one received a more severe sentence than he would have under the old parole guidelines, 7 received the same sentence and 13 received a lesser sentence. The Subcommittee's recommendations is that the basic offense level for robbery under Guideline 2B3.1 be raised substantially from the basic offense level of 18.

The Commission has solicited comments on whether additional robberies not covered by the count of conviction should be used to enhance punishment. We believe that they should be and recommend the adoption of option 2 which would provide for increased punishment based on the number of robberies the defendant is found to have committed.

ROBBERY INVOLVING USE OF A FIREARMS (AMENDMENT 50)

We also believe that there needs to be a very substantial increase in the specific offense characteristics where a firearm or explosive device is involved. Congress has clearly indicated that it feels the use of a firearm in carrying out a serious felony such as robbery warrants a mandatory five-year consecutive sentence. We believe that this specific offense characteristic for robbery carried out with a firearm or explosive device should reflect this Congressional mandate. This could be accomplished by providing, in §2B3.1(b)(2), that if a firearm or explosive device is discharged the increase shall be 10 levels, if the firearm or explosive device is used, 9 levels, and if the firearm or explosive device is brandished, displayed or possessed, 8 levels. An 8 level increase would be very close to the five-year consecutive minimum mandatory that Congress has provided.

Of course, in those cases where an 18 U.S.C. §924(c) violation is also charged, the enhancement under this specific offense characteristic would not normally be applied. However, the application of such a specific guideline would allow the Court to impose the justifiable increase for an armed bank robbery even though §924(c) was not specifically charged. We believe it would also bring the robbery guidelines more into keeping with existing practices and sentences and adequately punish robbery offenses where a firearm or explosive device is used.

We would also strongly recommend that a specific offense characteristic be put into the Guidelines for those individuals who use a fake or simulated firearm or explosive device. The fear engendered by victims is the same whether the firearm or explosive device is real or fake. In many cases, what appears to be a real firearm or explosive device will be displayed but it may be difficult to establish, even by a preponderance of the evidence, that what was displayed was in fact real. The defendant will normally, of course, claim that it was not real where he is not caught in actual possession of the weapon. A 2 level increase for use of a simulated or fake firearm or

explosive device would be entirely appropriate. This would recognize the fear caused to the victims and would also recognize that there is an increased risk in general when even a fake is possessed or displayed. With these additional adjustments, we would also recommend that the cumulative adjustment from Subsections (2) and (3) not be limited but in fact be given full force and effect.

NEW CRIMINAL HISTORY CATEGORY

Mr. Dennis has already pointed out the Department's position concerning the career criminal guidelines. Based upon the Congressional language and the Department's interpretation of it, we agree that the current guideline is required absent statutory change. We do support an acceptance of responsibility reduction to the current Guidelines.

However, in discussing the career offender offenses, the Commission proposed in option 1 a criminal history category VII. The Subcommittee believes that a criminal history level VII along the lines of option 1, should in fact be considered and adopted across the board without reference to the career offender provisions.

Many of us are seeing presentence reports which indicate that defendants have criminal history points in excess of 20. The current category 6 does not take into account criminal history points above 13. While it is always possible for the court to use a departure, an upward departure almost assures a defense appeal. the Subcommittee believes that there are a number of individuals who are in fact habitual criminals but who do not meet the violent or drug offense career test. These criminals are individuals who have committed repeated property immigration, and fraud related offenses. Given the fact that recent studies by the Department of Justice indicate that a large number of defendants, in fact, do come back into the criminal justice system within five years after release, we believe that those defendants who continue to commit crimes even though not violent, reach a point where they need to be incapacitated for increased periods of time. The range set for a new category VII would accomplish this.

The Subcommittee was particularly concerned, in many cases, in the immigration area that offenders with a history of many, many violations are simply not adequately punished.

CAREER OFFENDERS (AMENDMENT 243)

On the issue of career criminals, the Subcommittee was bothered by the current definitions in 4B1.2(3) which define prior felony convictions. This current definition as applied to the career criminal and criminal history scores seems, at times, to produce an arbitrary result.

For example, an individual who many years apart commits two unarmed bank robberies using a note only would qualify for career offender status upon his third note job and would be sentenced with a offense level of 32. On the other hand, an individual who commits five armed bank robberies over a five-year period is caught, pleads not guilty, and is convicted of all five bank robberies, would be deemed to have only one conviction and would not qualify for the career offender status. He could also have a criminal history level as low as II. It appears to us to be much more logical and consistent with the Congressional intent for the Commission to provide that prior felony convictions will be counted separately, where for sentencing purposes they would not have been grouped but counted separately. Thus, in the example that I cited, the individual convicted of five separate bank robberies would not have had those five robberies grouped together but would have received a sentence based upon these offenses being treated separately. To arbitrarily limit prior offenses to those which do not occur at a consolidated trial or consolidated plea seems unreasonable. An individual committing bank robberies in two states will normally be tried and convicted separately. An individual committing two bank robberies in the same locality will very often have his cases tried or sentenced together. The different treatment given these situations, particularly when it moves the defendant from a normal criminal history into the criminal career category seems to induce a tremendous disparity in the sentencing process.

HOBBS ACT (AMENDMENT 6)

Another area of considerable concern to the Subcommittee are those violations involving the Hobbs Act, particularly offenses committed under the color of official right. The current guideline 2C1.1 sets a base level of 10 but then applies the greater of either the value of the bribe or an 8 level increase by an official holding a high level decision making or sensitive position or an elected official. We believe that

these two offense characteristics should be added together to arrive at a substantially higher violation for those officials who have used their position to secure substantial sums of money. Offenses involving color of official right are extremely serious since they erode the public confidence in its elected and appointed officials. This erosion of confidence justifies severe punishment. Many of the United States Attorneys who have had experience under the guidelines with the Hobbs Act have pointed out that the current sentences often run well under two years real time. The base level for this offense also needs to be raised at least two levels. We will address this further in our written submission to the Commission.

ESCAPE PROVISION (AMENDMENT 160)

In connection with the escape provision, we believe that there should be a specific offense characteristic enhancement for those individuals who escape whether from a secured or non-secured facility who are serving time for drug or violent offenses. At least a 2 level adjustment upward should be given those individuals to insure that society remains protected from them as long as is reasonably practical.

RELEVANT CONDUCT (AMENDMENTS 11 & 12)

Concerning the amendments on relevant conduct, we believe that some clarification may be needed in some areas to prevent placing too much conduct on a low level defendant. We will submit more specific comments on this issue later.

SETTING LEVELS WHERE THERE IS A MINIMUM MANDATORY SENTENCE

The Commission in several cases has asked for comment on where offense levels involving minimum mandatory sentences should be set (Amendment 96). The Subcommittee recommends these be set above the minimum so there can be a reduction to the minimum mandatory sentences upon acceptance of responsibility. Without some flexibility and give, these minimum mandatory sentences risk clogging the system with trials.

TIME OF ACCEPTANCE OF PLEA (6B1.1(c))

The Subcommittee is worried that using this rule, many judges defer accepting any part of a plea until the presentence report is completed. This leaves the government in an awkward position for a couple of months until the PSI is completed. A defendant can withdraw his plea at any time for no real reason during this period. We recommend that the court be advised to

accept the plea itself at the time it is offered and only defer accepting the plea agreement until later. By accepting the plea, the defendant will have to show good cause to withdraw his plea. Should the court reject the plea, the defendant would have good cause to withdraw, but would not have two months or more to think about withdrawing for any reason that was not fair and just.

Again, the Sentencing Guidelines Subcommittee appreciates the opportunity to work with the Commission, and welcomes any questions that the Commission has now or in the future.

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FRED WARREN BENNETT
FEDERAL PUBLIC DEFENDER

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March 27, 1989

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

Attention: Public Comment

Re: Proposed Amendment No. 243
-Section 4B1.1 (Career Offender)

Gentlemen:

As the Federal Public Defender for the District of Maryland, I am writing this letter to support the adoption of proposed Amendment No. 243 to Section 4B1.1 (Career Offender) of the Sentencing Guidelines.

