(12) providing materially false information to a judge or magistrate (including false information as to the defendant's identity);

(13) providing materially false information to a probation or pretrial officer in respect to a presentence or other investigation for the court (e.g., providing false information concerning prior criminal history; concealing assets to avoid paying restitution or a fine).

(14) providing misleading or incomplete information, not amounting to a material falsehood, in respect to a pretrial or presentence investigation.

(15) recklessly endangering the safety of another in fleeing from arrest.

(16) [avoiding or fleeing from arrest][other than as described above].

Comment is also requested on the addition of a separate guideline (§3C1.2) providing a 2-level enhancement for reckless endangerment during flight from arrest (i.e., where the defendant recklessly created a substantial risk of bodily injury to another person in the course of flight from arrest or questioning in connection with instant offense).

* * *

58. Acceptance of Responsibility. The Commission requests comment concerning a number of aspects of this guideline. First, comment is requested as to whether this guideline should be amended to expressly provide that a reduction for acceptance of responsibility is not warranted when the defendant first evidences such acceptance after adjudication of guilt. Second, comment is requested as to whether the Commission should more clearly indicate the weight that should be given to the entry of a guilty plea in determining acceptance of responsibility and, if so, the appropriate weight to be given, and whether the timing of the plea should affect this weight. Third, the Commission requests comment on whether this guideline should be reformulated to give varying weights to different indicia of acceptance of responsibility, and, if so, how this might be accomplished.

* * *

63. §4A1.2 - Definitions and Instructions for Computing Criminal History. The Commission has received feedback from probation officers and others that certain definitions in this section are difficult to apply in certain cases. The definition of related offenses in Application Note 3, and the treatment of a revocation of probation where the defendant is under supervision for multiple unrelated offenses in Application Note 11, have been reported to be particularly difficult to apply. Some have expressed the view that the definition of related offenses in Application Note 3 is too inclusive (e.g., where otherwise unrelated federal cases are consolidated under Rule 20) and that distinctions should be made for different types of offenses (e.g., that previous offenses should be treated as related or unrelated by applying rules similar to those in Chapter Three, Part D (Multiple Counts)). The Commission seeks comment on how any of the definitions and instructions of this section might be improved. The Commission also seeks comment on whether §4B1.2 (Definitions of Terms Used in Section 4B1.1) should be amended to provide a separate set of instructions for counting prior crimes of violence or controlled substance offenses under this section to allow the counting of such convictions unrestricted by the applicable time periods of §4A1.2.

In addition, comment is requested on whether the Commission should develop a specific guideline enhancement for prior similar criminal conduct in lieu of the current provision for consideration of this factor under §4A1.3 (Adequacy of Criminal History Category).

* * *

AMENDMENT SUMMARY FORM

Amendment #_____ 2. Guideline_____

3. Type:

- ☐ technical
- ☐ clarifying
- ☐ substantive

4. Priority:

- ☐ low
- ☐ high

5. Staff Response:

6. Recommendations of Staff Director and General Counsel:

Commission Response:

☐ not approved ☐ approved ☐ approved with changes

AMENDMENTS TIMELINE: STAFF MEETINGS
10th Floor Conference Room

February 27, 1990 (9 a.m.)

- discussion of group I amendments (Low Priority Amendments -- Non-controversial)

March 5, 1990 (9 a.m.)

- discussion of group III amendments (High Priority Amendments -- Non-controversial)

March 8, 1990 (9 a.m.)

- discussion of group IV amendments (High Priority Amendments -- Controversial Issues) including:

  - Obstruction (#53)
  - Role (#50 - 51)
  - Revocations (#69)
  - §2G2.2 (#23)
  - Arson (#28)

March 13, 1990 (9 a.m.)

- discussion of group IV amendments (High Priority Amendments -- Controversial Issues) including:

  - Robbery (#10)
  - Savings and Loan (#12)
  - §2D1.2 (#15)
  - §2D1.6 (#16)
  - Civil Rights (#25-26, #49)

March 19, 1990 (9 a.m.)

- discussion of group IV amendments (High Priority Amendments -- Controversial Issues) including:

  - §2J1.6 (#27)
  - Armed career criminal (#31)
  - Steroids (#42)
  - Escape (#44)
  - §4A1.2 (#60, #63)

March 23, 1990 (9 a.m.)