I support a revision of the Career Offender guideline, and of the three options presented in the proposed amendments, I am writing to support Option 1 as being the most just. Option 2 represents a middle ground. I would hope that the Sentencing Commission would summarily reject Option 3 which would have the effect of setting a sentence for a Career Offender at the statutory maximum. Option 3 is draconian, gives a judge no discretion and totally ignores significant variations in the seriousness of the actual offense conduct.

The District of Maryland has been applying the Sentencing Guidelines since November 1, 1987, and my Office has had considerable experience dealing with the Career Offender provision. Although the United States District for the District of Maryland struck down the Sentencing Guidelines as unconstitutional in United States v. Bolding, 683 F.Supp. 1003 (D. Md. 1988)(en banc), the order in the Bolding case was stayed and judges in our District have been applying the Guidelines in all cases involving criminal conduct allegedly occurring after November 1, 1987.

My criticism of the present Career Offender guideline, Section 4B1.1, mirrors many of the complaints reported to the Sentencing Commission. These criticisms include:

1. Sentences for defendants in the Career Offender category, which are based at or near the statutory maximum, totally ignore significant variations in both the seriousness of the actual offense conduct and the prior criminal history of the offender. Thus, Career Offender guideline sentences are frequently unjust and provide no marginal deterrence.

2. A sentence for a Career Offender under the Guidelines is frequently excessive when compared to the actual seriousness of the offense conduct.

3. The sentence for a Career Offender too heavily depends on the charge of conviction for the instant offense and prior offenses. Thus, differences in plea negotiation practices among state courts (for prior convictions) and differences in plea negotiation practices among federal prosecutors (in regards to charge bargaining and the "offense of conviction") can affect whether the Career Offender provision applies at all in a given case.

4. The distinction between the criminal records of defendants with a criminal history category of VI and those who are in a Career Offender status is insufficient in most cases to warrant such large differences in the final sentence.

5. The sentences are longer than needed for either deterrence or incapacitation with a resulting waste in prison space.

6. The Career Offender provisions actually discourage guilty pleas because a person who is found to be a Career Offender cannot receive a two point downward adjustment for Acceptance of Responsibility. I see no rational reason as to why any other offender (including a defendant in the Criminal Livelihood Section 4B1.3 category) can qualify for a two (2) point downward adjustment for Acceptance of Responsibility, but not a Career Offender.

An actual case that I recently handled demonstrates the serious problems with the present Career Offender guideline. In the case styled United States of America v. Frank Dowling, Criminal No. K-88-0296 in the United States District Court for the District of Maryland, Mr. Dowling was convicted of possession with intent to distribute PCP under 21 U.S.C. § 841(a)(1). The facts show that Mr. Dowling acted as a "mule" or "courier" for a drug distributor and that Mr. Dowling drove from the District of Maryland into the District of Columbia to obtain a one ounce bottle of liquid PCP which sold for $250.00. Mr. Dowling was to receive $25 for acting as the "courier" and a "dipper" of the PCP. Mr. Dowling was arrested in the District of Maryland after an automobile accident occurred and he plead guilty to the felony of possession with intent to distribute PCP.

The base offense level for the crime of possession with intent to distribute one liquid ounce of PCP is 18. The offense level was raised to 32 because Mr. Dowling qualified as a Career Offender. Thus, Mr. Dowling's offense level was raised 14 levels based on the following convictions which qualified for Career Offender purposes:

1. A 1975 conviction for attempted arson in Baltimore, Maryland.

2. A 1982 conviction for assault and battery in Baltimore City, Maryland.

3. A 1985 conviction for assault and battery in Baltimore, Maryland.

All three convictions were based on guilty pleas and there is no question but that the attempted arson is a predicate offense. However, the two convictions for assault and battery qualified for Career Offender criminal history purposes even though they were misdemeanors under Maryland state law (and common law misdemeanors at that, i.e., the conviction carried no fixed penalty) because these

convictions were for state crimes which could be punishable by a term exceeding one year.

In light of the fact that Mr. Dowling qualified as a Career Offender, the offense level was raised from 18 to 32 and the guideline range went from 57-71 months (offense level 18, criminal history VI) to a guideline range of 210-262 months. Thus, because Mr. Dowling qualified as a "Career Offender" on a case involving his acting as a courier for the transportation of a one ounce bottle of liquid PCP purchased for $250, the possible guideline sentence was a minimum of 210 months. With all due respect, neither the actual offense conduct (possession with intent to distribute $250 worth of PCP in a case in which the defendant acted as a courier) nor the defendant's prior record (one actual state felony and two state misdemeanor convictions, all resulting from guilty pleas based on plea bargains) should have subjected Mr. Dowling to such a lengthy sentence.

The defendant actually received a sentence of 108 months under the Sentencing Guidelines. Although the defendant received this sentence based on his cooperation (a downward departure under Section 5K1.1 for cooperation) and because of other factors in the case, the main point that I wish to make from all of this is that I never should have had to start negotiating a disposition in this case with a beginning guideline range of 210-262 months.

It is interesting to note that under the Commission's proposed amendment, Option 1, the sentencing range for a Career Offender at the same offense level that applied to Mr. Dowling, offense level 18, would be 88-110 months. Mr. Dowling, who ultimately received a sentence of 108 months, fits precisely within the sentencing range proposed for a person with a criminal history of category VII (Career Offender) under Option 1 of the proposed amendment to Section 4B1.1.

In summary, I agree with the criticisms of the present Career Offender guideline which are set forth in the

proposed amendment. Based on the reasons set forth in the criticism of the present Career Offender guideline, and based on the reasons set forth herein, I would respectfully request that the Sentencing Commission amend Section 4B1.1 by setting a new criminal history category VII and by adopting Option 1.

I would also respectfully suggest that the Sentencing Commission give favorable consideration to a further amendment to Section 4B1.1 by including a new subsection that allows, consistent with the January 15, 1988, amendment to the Criminal Livelihood Section, 4B1.3, for a two point downward adjustment for Acceptance of Responsibility if Section 3E1.1 applies.

Thank you for your attention to this matter.

~~Sin~~cerely,

Fred Warren Bennett

FRED WARREN BENNETT
Federal Public Defender

FWB/jek

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
PROBATION OFFICE

January 16, 1990
Columbia, S. C.

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4A1.1
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Mr. Paul Martin
U. S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D. C. 20004

Re: Guideline Amendments

Dear Paul,

I am writing in response to the Commission's request for input from the field. I attempt to read all the presentence reports completed here in the District of South Carolina before the case gets to the sentencing hearing. The amendments that became effective November 1, 1989, cleared a lot of things up. It is surprising how the change of one or two words can make such a big difference. The application note amendments were particularily helpful. As far as any further changes are concerned, I would like for the Commission to consider several of the following items with which we continue to have difficulty.

First, in Chapter IV, I feel that it would be to everyone's benefit to have the applicable time periods noted under 4A1.2(e) included under appropriate subsections of 4A1.1, Criminal History Category. This would make an easier reference for the probation officer in computing the guidelines and would also make it easier to find the proper authority for prior sentences. Also in Chapter IV, many people are having difficulty with the definition of "conduct not part of the instant offense," which is found under 4A1.2(a)(1). Our position is that if any previous conduct for which the defendant was sentenced is related in any way to the instant offense, we do not count that previous sentence. Others have taken the view that the previous conduct has to be the same harm or at least punished in some way under the relevant conduct considerations in the instant federal case. I think an application note may be helpful to clear up some of the differences.

Probably the most problems we have experienced for the past year have been in the area of supervised release and fines. I really don't think any additional changes should be made in the supervised release guidelines unless others around the country are having an unusual amount of difficulty. At this point, our people have a knowledge of them, particularly the application of those guidelines in Title 21 drug cases.

However, the area of fine computation is another story. We continue to have errors where restitution is involved and the amount of restitution is greater than the minimum of the fine range. More specifically, under 5E1.2(c)(2)(C), many probation officers have had difficulty understanding the pecuniary gain to all participants. Many feel that once restitution has been made, there is no gain, and, therefore, an enhancement should not be made to raise the top of the fine range. An application note clearing this up would be helpful.

The Commission's consideration of these items will be very much appreciated by all of us here in the District of South Carolina. I wish you continued success in Law School, as well as in any other pursuits that you may be undertaking at this time.