- discussion of group II amendments (Low Priority Amendments -- Controversial Issues)

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

MEMORANDUM

TO: Phyllis Newton
John Steer
Andy Purdy
Peter Hoffman

FROM: Charles Betsey CB

SUBJECT: Draft Guideline Amendments with Potential Prison Impact

DATE: March 5, 1990

The following amendments have been identified as having a potential impact on the size of the federal prison population. Please provide any comments you have by Friday March 9 on items that may have been (or should be) omitted from this list for purposes of estimating prison impact.

Attachment

Amendment	Guideline	Subject
4	2A2.1	Increase offense level for attempted murder, assault with intent to commit murder is first degree; offer/receipt of something of value for murder; new guideline for conspiracy, solicitation to commit murder
5	2B1.1	increase in offense level where mail stolen or destroyed, more than minimal planning, and where loss is $1,000 of less
7	2B1.3	adds cross reference to arson
10	2B3.1	changes treatment of multiple bank robberies
11	2B3.2	increases base offense level for extortion from 18 to 20
12	2B1.1, 2B4.1, 2F1.1	adds specific offense characteristic for substantially jeopardizing the safety and soundness of a federally insured financial institution, minimum of level 24
15	2D1.2	allows for possibility that only portion of drugs sold near protected location or involving underage or pregnant individuals would be counted
16	2D1.6	for violations of 21 USC § 843(b) the offense level is the greater of 12 or the offense level from applying the drug table to the scale of the underlying offense
17	2D1.11	new guideline for importing, exporting, possessing, or distributing certain chemicals and equipment

18	2D2.1	provides level 8 for possession of 5 gm or less of cocaine base ("crack")
21	2G1.2	adds cross reference to 2G2.1 and changes the treatment of multiple counts
22	2G2.1	various changes for sex offenses
23	2G2.2	raises base offense level for some pornography offenses and adds specific offense characteristics
24	2G3.1	raises base offense level for obscenity offenses involving pecuniary gain and adds specific offense characteristics
25	2H1.1, 2H1.2	increases the offense level from 13 to 15 for cases currently covered by 2H1.2
26	Part H	various adjustments to offenses under Part H
27	2J1.6	changes treatment of failure to surrender for service as escape rather than failure to appear
28	2K1.4	increases the offense level for certain arson and property destruction offenses
29	2K1.6	adds cross reference for offenses where death resulted
31	2K2.6	creates new guideline for violations of 18 USC § 924(e) (conviction of 18 USC § 922(g) with three prior

		violent felony or serious drug convictions)
32	2K2.1	provides enhanced penalties for certain firearms offenses
33	2K3.2	adds new guideline for feloniously mailing injurious articles
34	2L1.1	allows for upward departure where offense involved knowledge that alien intended to enter U.S. to engage in subversive activity
35	2L1.1, 2L2.1, 2L2.3	introduces enhanced penalties where the offense involved six or more aliens, documents, or passports
38	2M5.2	increases base offense level from 14 to 22 for most offenses
39	2N1.1	adds cross reference to extortion
43	2P1.1	clarifies that sentencing for escape offenses should include updating of criminal history score
49	Chapter Three, Part A	adds general adjustment for "hate crimes" not prosecuted or sentenced under civil rights laws and corresponding guidelines
50	Chapter Three, Part B	revises adjustment for role in the offense

51	3B1.3	potentially provides for an adjustment for abuse of trust or special skill independent of (and in addition to) adjustment to adjustment for 3B1.1 (aggravating role)
53	Chapter Three, Part C	definitions of conduct that merit 2-level enhancement for obstruction
58	Chapter Three, Part E	whether acceptance of responsibility adjustment should apply under certain circumstances
59	Chapter Four, Part A	clarifies Commission's intent that constitutionally valid uncounseled misdemeanor convictions
62	Chapter Four, Part A	counting of expunged adult convictions in the criminal history score
64	Chapter Five, Part A	revises sentencing table to provide 13-15 points for criminal history category VI and adds a new category VII for 16 or more criminal history points
69	Chapter Seven--Violations of Probation and Supervised Release	provides two options for new guideline covering violations of probation and supervised release

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PROBATION OFFICE

CARLOS JUENKE
CHIEF PROBATION OFFICER

364 U.S. COURTHOUSE
P.O. BOX 012559
MIAMI, FL 33101-2559

March 8, 1990

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

Dear Sharon:

Enclosed for your review are three copies of the letter that was directed to Judge Wilkins in reference to the findings and recommendations of the work group on probation revocations. I have sent copies directly to Jerry, Joe, Nancy and Bill. I would ask that you provide copies to Patricia and Tim. Additionally, please feel free to make copies for distribution to Rusty, Jay, Phyllis and anyone else that you feel may be interested.