Sincerely,

James W. Dunbar

for Thomas N. Whiteside
Deputy Chief U. S. Probation Officer

TNW/bw

Paul Martin

UNITED STATES DISTRICT COURT
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July 12, 1989

REPLY TO: Springfield

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

Re: Clarification of Section 4A1.2(a)(3) of Guidelines Manual

Dear Commissioner:

Recently we had an objection to our criminal history computation by an Assistant United States Attorney. Enclosed is a copy of same. I believe that it would be helpful if the words, "or execution," were inserted following the word, "imposition," in 4A1.2(a)(3) on page 4.4 of the Guidelines Manual.

The section would read as follows:

(3) A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under §4A1.1(c).

This would clarify the guideline and alleviate similar objections in the future.

Sincerely,

Charles L Clark

Charles L. Clark, Ph.D.
Senior U.S. Probation Officer

CLC:cac
(Typed 07/12/89)
Enclosure
cc: Lewis D. Frazier, Chief U.S. Probation Officer, Kansas City, Missouri.

NACDL

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National Association of Criminal Defense Lawyers

Reply To:

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April 10, 1989

VIA FEDERAL EXPRESS

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

Re: Supplementary Written Comments on Proposed Amendments to the Sentencing Guidelines Authorized by Commission Action Dated February 14, 1989

Dear Judge Wilkins:

These written comments are submitted to supplement the public testimony of Scott Wallace and I, on behalf of the National Association of Criminal Defense Lawyers, at the hearings dated April 7, 1989, in Washington, D.C. NACDL is a non-profit organization representing approximately 15,000 criminal defense attorneys, law professors and criminal justice professionals residing and practicing in every state throughout the nation. NACDL has been working with the Commission over the past several years with respect to the development of the Guidelines. Representatives of

NACDL have testified in previous public hearings held by the Commission. I serve as Vice-Chair of the NACDL Sentencing Committee and Co-Chair of the NACDL Committee on Prisoner's Rights. My private practice is limited to federal post-conviction remedies, including Guideline sentencing, direct appeals and habeas corpus litigation in federal courts throughout the nation.

I. Introduction: The Amendment Process

As a threshold issue, NACDL urges that before further amendments to the Guidelines are considered or acted upon by the Commission, careful scrutiny and attention must be given to the process by which amendments are developed and the precedent which is being set for the development of future amendments.

The initial Guideline package developed by the Commission was the product of an extraordinarily thorough, deliberative process which, according to Commission statements, was based upon an exhaustive empirical review of existing sentencing practices.[1/] It is precisely this

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1/ See e.g., "Supplementary Report on the Initial Sentencing Guidelines and Policy Statements" (June 18, 1987) ("The Commission sought to resolve the practical problems of developing a coherent sentencing system by taking an empirical approach that starts from existing sentences. It has analyzed and considered detailed data drawn from more than 10,000 presentence investigations, less

(continued...)

intense level of scrutiny that Congress hoped for when it established the Commission. However, after reviewing the present set of Proposed Guideline Amendments, NACDL is deeply concerned that the Commission appears to be retreating from its earlier painstaking, empirically-based approach. We do not believe that there is presently enough data available to conduct any meaningful analysis of sentencing practices under the Guidelines and whether they are "working" as intended.[2/]

In lieu of basing Proposed Guideline Amendments on empirical data and an examination of past sentencing practices, particularly experiences under the Guidelines in

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1/ (...continued)
detailed data on nearly 100,000 federal convictions during a two-year period, distinctions made in substantive criminal statutes, the United States Parole Commission's Guidelines and resulting statistics, public commentary, and information from other relevant sources, in order to determine current sentencing practices, including which distinctions are significant in present practice." Ibid. at 16.

2/ At the April 7, 1989, public hearings, Judge Breyer essentially conceded that point by stating that the Commission did base the Proposed Amendments pertaining to robbery (amendment nos. 47-50,) and the career criminal offender amendment (amendment no. 243) on statistical analysis. This data has not yet been made available to NACDL but, upon information and belief, we feel from what we know thus far that such data fails to reflect the commitment to empirically-based review established by the initial development of The Sentencing Guidelines. We are unaware as to whether exhaustive, empirically-based analysis formed the rationale for other Guideline amendments at issue herein particularly since many district courts throughout the nation did not apply the Guidelines until after the decision in Mistretta.

relation to previous sentencing statistics, it appears -- much to our chagrin -- that this process is one of "amendment by anecdote." Most striking among the anecdotal amendments is the Commission's reaction to United States v. Correa-Vargas, 860 F. 2d 35, 1 Fed. Sent. R. 313 (2nd Cir. 1988) (amendment no. 97, §2D1.6, discussed infra.). Similarly, the proposal for amendment to the bank robbery guideline (amendment no. 50, §2B3.1) is evidently based upon the comments of a self-selected array of "comments from several sources, primarily Assistant United States Attorneys and certain district judges." This, clearly, is not the type of scientifically-based empirical analysis that Congress expects of the Commission.

Finally, with respect to this point, NACDL firmly believes that the process of "amendment by anecdote" is inconsistent with the enabling legislation which subjects Sentencing Commission rules and regulations to the notice and comment provision of the Administrative Procedure Act. See, 28 U.S.C. 994(x); 5 U.S.C. §553. et seq. [3/]

[3/] Although the "judiciary" is generally immune from A.P.A. challenges, based upon the unique "agency" characteristics of the Commission, it is possible that the Commission will be faced with Administrative Procedure Act challenges under 5 U.S.C. §706(2)(A) which states that "the reviewing court shall... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law." In more than 20 constitutional challenges

(continued...)

NACDL also believes that a prison impact statement should be prepared as to each proposed amendment. While it is our understanding that a prison impact statement is in progress, it was not completed prior to the publication of the proposed amendments. In this regard, the Commission may have discounted the integral role of a prison impact statement which promulgation of each amendment may effect. It may serve as a post hoc rationalization only.

In summary as to this point, NACDL does not believe that the Commission has had adequate experience under the existing Guidelines, nor has it continued its exhaustive,

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3/ (...continued)
to the Guidelines in which NACDL participated, amicus curiae, there was a vast difference of opinion between the Sentencing Commission and the Department of Justice as to the appropriate location, for separation of powers purposes, of the Commission. The Sentencing Commission displays all of the incidents normally associated with an executive agency and the United States consistently maintained, even in the Supreme Court, that the Commission is or may be an executive agency notwithstanding the statutory moniker placing it within the judicial branch. See e.g., Brief of the United States to the Supreme Court in Mistretta which stated, in relevant part, "the Commission thus performs a type of rulemaking function that has regularly been assigned to administrative agencies exercising the executive power." Ibid. at 34 (footnote omitted). In Mistretta, the court noted that the Commission "is an independent agency in every relevant sense." 109 S. Ct. at 665-66 (1989). Thus, NACDL is opined that the Commission must be far more sensitive to the spirit and intent of the Administrative Procedure Act in promulgating regulations or amendments which may become subject to challenge -- on procedural and substantive grounds -- through judicial review.

deliberative, empirically-based analysis of past sentencing practices to place itself in the position of proposing amendments at this time. **For these reasons alone, we urge the Commission to withhold any action on the proposed amendments, except for all but indisputably non-controversial or purely technical amendments, until its submission to Congress in May 1990.**

II. Comment on Specific Guideline Amendments

The following constitutes NACDL's position with respect to the proposed Guideline Amendments, seriatim.

Amendment Nos. 1-2: No comment.

Amendment No. 3: This proposed amendment would delete "interpolation" as a standard means of departure. At present, most of the assault offense Guidelines increase two levels for bodily injury, four levels for serious bodily injury, and six levels for permanent or life threatening bodily injury. This amendment sets the stage to provide for three and five level increases for injuries occurring in between the already described injuries rather than suggesting that the court "interpolate" and depart up or down. Not having much experience with how the Guidelines apply in assault cases yet, it is difficult to comment on the effect of this amendment. NACDL concurs

with the Federal Defenders' position that "interpolation" is a useful tool and should be preserved in the Guidelines. While the impact on assault cases may be slight, NACDL believes that interpolation should be specifically authorized and not just in an "additional explanatory statement" as the amendment suggests.[4/]

Amendment Nos. 4-5: No comment.

Amendment No. 6: NACDL suggests a clearer definition of "dangerous weapon."

Amendment No. 7: The necessity of this amendment is unclear. It simply refers to §2J1.7 for defendants subject to a sentence enhancement under 18 U.S.C. §3147. There is a substantive amendment to §2J1.7 contained in proposed amendment no. 142. In that section, the Commission proposes to add two, three, or four levels to the offense level for the offense committed while on release rather than to give a separate offense level for a §3147 enhancement. The difference in the two sections, assuming an

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[4/] The Commission appears to create a new category called the "additional explanatory statement." It is unclear from the amendments what role these additional explanatory statements have and whether they will be reproduced with the Guidelines. In the interpolation example, the additional explanatory statement acknowledges that the amendment does not preclude interpolation in other cases. However, if the additional explanatory statement does not appear in the Guidelines, the term will effectively be lost except for those administrative law buffs who can locate the history of the regulations.

addition of only two levels (rather than three or four levels) is probably negligible depending upon the offense level for the new offense. Under existing §2J1.7, a defendant could have an offense level for a §3147 violation of up to 12 levels. Unless the §3147 offense level was five or more levels less serious than the underlying offense level (as we understand it at this moment), there would likely be a two-level increase anyway. In short, NACDL takes no position on amendment no. 7 other than to express our concern about the necessity for the amendment.

Amendment Nos. 8-9: No comment.

Amendment No. 10: The fundamental objection that we have to the proposed addition of (d) relates to the provision that a conspiracy count with multiple objectives is to be treated as if the defendant were convicted of a separate conspiracy count for each objective set forth in the conspiracy. A similar instruction is now found at Application Note 9 of §3D1.2 which the Commission now says is inadequate. The fundamental objection we have is that the Guideline attempts to transform a single count of conviction into multiple counts of conviction with a related increase in units that increases the overall offense level. Consequently, a defendant convicted of a conspiracy with multiple objectives (however objectives are

determined) will then face an offense level higher than the count of conviction. This would probably happen in drug and fraud cases as a result of the relevant conduct rules anyway. Yet, this amendment attempts to cover conspiracy convictions where substantive offenses are not otherwise obtained. It is laudable that the Commission suggests that the court should not apply the new rule unless it would convict the defendant of conspiring each object of the conspiracy. We urge the Commission to consider conspiracy as only one count of conviction unless the defendant is also convicted of the substantive objects of the conspiracy. The rule encourages prosecutors to file a one-count conspiracy charge with multiple objectives without having to prove the substantive offenses. That is, through a potential abuse of prosecutorial discretion, Guidelines in conspiracy cases may be determined by the preponderance of the evidence standard where it might be more appropriate, and consistent with fundamental notions of due process, to require proof beyond a reasonable doubt.

Amendment No. 11: No comment.

Amendment No. 12: This amendment attempts to clarify the sentencing liability of one defendant for conduct of codefendants. In actuality, it appears to impute liability for reasonably foreseeable codefendants' conduct in all

cases rather than in just conspiracy cases. This appears to be in marked contrast to former Parole Commission policy from which this idea evidently originated. The Guidelines would create sentencing liability for an uncharged conspiracy or an uncharged aiding and abetting offense so long as the conduct of a codefendant was reasonably foreseeable by the defendant. Actually, the language is broad enough ("conduct of others") to place sentencing liability on the defendant for uncharged conduct of unindicted persons. This appears to be a substantial break from the offense of conviction system with all of its variables under the rules of relevant conduct. In addition, the proposed amendment to the Application Note contains an example of where the Commission would hold a defendant liable for acts of other codefendants in a bank robbery case. This example is inappropriate because it concludes that a defendant who did not enter the bank would be held liable for injury inflicted on a teller by codefendants who enter the bank "because such an injury is reasonably foreseeable of the commission of a bank robbery." This example should be deleted. Another example regarding an ongoing marijuana importation conspiracy purports to limit the sentencing liability of a defendant hired to off load a single shipment. While this example could be construed as favorable

to the defense, on balance, we recommend that all examples be deleted and that the courts be left to their own interpretation as to what is reasonably foreseeable.

Amendment Nos. 13-19: No comment.

Amendment Nos. 20 & 21: These amendments provide that the base level of six for a "minor assault" include conduct that involves physical contact or where a dangerous weapon (including a firearm) was possessed and its use threatened. This appears to broaden sentencing responsibility in minor assault cases. It is not possible to determine from the amendment the impact on prison population.

Amendment Nos. 22 & 23: Apparently this is a clarifying amendment except that it appears to authorize (in the commentary) the application of the "official victim" adjustment if the conviction is for aggravated assault. If the conviction is under 18 U.S.C. §111 where the official status of the victim is a material element of the offense, there should not be an official victim adjustment to avoid double counting.

Amendment Nos. 24 & 25: See comment to amendment no. 3.

Amendment Nos. 26-28: No comment.

Amendment No. 29: See comment to amendment no. 3.

Amendment Nos. 30-31: No comment.

Amendment Nos. 32-33: These sections purport to change the theft-loss tables to match the tax-loss tables and then further increase the levels for various monetary amounts at the higher end of the range. While it probably makes sense to have one table for theft, fraud, and tax losses, in the absence of evidence that sentences are too low, the increase in levels at the higher ends of the tables would appear inappropriate.

Amendment Nos. 34-49: No comment.

Amendment No. 50: This represents a significant change in the bank robbery guidelines with the Commission suggesting several options. The proposal results from "comments from several sources, primarily Assistant United States Attorneys and certain district judges" that the robbery guidelines result in low sentences for first offenders. We strongly object to any amendment to this guideline unless and until it is shown by experience that the past sentencing practice warrant an increase to avoid disparity. The relevant conduct rules for dismissed counts appear inequitable here.

Amendment Nos. 51-53: No comment.

Amendment No. 54: See, Amendment 3, supra.

Amendment Nos. 55-63: No comment.

Amendment No. 64: This section seeks to clarify the commentary to bribery guidelines specifying that bribes are treated as separate unrelated offenses unless the counts involved several related payments as part of a single bribe. NACDL supports a proposal to allow bribery offenses to be grouped rather than clarifying that they are not to be grouped unless part of a common scheme or plan.

Amendment No. 65: No comment.

Amendment No. 66: The Commission seeks comments and suggestions on how to address multiple bribery or gratuity cases. The Commission acknowledges that there is no enhancement for repeated instances of bribery involving the same course of conduct or common scheme or plan whereas the fraud and theft guidelines provide an increase for more than minimal planning. The Commission suggests consideration of a two-level increase for offenses involving more than one bribe. NACDL recommends that the Commission withhold adoption of this amendment to determine how many cases are actually involved, what departures are being used, and so that the Commission may evaluate the impact on prison population of this two-level increase before making any change.

Amendment No. 69: No comment.

Amendment No. 70: See comment on amendment no. 6, supra.

Amendment No. 71: No comment.

Amendment Nos. 72-78: These proposed amendments concern the "Application Notes" relating to the "drug equivalency tables." The drug equivalency tables set forth in chapter 2D convert most drugs, regardless of their pharmacological characteristics, to a heroin or marijuana equivalency. For example, one gram of LSD[5/] is deemed the functional equivalent of 100 grams of heroin or PCP notwithstanding the fact that pharmacologically LSD is an hallucinogen rather than a traditional narcotic or opiate derivative. The Guidelines convert one gram of methaqualone (quaaludes) to .7 grams of heroin or seven milligrams of marijuana. Methaqualone, a psychotropic drug, is not in the same pharmacological class as opiates or marijuana. The list goes on and on, ad infinitum. Barbiturates such as sodium secobarbital (seconal) are also converted to a heroin or marijuana equivalency. So are tranquilizers such as valium.

Not only is the Commission's drug equivalency table irrational, the drug quantity table is equally irrational

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5/ See amendment no. 82, infra.

by arbitrarily classifying drugs with different pharmacological characteristics in the same base offense level. This may lead to the type of Administrative Procedure Act challenges described, supra. NACDL believes that the drug equivalency tables and drug quantity table set forth in chapter 2D represent agency rules which are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).

Amendment Nos. 80-81: No comment.