There is something that you should be aware of in terms of the letter's contents. I was not the sole author. The letter was very much a group project. I wrote an initial draft of a letter. The contents of that letter were reviewed with each work group member. Several of the members felt that changes should be made. For example, two members felt that the paragraph describing the committee's recommendations as to Option Two were too tame. Consequently, stronger language was inserted at the request of these members. I point this out in case a suggestion is made that the letter was written on behalf of the committee members without their approval.

This is a highly charged issue and generates considerable personal investment for all parties. If you wish to discuss this matter further or review the letter, please do not hesitate to contact me. Thank you for asking me to participate on the committee and please do not hesitate to contact me again if you feel I may be of the slightest assistance to the commission.

Sincerely,

John M. Shevlin, Supervising
U. S. Probation Officer

JMS:mhd

Enclosures

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PROBATION OFFICE

CARLOS JUENKE
CHIEF PROBATION OFFICER

364 U.S. COURTHOUSE
P.O. BOX 012559
MIAMI, FL 33101-2559

March 8, 1990

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

RE: PROPOSED REVOCATION GUIDELINES

Dear Judge Wilkins:

On March 5-6, 1990, a working group of probation officers met with commission staff to discuss two options in reference to proposed revocation guidelines. It was suggested to the group that correspondence describing the findings and recommendations of the group be directed to your attention. This is the purpose of this letter.

A detailed description of both options for revocation was distributed to the invitees prior to the group meeting. As a consequence, all of the officers were able to apply three actual revocation cases to each of the two options. This proved to be very valuable in terms of evaluating the two options. The group was able to not only discuss the philosophical and theoretical aspects of the options, but the practical aspects of application as to each option as well.

Option Two was examined first. A detailed presentation was made to the group describing the theory as well as the application principles for Option Two. However, the group unanimously recommended that the commission not adopt Option Two. This was based upon the philosophy behind Option Two as well as application and reality concerns. Essentially, the group found Option Two to be far too complex and demanding for the courts to effectively utilize for purposes of revocation. The translation of revocation behavior into a guideline sentence appeared to be not only unrealistic but unworkable. One of the group members felt that the complexity and demands of Option Two were so severe that the judges in that district would simply ignore the guideline. After unanimously reaching an agreement as to Option Two, the group undertook an evaluation of Option One.

RE: PROPOSED REVOCATION GUIDELINES

Once again, the theory and application principles were examined. The group felt that the categorization of revocation behavior was a reasonable approach for the courts to utilize. This provided a means to differentiate between types of revocation behavior while not making the determination so complex that application would be overwhelmingly difficult. Nevertheless, the group did recommend some changes in the ranges for incarceration, the classes of offenders and application. A report reflecting those recommended changes is being prepared and will be submitted to the commission members for evaluation.

It was a pleasure to work on this project. All of us enjoyed it. On behalf of the members of the group, please do not hesitate to call upon any of us in the future if you feel that we may be of additional service to the commission.

Sincerely,

John M. Shevlin

John M. Shevlin, Supervising
U. S. Probation Officer

JMS:mhd

cc: Jerry Denzlinger, SUSPO, SD/TX
Patricia Hardage, USPO, ED/AK
Tim Kitch, USPO, D/ID
Joe Napurano, SUSPO, D/NJ
Nancy Reims, DCUSPO, CD/CA
William H. Tugwell, SUSPO, ED/VA
Sharon Hennigan, U.S. Sentencing Comm.

U.S. Department of Justice
United States Parole Commission

Office of the Chairman

5550 Friendship Blvd.
Chevy Chase, Maryland 20815

March 9, 1990

Honorable William Wilkins
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, DC 20004

Dear Judge Wilkins:

Based on my experience in parole and supervision related matters I would like to comment on the two proposed options for handling the revocation of probationers and supervised releasees.

After careful review of the options published I would strongly encourage the Sentencing Commission to reject Option I and adopt Option II in a modified form. Option I would be problematic and circumvent the statutory mission of the Sentencing Commission: incapacitation, reduction of disparity and providing just punishment.

The concept I would like to address is the two classes of violators included: probationers and supervised releasees. Although the process of supervising these clients may be similar, to assume that the individuals who fall in these two categories are also similar is a grave oversight. To ignore the background characteristics of the probationer or a supervised releasee would be an injustice to the client, the supervising probation officer and the community.

OPTION I

I want to emphasize the misguided quest for "simplicity"

proposed under Option I. I recognize that the Probation Officer's duties continue to grow more complex and burdensome however there is a much greater issue at stake. The process of managing a person's freedom and protection of the public have never been a simple process and should never be reduced to one.

The ultimate responsibility for applying any type of revocation guidelines will fall on a court, a Magistrate, or Executive Agency appointed for that task. Determining guidelines for revocation purposes will not be any more complex than determining them for an initial sentencing proceeding. Whenever a personal liberty is at issue we must not simplify procedures merely to keep the job simple or easy.

In view of the administration's policy toward "zero tolerance" and emphasis on fighting drug abuse, I see no emphasis for sanctioning drug users in the community. Under Option I a drug user could receive a maximum of 1-6 months and under Option II 6-12 months. Supervised Release is not unlike the Special Parole Term violator's who receive anywhere from eight to sixteen months under U.S. Parole Commission guidelines. The Sentencing Commission would be perceived as getting "soft" on drug cases if these current options are adopted.

The major problem perceived with Option I is the broad, vague classification of offenses and the total absence of risk factor consideration.

A Class I violator as outlined can include a probationer who is arrested for selling a gram of cocaine or a supervised release violator (who might have a criminal history Category VI) who is convicted of possessing with intent to distribute 100 kilos of cocaine. Under Option I both of these individuals have guidelines of 12-18 or [15-21] months.

Similar examples can be made for Class II violators. It would appear that the system proposed by Option I would generate numerous departures on a regular basis at best. THIS SYSTEM WOULD TREAT DISSIMILAR OFFENSES AND DISSIMILAR OFFENDERS SIMILARLY AND THIS DISPARTY WOULD BE INHERENT.

Under Option I a person serving a 5 year SPT who violates by possession of a controlled substance is required by statute to

serve a minimum of one-third of the term of supervised release. (18 U.S.C. 3583)

Option I does not incorporate this under the proposed guidelines and instead offers that when the guidelines are in conflict with the statute, obviously the statute controls. The point I make is that in the situation of a violator found in possession of drugs, anyone with a 2 year SPT or more will be outside the guidelines in order to allow for the statutory minimum penalty to be served.

The proponents of Option I argue against a guideline range determination that would require "mini-trials". Option I therefore attempts to merely sanction a violator for breaking the supervision contract regardless of the violation behavior, in hopes that the pending charges will be pursued by a state or local jurisdiction. This is a risk that responsible criminal justice professionals should not be willing to take. The current crisis of overcrowded jails and prisons is a constant inducement for prosecuting agencies to drop their charges in favor of the federal warrants placed as detainers. In instances where the charges are dropped, no review or sanction for new criminal behavior would be attempted under Option I. The violator would simply be sanctioned for breaking his supervision contract. How does this type of policy "enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system?" This directly violates the objective of Congress "to achieve proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." To ignore the content of the violation behavior by broad and vague classifications as well as ignoring the background characteristics of these offenders will undermine the concept of selective incapacitation of violators and defeats the statutory purpose of protection of the public.

Option I also creates a disparate system that treats the initial sentencing decision under a "modified real offense system," but treats probation or supervised release violators by ignoring the "modified real offense" behavior.

Finally under the proposed sanctions for Class III violations, this option allows for Probation Officers to make

their own determination as to when the court should be notified of technical violations. This allows for some 2,000+ Probation Officers to decide how many dirty UA's are acceptable before being reported. For example, it could be 1, 3, 10 or 20. How long can a person be out of contact (absconder behavior) before the Probation Officer reports this to the court, one month, 3 months or 6 months? Again the broad vague categorization would appear to encourage disparity as a result of 2,000+ interpretations of what "undue risk" is, or how one views the public's, perception of what constitutes "respect for the justice system." How does the Probation Officer insure proper interpretation of the original intent of the Sentencing Court? This system would not even promote uniformity within districts let alone the entire country.

OPTION II

Although this is a more complex option, Option II is a more credible approach to a complex problem. It would achieve uniformity and proportionality, and allow for a consistent application of policy not subject to personal interpretation.

I would urge that the offense level and criminal history be recomputed for all new felony offenses and that all misdemeanor offenses be treated under the proposed 6-12 month guideline range. I would urge the application of the Chapter two guidelines to consider the "real offense" violation behavior. This would be consistent with the Sentencing Commission policy and treatment of all other offenders.

In closing I would again urge the Sentencing Commission to consider the offender's characteristics and recalculate the criminal history score when considering a new offense. I would caution against adopting any proposal that would make revocation guidelines simple or easy if they do not safeguard the objective of truth in sentencing and public safety.