Amendment No. 82: In the interest of uniformity and fairness, it is critical that the Commission clarify that the carrier on which LSD is placed is not considered as part of the mixture and therefore weighed.

Amendment Nos. 83-84: No comment.

Amendment No. 85: See comments to amendments 72-78 regarding drug equivalency tables generally.

Amendment No. 86: NACDL supports this proposal for the reasons stated in the Notice of Proposed Amendments.

Amendment No. 87: See generally, comments on drug equivalency tables set forth at amendments 72-78, supra.

Amendment No. 88: No comment.

Amendment No. 89: This section pertains to the "drug equivalency tables" which previously converted one gram of paregoric into two milligrams of heroin or two grams of

marijuana. It also converted one gram of hydrocodone cough syrup into two milligrams of heroin or two grams of marijuana. The proposed amendment would partially achieve its stated goal by measuring paregoric and hydrocodone cough syrup in milliliters instead of grams since these opiate derivatives are generally in liquid form. But for the reasons previously stated, conversion to a marijuana alternative equivalency lacks any pharmacologically based validity.

Amendment No. 90: See comments to amendments 72-78, supra.

Amendment Nos. 91-92: No comment.

Amendment No. 93: NACDL opposes the proposed amendment to section 2D1.4. The Commission's stated "reason for amendment" is inconsistent with the proposed amendment because it makes the Application Note more restrictive by adding another material element, intent. The determinative factor here should be either capability or intent recognizing -- as the Commission apparently does -- that mere "puffing" absent either the capability or intention to produce additional drugs should not be calculated in reaching the base offense level.

Amendment No. 94: NACDL opposes the proposed amendment to Application Note (1) to section 2D1.4, and for the

reasons stated herein, also opposes the amendment of 1B1.3 (proposed amendment 12). The purpose of this Application Note is to hold an offender accountable for his or her individual offense characteristics. Inchoate offenses, including conspiracy, should clearly exclude conduct which was not "reasonably foreseeable" but also -- in the conjunctive "or" -- excludes conduct where the offender had no reasonable ability to control the activities of other offenders committing more serious acts in furtherance of the overall offense conduct. This conforms with previous Parole Commission policies.

Amendment No. 95: NACDL opposes this proposed amendment because it takes away the plain meaning, as clarified by the Application Note, that a downward departure may be indicated for an unconsummated or uncompleted attempt or conspiracy.

Amendment No. 96: No comment.

Amendment No. 97: NACDL vigorously opposes the proposed amendment relating to section 2D1.6 for several reasons. First, the Commission has not accumulated or analyzed sufficient data regarding violations of 21 U.S.C. §843(b) to fully appreciate the far reaching ramifications of this radical change in Commission policy. Second, it sets a dangerous precedent, for purposes of future amend-

ments, to base a proposed amendment upon one or two currently isolated Court of Appeals decisions which further experience will only determine to be predictively significant as to the manner in which sentencing courts generally treat telephone counts in individual cases.

The third reason why NACDL strongly opposes any modification to this section relates to plea bargaining. This offense represents the only "safety valve" providing an escape from the restrictive drug quantity table which determines the base offense level for all other narcotics offenses. This valve must be left open in order to avoid a complete breakdown of the plea bargaining process, especially for offenders with relatively low culpability and peripheral involvement. See generally, §§6B1.2, 6B1.4. See also U.S. Department of Justice, Prosecutor's Handbook on Sentencing Guidelines and Other Provisions of the Sentencing Reform Act of 1984, and the "Thornburgh Memorandum" dated March 13, 1989.

Amendment Nos. 98-100: No comment.

Amendment No. 101: NACDL opposes this proposed amendment.

Amendment Nos. 102-109: No comment.

Amendment No. 110: The stated purpose is "to ensure that attempts and solicitations are expressly covered" but

the language is confusing. Is an attempt or solicitation to be graded under 2E5.1 or 2X1.1? The commentary should make it clear that section 2X1.1 controls.

Amendment No. 111: By incorporating the general breach of trust provision and removing the specific one presently contained in section 2E5.2, the Commission may unintentionally expand the scope of the breach of trust provision. Only one special kind of fiduciary is treated in 29 U.S.C. §1002(21)(A). As a result, this provision of the Guidelines should apply only to that class of fiduciary and to the exclusion of those who may fall within the scope of section 3B1.3. Maintaining the distinction is consistent with section 2E5.4.

Amendment No. 112: The proposed amendment works a significant increase in the scope of the guideline, applying it to efforts to conceal a theft or embezzlement. We suggest that concealment more properly is treated as the Commission has structured accessorial liability after the fact, i.e., a false entry to conceal should be treated less harshly than a false statement to conceal. In addition, we are concerned that the language "to facilitate" is too ambiguous and therefore may result in unnecessary litigation.

Amendment No. 113: No comment.

Amendment No. 114: See comment on amendment no. 112, supra.

Amendment No. 115: Comparing the theft loss and tax loss tables, the former are clearer and more workable. The fragmentation of dollar ranges in the tax loss tables creates an unwarranted need for litigation. There should be fewer, not more, gradations.

Amendment No. 116: See comment on 115, supra.

Amendment No. 117: No comment.

Amendment No. 118: In our view, this proposal places too much sentencing power in the hands of the prosecutor without any ability for the defendant to challenge the allegations. If the prosecutor can persuade a jury that an arson was committed, then let him or her file that charge. It is unfair to apply guidelines for a crime that has not been charged, and force the defendant to litigate at sentencing allegations never brought by a grand jury and which will be resolved by a lower standard of evidence at sentencing.

Amendment No. 119: The Commission should act in accordance with Congress's limited and specific direction. It should provide an enhancement only for the Major Fraud Act and should not provide a minimum offense level. Moreover, it is too early in the history of Guideline

sentencing to consider a new Guideline or higher offense level for insider trading or procurement fraud. There is no indication at present that change is indicated.

Amendment No. 120: The proposal is ambiguous. What is "coercion by drugs?"

Amendment No. 121: No comment.

Amendment No. 122: See comment to amendment no. 120, supra.

Amendment Nos. 123-127: No comment.

Amendment No. 128: The aggravating offense characteristic is not one contemplated by Congress or included in the statute. If there is media coverage of a trial involving "sadomasochistic or other violent conduct," does the increased penalty apply assuming that the material is otherwise obscene?

Amendment Nos. 129-139: No comment.

Amendment No. 140: NACDL opposes (c)(1) applying Guidelines for an offense which was not charged or tried, placing the defendant at sentencing in the position of defending against allegations never brought by a grand jury and which will be determined by a substantially lower standard of evidence applicable during the penalty phase.

Amendment No. 141: No comment.

Amendment No. 142: Given the confusion over the nature of 18 U.S.C. §3147 and the relatively few circuits that have decided the question to date, we suggest that the issue is best left for resolution by the courts as a matter of law and that the Guideline be held in abeyance until the legal issue is resolved.

Amendment No. 143: No comment.

Amendment No. 144: Is making an offer an attempt which therefore would fall within the scope of section 2X1.1?

Amendment Nos. 145-152: No comment.

Amendment No. 159: This amendment suggests consideration of the status of the smuggler of illegal aliens and increases the offense level to at least a level eight. Without this amendment, the offense levels range from six to 14 depending upon whether the offense was for profit and if the defendant has a prior conviction for smuggling aliens. In some respects, this amendment extends the relevant conduct rules to situations where the defendant is a deported alien (which carries a base level eight). This amendment would hurt the defendant if the smuggling was not for profit (level six) and the illegal alien defendant had no prior smuggling conviction. What this does, however, is allow the prosecutor to obtain a conviction for alien

smuggling and not have to charge or convict the defendant of his or her illegal status. However, it would appear to prevent an increase in levels in a multiple count conviction situation (e.g., one count of smuggling and one count of being a deportable alien found in the United States). On balance, we urge the Commission to consider the impact on prison population before amending.

Amendment Nos. 160-161: No comment.

Amendment No. 162: This proposal introduces a presumption of profit in section 2L2.1, trafficking in evidence of citizenship or documents authorizing entry. This amendment conforms section 2L2.1 to the structure of section 2L1.1. We object on the grounds that profit is an aggravator that should be proven by the government and not presumed as inherent in the offense. Section 2L1.1 should be reamended to conform to existing section 2L2.1 (section 2L1.1 was amended in January 1988 to presume profit).