Sincerely,

Benjamin F. Baer
Chairman

CHARLES LARSEN
REG NO 03616-091
F.C.I. ENGLEWOOD, U/E
9595 West Quincy Avenue
LITTLETON, CO 80123

MARCH 12, 1990

UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, N.W., SUITE 1400
WASHINGTON, DC 20004

RE: PUBLIC COMMENT ON GUIDELINES
CONCERNING LSD PACKAGED IN UNIT DOSES.

Dear Sir:

The amendments made to the guidelines that took effect on November 1st of 1989 were not real clear if the Commission had addressed the issue concerning the carrier excipient used in the conduct of packaging doses. The Courts are erroniously including the carrier, blotter paper, as quantity. The published cases concerning this issue are considering the weight of the excipient along with the LSD because it is ingested. Packaging often times serves more than one purpose. This does not make it net quantity weight. All the Courts have agreed that the Carrier and LSD combined are a gross weight determination. Gross weight always infers that the weight of the packaging is included. The very name Carrier infers packaging. When you base the amounts in these guidelines on quantity you are inferring net weight. Net weight is always quantity weight. A cut/adulterant adds net quantity weight. They add quantity, a carrier acts as a vehicle or gross weight.

The excipient used in the conduct of packaging doses should not be included in quantity, it is gross weight.

Sincerely
Charles Larsen

Connie Dumont
109 Lisa Ct.
Santa Cruz
CA. 95060

Feb. 20 1990

Dear Mr. Martin,

I spoke with you a couple of times in the last month concerning the guidelines and how they apply to L.S.D. I have enclosed a letter written by my son who is in jail awaiting trial. Please see to it that the chairman and those on the commission read this letter.

Because they have chosen to weigh the "carrier" (blotter paper) in my son's case he is being charged with in excess of 400 grams of L.S.D. He will most likely be sentenced to 20+ years in Federal prison. He is 19 YEARS OLD! Most of his time will be for blotter paper. Something must be done and it is the Sentencing Commission's job to get it done. Please help.

Sincerely,
Connie Dumont

To The Honorable William W. Wilkins Jr.,

I am writing to you concerning a gross unfairness currently occuring within the federal court system. I am speaking of the LSD carrier blotter weight.

In your letter to Senator Biden you address the discrepencies. A sugar cube weighs more then 40,000 times the weight set forth in the table, a piece of blotter paper more then 200 times the liquid or crystal LSD. Someone with a gram of crystal LSD, you identify is equal to

20,000 hits, gets off easier then someone with 100 paper doses or one sugar. Your letter makes a false comparison, when heroin is 'cut' with sugar, the sugar is identified as heroin and the total amount of the sugar and the heroin is being sold together as a certain weight i.e: a kilo of 100% heroin, 90% sugar, is identified, sold & consumed as a kilo of heroin. An agent who is purchasing LSD may ask for a gram thus he is asking for 20,000 doses, which might come in the form of a gram

of crystal seperate from but along with 20,000 pieces of blotter paper, or it might come already impregnated on that paper. Either way it is identified as a gram, sold as a gram and, since it is likely the paper would be sucked on and spit out we can say consumed as a gram. Among dealers or agents, LSD carrier is not identified in the weight, when someone wants to purchase a gram, they don't mean 75 pieces of 'blotter paper' or ½ a sugar cube or whatever carrier might weigh a gram,

they mean to purchase that gram of LSD, whether impregnated or not. Obvious. a gram of crystal or liquid is not carried around in your hand, thus it is packaged to be carried, someone ca carry the paper in their hand, like someone may hold a bag of heroin, the bag is not weighed. A lab makes and sells cry stal, a smaller dealer packages and sell this crystal, thus a lab has 1/200 tha of a small dealer with paper and 1/20 the amount someone who chooses sugar

Levon Dumont
717 Wis Ave
Racine Wis 53403

cubes, for the same LSD. The Lab can laugh, a man with a carrier must cry. Don't let the Lab off, they are the older ones who intise the younger ones. D it by numbers!

Please put in your proposal in by the May 1st deadline. You know what is right This is wrong and so simple to change. Do someone care? The number of doses is how someone must be punished; and you know it. There can be no excuse!