Amendment No. 163: This purports to do the same to section 2L2.2 that amendment no. 159 does to section 2L1.1.

Amendment No. 164: This attempts to presume profit in section 2L2.3 (trafficking in United States passport). See comments to amendment no. 162, supra.

Amendment No. 165: This section seeks to amend section 2L2.4 in a manner similar to amendment no. 159. See comments to amendment no. 159, supra.

Amendment Nos. 166-168: No comment.

Amendment No. 169: The Commission seeks comment on whether an additional distinction should be made in escape cases where the escape is from secure as opposed to nonsecure custody. Presently, the Guidelines only distinguish between escapes from secure custody and those from nonsecure custody where the defendant voluntarily returns within 96 hours. Many escape cases involve walk-a-ways from halfway houses where the defendant does not voluntarily return within 96 hours. However, this kind of "escape" is significantly different from secure custody escapes. A nonsecure 96 hour return case should have a guideline which permits probation. Other walk-a-ways without a voluntary return could be placed within Guideline ranges where probation or 30 to 90 day sentences could be imposed. The Commission could also consider the relative severity of the offense for which the defendant was serving time when he or she absconded and the conduct while on escape status. There should be statistical support from past practices to give the Commission appropriate guidance regarding such sentences.

Amendment Nos. 170-187: No comment.

Amendment Nos. 188-242: No comment.

Amendment No. 243: NACDL concurs with the numerous critical grounds set forth in the Notice of Proposed Rule Making. The Commission proposes three options but NACDL does not believe that any one of those options would adequately remedy the flawed application of career offender guidelines and its reconciliation with the enabling legislation. We believe that further empirical study is needed in addition to more experience under this section before amending this important guideline. In reaching this conclusion, NACDL has studied the positions advanced by the Federal Defender Service and the American Bar Association. Of the two, NACDL tends to agree with the suggestion by the ABA indicating that "the Commission may want to consider making the career offender designation a basis for departure, given the tremendous variations among the underlying prior convictions that define a 'career offender.'"

Amendment Nos. 224-245: No comment.

Amendment No. 246: NACDL adopts the commentary submitted by the Federal Defender Service on the Criminal Livelihood Guideline Amendment, section 4B1.3. See also, United States v. Rivera, 694 F.Supp. 1105 (S.D.N.Y. 1988).

Amendment Nos. 247-259: No comment.

Amendment No. 260: The Commission seeks public comment on the question of whether the policy reflected in the existing Guidelines should be revised to accommodate the provision in section 7305 of the Omnibus Anti-Drug Abuse Act of 1988 providing for the use of home detention as an alternative to imprisonment in light of the existing Guideline distinction between home detention, community or intermittent confinement and imprisonment. First, it is clear that section 5C2.1(e) must be amended to permit home detention to be imposed as a substitute for imprisonment. As with intermittent community confinement, home detention, if substituted for imprisonment, should be done as an exact equivalent, i.e., day for day credit. Additionally, NACDL would not object to the court's discretionary imposition of electronic monitoring being used to supplement probation officer enforcement of the condition so long as the prisoner not be made to bear the cost of the hardware which could preclude large numbers of offenders from the benefit contemplated by this section. NACDL also believes that no type of offender should be precluded from home detention and that offenders should be able to be sentenced directly to home detention even if the applicable guideline range in the sentencing table is more than ten months. At the very least, if the Sentencing Guideline range is more than six

months but not more than ten months, a defendant should be able to be sentenced to home detention without being required to serve at least one-half of the minimum term in prison.

Amendment Nos. 260-267: No comment.

Amendment No. 268: NACDL strongly opposes this amendment which would revise section 5K1.1 relating to substantial assistance. First, prosecutors have far too much discretion in determining whether to move the sentencing court to authorize a sentence below any mandatory minimum, 18 U.S.C. §3553(e), or for a reduction of sentence, Rule 35(b), F.R.Cr.P. on account of cooperation with the United States. The proposed amendment to this section relating to the defendant's best good-faith efforts represent an impractical limitation. NACDL has consistently favored the use of cooperation as a ground for departure. Concomitantly, however, we feel that the enabling legislation vests far too much discretion in the government to unilaterally seek to reward a defendant's cooperation. Ultimately, we feel that both parties should have the opportunity to move the sentencing court either to impose a sentence below a statutory minimum or for relief under Rule 35. We recognize, of course, that this is beyond the Commission's authority. The proposed amendment,

in our view, which essentially requires "results" will likely lead to widespread perjury and confidential informant overreaching in order to secure the benefits of the proposed amendment.

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In conclusion, it is the position of the National Association of Criminal Defense Lawyers that the Commission should not adopt any amendments at this time due to the lack of empirically-based data and sufficient experience under the Guideline system upon which to predicate the promulgation of further rules. This point was underscored in comments by a number of the Commission's members in the Federal Sentencing Reporter (Feb./March 1989).

I wish to acknowledge the valuable assistance provided to me in the compilation of these comments, including the efforts of Alan Ellis, Esq., Judy Clarke, Esq., Alan Chaset, Esq., Neil Jaffe, Esq., Scott Wallace, Esq., and Irwin Schwartz, Esq.

We deeply appreciate the opportunity to comment on these matters of public importance.

Respectfully submitted,

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

By: _____
BENSON B. WEINTRAUB,
Vice-Chair, NACDL
Sentencing Committee

BBW/p

cc: Honorable Michael K. Block
Honorable Stephen G. Breyer
Honorable Helen G. Corrothers
Honorable George E. MacKinnon
Honorable Ilene H. Nagel

UNITED STATES COURT
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201

MBERS OF
EENA RAGGI
DISTRICT JUDGE

July 17, 1989

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

Dear Chairman Wilkins:

I am writing at the suggestion of members of your staff, Paul Martin and John Steer, with whom I have recently discussed my concern about the sentencing guidelines provision for supervised release terms as it applies in narcotics cases. The source of my concern is the discrepancy I perceive between the lengthy supervised release terms provided for in Title 21 and the more limited terms provided for in the guidelines.

The various sections of Title 21 suggest that Congress intended for defendants convicted of narcotics offenses to serve lengthy terms of supervised release, certainly no less than three years and, where appropriate, for the remainder of a defendant's life. The underlying rationale is clear: because of the high recidivism rate among narcotics offenders, and because of the devastating effect this particular criminal conduct has on communities, a strong deterrent is necessary to dissuade a narcotics defendant from returning to illicit activity.

In sharp contrast to the provision for possible life-long supervised release under Title 21, Congress has decided that for the majority of other federal crimes, supervised release terms shall not exceed five years. 18 U.S.C. § 3583. This distinction in supervised release terms between narcotics cases and all others is not, however, reflected in the guidelines.

Guideline 5D3.2(a) provides simply that: "If a defendant is convicted under a statute that requires a term of supervised release, the term shall be at least three years but not more than five years, or the minimum period required by statute, whichever is greater." Thus, for the vast majority of narcotics cases, supervised release is limited to

five years, substantially narrowing the possible term provided by Congress. Moreover, in those situations where Title 21 requires supervised release terms in excess of five years, for example when defendants have prior narcotics convictions, the net effect of the guidelines is to convert the statutory minimum into the guideline maximum. If this is indeed the Commission's intent, it would be useful to have it specified in commentary, as well as the reasons for reaching this conclusion, so that courts considering lengthier terms of supervised release can know whether or not factors are present in particular cases not adequately considered by the Commission and, therefore, warranting departure. I would, however, urge the Commission not to reach this result.

From my many years prosecuting federal narcotics cases, as well as from my current position serving as a judge in such cases, I am convinced that lengthy terms of supervised release are an important part of the sentencing scheme for such crimes. The reasons for placing repeat offenders dealing in large quantities of drugs on life-time supervised release are too obvious to detail. Even, however, in the case of individuals convicted for the first time, a defendant's background and the circumstances of his offense may indicate to a sentencing court a real risk that the individual will be tempted to return to a life of crime. A three to five year term of supervised release, with the possibility of re-incarceration for such a term should a defendant violate his release conditions, may not be an adequate deterrent to future criminal conduct, particularly for young defendants. In such cases, it may be appropriate to impose a twenty or thirty year term of supervised release, or even life-time supervised release as a strong message to the defendant that he must make a real change in his life. More flexibility is also necessary in the case of defendants who cooperate with the government, thereby warranting a departure from the guidelines' incarceration provisions. Because these individuals do not serve lengthy jail terms, there is a particular need to emphasize to them that, cooperation or no, further criminal conduct can have very serious consequences. Indeed, in many cases in which I depart downward on incarceration for cooperating narcotics defendants, I have departed upward on supervised release. There is nothing in the guideline commentary, however, that indicates whether this is or is not consistent with 5K1.1.

In short, I urge the Commission to consider amending the guidelines to provide for greater flexibility in the imposition of lengthy terms of supervised release, at least in narcotics cases.

If anyone on your staff would like to discuss this matter further, please feel free to call me. Thank you.

Very truly yours,

Reena Raggi

REENA RAGGI
UNITED STATES DISTRICT JUDGE

U.S. Department of Justice

RAP:bjl
#890007115

Washington, D.C. 20530

MAY 11 1989

John Steer, Esquire
General Counsel
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 200004

Dear John:

Now that the "dust has settled" somewhat, I wanted to call your attention to two guideline matters, one significant and the other relatively minor, that we hope can be the subject of review by the Commission in the coming months.

The matter of significance concerns §5G1.2 of the guidelines relating to sentencing on multiple counts of conviction. Amendment #222 just forwarded to Congress amends the commentary to that guideline to "clarify" that it applies to multiple counts that are contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding. The effect of this "clarification", as we understand it, is to bring within the guideline Rule 20, (F.R. Crim. P.) situations in which a defendant may wish to plead guilty in one district to offenses committed in another. Use of Rule 20 dispositions requires the consent of the United States Attorneys in both the transferor and transferee districts.

Use of Rule 20 is quite common and is clearly of benefit to the justice system in obviating the need for a separate proceeding and sentence in each district, not to mention the delay and expense occasioned in transporting the defendant. Therefore, we are concerned that the Commission's action in bringing Rule 20 situations within §5G1.2 has created a disincentive from a prosecutorial standpoint to the use of Rule 20 motions. For example, if a defendant is indicted for two bank robberies in Colorado and two other bank robberies in New York, is apprehended in New York and expresses a desire to waive venue on the Colorado cases and plead guilty to all four robberies in New York, the result under the current guideline amendment is that, by operation of §5G1.2, the defendant is treated as though he was convicted of four counts of bank robbery. While this assures that his sentence will reflect some incremental increase for each robbery, the total sentence is not likely, in our view, to be as severe as if the defendant were sentenced for two

robberies in New York, and then transported to Colorado and sentenced there for the additional two robberies. This is because (1) the Colorado judge, would likely impose a consecutive sentence to that meted out in New York, at least where the Colorado robberies were not part of the same transaction as those for which sentence was imposed in New York, and (2) the defendant's criminal history score in Colorado would be higher in that it would properly reflect the prior conviction in New York. The upshot is that the United States Attorney in Colorado, if he understands the operation of §5G1.2, as amended, is likely henceforth to be unwilling, in a situation such as described, to grant consent to the Rule 20 motion. In addition to burdening the justice system, this will generate disparity, since defendants who commit disparate crimes for which there are multiple indictments in the same district that are consolidated for sentencing purposes will be treated differently under the guidelines from those whose crimes occur in diverse districts where the United States Attorneys are not amenable to a consolidated sentencing proceeding.

In our written comments on this proposal, we suggested that the government should not be disadvantaged by consenting to a Rule 20 motion. Specifically, we recommended that the approach taken by the proposed amendment to §5G1.2 should only apply where the offenses in the separate indictments were so related (e.g. the robberies were committed as part of a crime spree by the defendant) that, venue considerations aside, the government could have charged them in the same indictment under Rules 8 and 14, F.R. Crim. P. In all other situations, we believe the current guideline operates improperly to benefit a defendant, by not leaving open the possibility of a consecutive sentence, and by not treating the defendant as having been convicted of the counts in the transferor district for purposes of assessing his criminal history.

Our suggested changes may not be the only way to address this issue; but the present guideline is unsatisfactory, and because of the utility of Rule 20 motions, and the fact that in the future we believe their number will decline markedly, the Commission should promptly address and repair this problem.

The minor matter I wish to bring to your attention involves the commentary to §2A1.1 relating to murder. The commentary (as amended by amendment #16 just transmitted to Congress) takes the position that, under 18 U.S.C. 1111, a sentence of life imprisonment is not mandatory for first degree murder. We think this view is legally indefensible and creates irrational results. I would expect that the government will challenge the validity of the guideline if the issue arises in the courts.

Section 1111(b) initially states that the penalty for first degree murder is death "unless the jury qualifies its verdict ..., in which event [the defendant] shall be sentenced to imprisonment for life". The subsection next provides that a person convicted of second degree murder "shall be imprisoned for

any term of years or for life." For the life of us, we do not see how anyone can interpret the statute as providing for other than a mandatory life sentence for first degree murder. To do otherwise, one must disregard consecutive sentences in the same statute, in which Congress plainly evinced its understanding of the difference between a sentence to "imprisonment for life" and a sentence "for any term of years or for life". Whatever policy considerations the Commission may believe render it desirable to make the penalty for first degree murder less harsh, we submit those reasons should be brought to the attention of Congress; they have no basis for implementation in the existing statute. The fact, cited in the commentary as justification for the asserted flexibility in the penalty for first degree murder under 18 U.S.C. 1111, that the offense is classified under 18 U.S.C. 3559(a)(1) as a Class A felony is irrelevant, since 18 U.S.C. 3559(b) clearly states that the underlying statute governs as to the maximum term of imprisonment. The effect of the Commission's reading is to treat Congress as having irrationally eliminated any distinction in terms of severity of punishment between first and second degree murder, contrary to the plain import and language of section 1111.

Accordingly, we urge the Commission to rescind the contrary commentary to §2A1.1 and, if it wishes, to take its case for a statutory amelioration in the penalty for first degree murder to Congress.

On the whole, the recent amendments promulgated by the Commission were from our perspective salutary and thoughtful. And we certainly applaud the extensive effort expended by the Commission and its staff. In these two instances, however, we believe the guidelines are deficient, and we urge reexamination of them, as always, in a spirit of continued partnership and cooperation. 1/

Sincerely,

Roger A. Pauley

Roger A. Pauley, Director
Office of Legislation
Criminal Division

1/ I am constrained to say that we remain dissatisfied with the Commission's response to Congress's recent enactments elevating the maximum penalty for procurement and securities fraud (and soon for financial institution fraud). Simply increasing the fraud table for large scale offenses does not, in our view, capture Congress's intent to treat the above kinds of fraud as generally more serious than other species of fraudulent activity.

Statement of United States Circuit Judge Jon O. Newman
to the
United States Sentencing Commission
Concerning Pending Sentencing Guideline Revisions

The following comments are submitted with respect to the sentencing guideline revisions proposed for submission to Congress by May 1, 1989:

Proposal 267: The proposed revision of the guideline for consecutive sentences is highly desirable to avoid substantial injustice. As the Commission acknowledges, the existing guideline, § 5G1.3, rests on an erroneous interpretation of 18 U.S.C. § 3584(a). That statute creates a rule of interpretation for sentences that fail to specify whether sentences are concurrent or consecutive; if the sentences are imposed at different times, the sentences are to run consecutively unless the court orders the sentences to be concurrent. However, as the Commission now recognizes, the statute provides no rule to guide the sentencing judge in making the decision whether to make the sentences consecutive or concurrent. The existing § 5G1.3 requires consecutive sentences, subject only to an exception in the event the second crime arose out of the same transaction as the first crime. That is an extremely harsh rule. It is not required by section 3584(a), and it is not sound policy. The Commission has recognized that sentences imposed for different crimes charged in several counts of the same indictment should not be completely cumulated, but instead should be subjected to the refined analysis of the multiple count guideline. See Sentencing Guidelines, Part D. The Commission is therefore on sound ground in proposing to delete the existing § 5G1.3.