Sincerely, Levon Dumont

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
PROBATION OFFICE

ROBERT M. LATTA
CHIEF PROBATION OFFICER

600 U.S. COURT HOUSE
312 N. SPRING STREET
LOS ANGELES, 90012

March 14, 1990

Ms. Sharon Henegan, Director
Training and Technical Assistance
U. S. Sentencing Commission
1331 Pennsylvania Avenue, N. W.
Washington, D. C. 20004

Dear Sharon:

As I recall, the probation officer working group was asked to submit responses in writing regarding the proposed guideline amendments we discussed, namely the guidelines addressing acceptance of responsibility, role in the offense, obstruction of justice and fines. My thoughts are as follows:

ACCEPTANCE OF RESPONSIBILITY

This adjustment is one of the more nebulous and subjective sentencing factors. I would advocate a two level reduction for a guilty plea and call it what it is. Should the defendant demonstrate behavior that is now defined as "acceptance of responsibility," the commentary could suggest that such acts may warrant a sentence at the lower end of the applicable guideline sentencing range. The commentary could also note that a denial of culpability or an attempt to minimize culpability during the presentence investigation, but after a guilty plea, may warrant a sentence at the higher end of the guideline range. In other words, what is now written as guideline 3E1.1 would be commentary that speaks to reasons for sentencing at the higher or lower end of the guideline range.

ROLE IN THE OFFENSE

The clarification of mitigating and aggravating roles should abate dispute over application of this guideline, particularly the criterion that limits the use of mitigating roles to those who are managed, supervised, etc. by others.

I would also like to see further clarification, possibly by way of examples, of the adjustment for "abuse of position of trust." We have been applying this adjustment for postal employees who steal mail entrusted to them by reason of their employment; our rationale reads, in part, as follows: ...it would seem that the extent to which the public is dependent upon the integrity of the U. S. Postal Service, and thus its employees, is definitive of a position

of public trust." We have also concluded that the position of trust significantly facilitated their commission of the offense, and note the example that this adjustment would not apply to an ordinary bank teller. Since this is a common federal offense, more uniform application might occur with specific examples. The "ordinary bank teller" exception seems to add to the confusion rather than diminish it.

OBSTRUCTION OF JUSTICE

I like the idea of numerous examples as to when this adjustment would and would not apply, along with the statement that spontaneous behavior contemporaneous with the arrest would not be considered obstruction of justice, whereas, calculated, premeditated or continuous acts would be requisite for this adjustment. Also, the commentary might note that certain aggravating behavior which does not rise to the level of obstruction of justice, such as an attempt to flee from arrest or disposal of a weapon during a chase, might warrant a sentence at the higher end of the guideline range.

FINES

I don't know the impetus behind modifying this section, but I can't help but ask, "If it ain't broke, why fix it." Most defendants don't have the wherewithal to pay these fines, and I like the provisions that allow for calculation of the pecuniary gain to be waived. Doubling the gross pecuniary gain to <u>all defendants</u> rather than tripling this gain also seems more realistic. As for the other changes, I don't see that they are all that necessary, or that the minimal impact of the change is worth this kind of revamping and, hence, retraining.

I appreciated the opportunity to participate in the workshop, and I hope it proves helpful to the Commission. If I can be of any further assistance, don't think twice about calling.

Very truly yours,

Nancy Reims

NANCY REIMS, Deputy Chief
U. S. Probation Officer

NR:aw

U.S. Department of Justice

Washington, D.C. 20530

STATEMENT

OF

JOE B. BROWN
UNITED STATES ATTORNEY
MIDDLE DISTRICT OF TENNESSEE

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

AMENDMENTS TO THE SENTENCING GUIDELINES

ON

MARCH 15, 1990

Mr. Chairman and members of the Commission:

I appreciate the opportunity to appear before you to address the proposed sentencing guideline amendments. I am pleased that the proposals address a number of concerns of the United States Attorneys, including current weaknesses in the guidelines for assault with intent to commit murder and arson. While we recognize that some important amendments are needed, the United States Attorneys are concerned about the disruption caused by guideline amendments every year and the need to determine in each case which version of a guideline applies. We urge the Commission to give careful consideration to the proposed amendments and to adopt those that are necessary. I will address two areas where we believe that revision of the guidelines is necessary.

Criminal History

The Commission has proposed the addition of a new criminal history category for offenders with high criminal history scores. Amendment No. 64. We urge the Commission to adopt this proposal. Offenders with criminal history scores of more than 13 should not get a free ride, as they do under the current guidelines. Relying on the possibility of departures for this group of offenders is not sufficient, given their serious backgrounds.

Several other revisions are in order for the criminal history guidelines in Chapter Four. We regard this area as one of the most important for amendment because problems in the criminal history scoring potentially affect every case. The Commission's guideline proposals ask how the definitions and

instructions for computing criminal history might be improved. Amendment No. 63.

We believe that the guideline containing definitions and instructions for computing criminal history should be amended so that sentences for separate offenses are not artificially treated as one. The current guideline states that prior sentences imposed in "related cases" are to be treated as one for purposes of criminal history. "Related cases" are defined as those that: (1) occurred on a single occasion; (2) were part of a single common scheme or plan; or (3) "were consolidated for trial or sentencing." Guideline §4A1.2(a)(2), Application Note 3. It is this last factor that is problematic because it arbitrarily counts sentences in unrelated offenses as a single prior sentence. The fact that cases were consolidated for trial or sentencing for purposes of efficiency in the administration of justice should not dictate criminal history results. The current rule means that defendants whose backgrounds are replete with criminal convictions based on consolidated proceedings benefit from significant undercounting in the computation of their criminal history score.

To cure this problem we suggest that the third category of related cases for purposes of criminal history be limited to those that were consolidated for trial or sentencing if the counts would have been treated as a single group of closely related counts under the multiple count guidelines, guideline §3D1.2. This limitation would require some relationship between

the offenses which are the object of the sentencing or a similarity in the type of offense. The Commission has recognized the problem by including it as a basis for departure under the guidelines. Policy Statement §4A1.3, and Application Note 3 to guideline §4A1.2. We believe that the problem should be corrected by a guideline, not a recommendation regarding the appropriateness of departure.

The Commission has also asked whether the definitions used in connection with the career offender guideline, guideline §§4B1.1 and §4B1.2, should be amended to provide a separate set of instructions for counting prior crimes of violence or controlled substance offenses to allow counting of convictions unrestricted by the time periods set forth in the criminal history definitions and instructions. Under the current guidelines the definitions generally applicable in computing criminal history apply to the career offender guideline. Guideline §4B1.2, Application Note 4. As a result, a sentence of more than one year and one month that was neither imposed nor served during the fifteen years prior to the commencement of the instant offense is not counted. Similarly, a sentence of less than a year and a month does not count unless it was imposed within ten years of the commencement of the instant offense.

The limitations on career offender scoring imposed by the criminal history definitions are inconsistent with the statutory mandate regarding career offenders. The statute requires the Commission to "assure that the guidelines specify a sentence to a

term of imprisonment at or near the maximum term authorized" for defendants who are convicted of felonies that are crimes of violence or certain drug offenses and who have two prior convictions for such crimes. 28 U.S.C. §994(h). Applying the artificial time limits of the criminal history guidelines to career offenders is simply not in keeping with the career offender provision of law, which was designed to look at the defendant's entire criminal past. The same concerns attach to the development of a guideline for the armed career criminal provision discussed earlier. Beyond these two specific statutory provisions requiring an assessment of the defendant's entire criminal past, we believe it would make sense in the future for the Commission to consider exempting violent and serious drug offenses from the time constraints of the criminal history provisions for all offenders.

Revocation of Probation and Supervised Release

The Commission seeks comment on the development of guidelines relating to probation and supervised release revocation and resentencing upon revocation. We believe there is a real need for guidelines in this area because probation and supervised release revocations are taking place without the benefit of any guidelines regarding resentencing.

Two options are proposed for probation and supervised release revocation. Amendment No. 69. The first divides probation and supervised release violations into three categories and

provides for specific ranges of imprisonment for resentencing, with the most serious offenses subject to a resentencing range of 18 to 24 months. Option one is based on the assumption that new criminal behavior will be appropriately sanctioned by the court that has jurisdiction over the underlying offense. Option two determines the resentencing range by applying the sentencing guidelines to the new criminal conduct.

We prefer option two because it more fairly reflects the nature of the violation giving rise to probation or supervised release revocation. A defendant who commits a very serious offense should not be limited to a maximum term of imprisonment upon revocation of only 18 to 24 months. We also disagree with the assumption that the new offense will result in prosecution and conviction since the new offense may be a state violation. With the pressures of criminal prosecution and prison overcrowding on state governments, we have found that prosecutors are sometimes content to rely on federal revocation proceedings.