The proposed revision of § 5G1.3 is commendable but obviously of limited application. It provides for a consecutive sentence if the second offense occurred while the defendant was serving a prior unexpired sentence. Left unanswered is the more frequent situation where the second crime was committed while the defendant was not serving a prior sentence. One appropriate solution might be to have the sentencing judge select a sentence for the second crime that, when aggregated with the combined effective term of the prior sentences, produces a total sentence equal to the sentence that would be indicated under the multiple count guideline. It might be useful, however, not to specify this approach as a mandatory guideline but only as a suggested approach. The reason for caution is that a requirement of using the multiple count guideline may confront a sentencing judge with difficult problems of calculation in cases where the prior crimes are state offenses for which the federal guidelines offer inadequate guidance. In many situations, the prior sentence may be slight, and the federal judge can achieve an appropriate sentence by imposing a guideline sentence concurrently. Consecutiveness is a blunt instrument, and care should be taken not to require its use as a general rule because of the many unforeseen situations in which its use would plainly be contrary to the sentencing objectives of the Sentencing Reform Act of 1984.

Proposal 3 (and related Proposals 17, 19, 25, 29, 51, and 54): This is an ill-advised change that risks imposing upon sentencing judges needless fact-finding tasks without any commensurate benefit in

more equitable sentencing. The Commission's current guidelines already go too far in the direction of unnecessary precision by requiring sentencing judges to distinguish among three degrees of injury. The virtue of the "interpolation" rule is that a judge need not precisely determine whether an injury was level one or two, or level two or three; the judge may "depart" and use an intermediate value, thereby avoiding precise fact-finding and the risk of reversal for having used the wrong level. If interpolation is eliminated as a departure and intermediate levels are substituted, the judge will now be obliged to determine as a fact which of five categories most accurately describes the injury. This is a pointless inquiry.

The better solution would be to authorize the judge to increase the base offense level by an increment within a range of two to six levels depending on the judge's assessment of the seriousness of the injury. If that approach is not acceptable, it would be far preferable to retain the present interpolation/departure approach.

Proposal 10: The proposed addition of paragraph 5 to the Notes on 21B1.2(a) sets forth an example that does not illustrate the guideline. The guideline is to be applied, according to paragraph 5, "if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense." The illustration is an instance where the evidence is insufficient to support a separate conviction. Though a judge would not convict in that situation, the example should be of an instance where the judge, as fact-finder, deems the evidence not persuasive of guilt beyond a reasonable doubt.

More important than the inadequacy of the Note, however, is the inadvisability of adopting any language, such as now proposed for § 1B1.2(d), which, unless clarified, risks imposing upon sentencing judges the obligation to make discrete factual determinations as to whether the defendant is guilty of conspiring to achieve each object of the conspiracy. With some indictments, that would impose upon the judge a formidable and time-consuming task. Some flexibility should be added to § 1B1.2(d) or to the commentary to make it clear that a judge need not perform this fact-finding as to all objects of a conspiracy upon a determination that the sentence as determined without such fact-finding adequately serves the purposes of the Sentencing Reform Act.

Proposal 12: This well-intentioned proposal poses a distinct risk of creating considerable uncertainty as to what the Commission intends because the proposal appears to be inconsistent with the law of conspiracy. The problem arises in the second example of proposed § 1B1.3, which states that as to a defendant who conspires to import marihuana, relevant conduct does not include subsequent shipments from which he received no benefit and in which he played no part "because those acts were not in furtherance of the execution of the offense that he undetook with Defendants A and B." Yet, if these shipments were really not in furtherance of the offense, then they were not within the scope of the conspiracy of which C may be convicted. However, C is liable, under conspiracy (and joint venture) law for subsequent shipments that were within the scope of the conspiracy even if he received no benefit from them and played no part in them. Thus, to

state flatly that the described shipments were "not in furtherance of the execution of the offense" runs counter to substantive law. The Commission can probably accomplish its purpose by revising the guideline to make clear that it is endeavoring to describe only what is relevant conduct for purposes of the guidelines and not trying to describe what is culpable conduct for purposes of a determination of guilt.

April 4, 1989

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April 10, 1989

Judge William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1331 Pennsylvanie Avenue
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

I write on behalf of the Federal Defense Lawyers of Michigan to present our comments on some of the Commission's proposed Guideline amendments.

We appreciate the opportunity to address our concerns to the Commission. At the same time, we believe that it is too early in the life of the Guidelines for the Commission to embark on this substantial revision without having the benefit of adequate empirical research on the initial workings of the Guidelines. We concur with the comments of Commissioner Block, reported in the recent Federal Sentencing Reporter:

> Certainly, before we go much further in amending the existing guidelines, we ought to have a more comprehensive picture of how our initial efforts to regulate the process have actually fared.

Further, the Guidelines state at 1.4 and 1.12 that they will build upon data that can provide "a firm empirical basis for revision". That data does not yet exist.

At the same time, because the Commission has proceeded to propose amendments, we present the following comments:

1. As to #169 -- Offense Levels for Certain Escapes -- we concur with the Bureau of Prisons' recommendation that decreases the Base Offense Level (BOL) for an escape from a non-secure custody, e.g., halfway house. This reduction is justified for two reasons:

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Chief Defender

a. the Guidelines have drastically increased the sanctions for escapes from halfway houses as contrasted with past Federal sentencing practices; and

b. the nature of the offense does not support such a high (13) BOL.

Finally, we do not believe that the nature of the original offense of incarceration should be determinative of whether the individual receives the lower BOL.

2. Re §5F2 -- House Detention -- we believe that the Commission should conform the Guidelines to the provision of the Omnibus Anti-Drug Abuse Act of 1988 which states that house probation may be used as an alternative to incarcera-tion.

3. Re §5G1.2 -- Sentencing on Multiple Counts of Conviction -- we believe that the change from "may be imposed" to "are to be imposed" is not justified, and further that it conflicts with the enabling legislation for the Guidelines.

4. Re §5K1.1 -- Substantial Assistance to Authorities -- we oppose the change from "made a good faith effort" to "provided". We believe that its original language protects both the government and the defendant in this on-going plea process, whereas the proposed amendment destroys the necessary protection for the defendant who makes every possible effort to assist the authorities.

5. Re §5K1.2 -- Refusal to Assist -- we believe that the change in the commentary can be utilized by the government or the probation officer to prevent a defendant from receiving a reduction for acceptance of responsibility unless he assists authorities.

This drastic change rewrites §3E1.1, Acceptance of Responsibility, by adding as a precondition that the defendant must assist authorities, e.g., act as an undercover informant, in order to receive his two point reduction under §3E1.1. This amendment should be withdrawn en toto to preserve the intent and integrity of §3E1.1.

6. Item 50 -- increases in the offense level for robbery. We oppose the proposed increases because:

a. the Commission lacks adequate empirical data and sufficient comments to support this significant upward move;

b. the reality is that Guideline sentences, without significant good time, are more harsh than prior federal sentences -- we are not comparing apples and apples.

7. §4B1.1 (Career Offender) -- we support Option 1 as an initiative toward creating a flexibility in sentencing career offenders. We note with interest the proposal presented by the American Bar Association that would make "the career offender designation a basis for departure, given the tremen-dous variations among the underlying prior convictions that define a career offender."

Finally, we wholeheartedly support the ABA's forthcoming proposal for an advisory committee of practitioners to "provide the Commission with the on-going views of criminal law practitioners on Guideline application and amendment issues."

We look forward to working with the Commission to improve the Federal criminal justice system.

Sincerely,

Paul D. Borman/kcm

Paul D. Borman
Chief Federal Defender

PDB:cjm

cc: Winston S. Moore
Staff Director

John Steer

THE UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
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MEMORANDUM:

DATE: April 17, 1989

TO: All Commissioners, Peter Hoffman and Winston S. Moore

FROM: TAS and Training Units

RE: Comments on the Proposed Amendments

Attached are our comments to each of the proposed amendments that were designated for further discussion at the Commission Meeting scheduled for Tuesday, April 18, 1989. These comments represent not only our combined opinions, but also the opinions of many judges, prosecutors, defense attorneys and probation officers with whom we interact.

cc: Legal, Research, Drafting, Hotline Staff