While we prefer option two, we believe it should be revised regarding the minimum prison term for resentencing. For some violations warranting a prison term, the sentencing range should provide a minimum prison term of less than the six months proposed. We also question the proposed application of guideline §5C1.1 to supervised release revocation. Guideline §5C1.1 authorizes split sentences (including a term of supervised release) that may not be compatible with resentencing upon supervised release revocation. Conforming changes would also be

necessary with regard to this reference to guideline §5C1.1 in light of our recommendation to lower the minimum of the resentencing range to less than six months and should be made to the proposed provisions regarding both probation and supervised release. The Department would be pleased to assist in the Commission's efforts to develop these and other guidelines further.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

On behalf of all Federal Public and Community Defenders throughout the United States, thank you for the invitation to testify. We also want to thank the Commission for

1) inviting a Federal Defender intern to join your staff, and

2) setting up a Defense Practitioner Advisory Committee.

We commend the Commission for inviting comments on the **proposed** amendments. As federal defense practitioners, we have been totally immersed in Guideline Sentencing.

A few opening salient points about Guideline practice.

While we who are present today in these hallowed chambers are privy to the inner-workings of the Guidelines of 1987, 1988, 1988 1/2, 1989 and now proposed 1990, we are not participants in all of the federal criminal cases in the 50 United States. And unfortunately, we cannot develop Guideline de-coder rings to include in lawyers boxes of Oat Bran.

Most of the participants in Federal Guideline practice have not even mastered the original Guidelines -- the complex, complicated categories, multipliers, aggravators, mitigators, etc., etc., etc.

(1) The most constructive answer to the present-day situation is to put these amendment proposals on hold. Don't change the Guidelines; let everyone try to master them. You should, each and every one, and your entire staff, get out of Washington and visit the federal districts where they are being implemented, to find out first-hand what is going on. Watch sentencing proceedings, talk to participants, see if they truly know how to apply the Guidelines, ask for their suggestions. To use the old Railroad Crossing Maxim, we believe that the Commission should "stop, look and listen", then proceed cautiously.

(2) A second constructive suggestion would be for the Commission to establish a task force aimed at simplifying the Guidelines. They are extremely and unnecessarily complex.

(3) The Commission should not propose any 1990 Guidelines amendments except for those few technical matters absolutely essential to the functioning of the Guidelines. These 88 pages of proposals lack necessary supporting background data and research. The explanations accompanying most of the amendments-- "clarification", "to even out penalties", "to better reflect the seriousness of the conduct" -- provide support for the Defender recommendation that these proposals be shelved.

We provide the following comments with regard to the specific proposals:

CHAPTER 1 -- Part A (Introduction)

4(b), Departures, at Page 8,

In rewriting the provision, the Amendment deletes two sentences from Page 7 of the Guidelines that should be retained:

> Thus in principle, the Commission by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the court's departure powers.

They should be retained to permit the courts, where necessary, to fashion justice through a departure, which will then be channeled back to the Commission for a better understanding of how the Guidelines are functioning. This is just the type of information the Commission needs as a basis for implementation of future amendments.

4(c), Plea Agreements at Page 9

The rewrite Amendment deletes the last sentence from page 8 of the Guidelines:

> Since they will have before them the norm, the relevant factors (as disclosed in the

plea agreement), and the reasons for the agreement, they will find it easier than at present to determine whether there is sufficient reason to accept a plea agreement that departs from the norm.

This should be retained. The Commission should not discourage proper departures. They should be utilized, where appropriate, as the type of experience that can form the basis for constructive amendments in the future.

(g) Sentencing Ranges, at Page 12

The rewrite Amendment neglects to update the prison population numbers and projections. We propose the revised numbers. As of 11-1-87, Federal Prisons were at 159% of capacity; as of 3-12-90, they are at 168% of capacity. Inmate numbers have gone from 44,000 to 55,000.

CHAPTER 1 -- Part B

2, Page 13 -- §1B1.8(b)

We object to the proposed amendment to §1B1.8(b) that creates a new subdivision (2) that would permit the use of information provided under cooperation to raise that individual's criminal history score.

The protections provided to a defendant by the cooperation agreement are destroyed by this exception. Contrary to the Reason for Amendment, Application Note 2 currently speaks of determination of criminal history adjustments from the probation interview -- not from this cooperation interrogation. This Amendment should be deleted. Indeed, the Commission should act to clarify, that in view of Fed. R. Crim. P. 11 and F.R.E. 410, any such use should be prohibited.

3, Page 14 -- §1B1.3

We object to this Amendment. Further, we believe that the Commission should revisit the issue of Relevant Conduct under §1B1.3 and other provisions. Specifically, we object to convicting and sentencing a defendant for conduct based on hearsay, secondhand statements.

Example:

A defendant pleads guilty to possession of 1 ounce of cocaine. A D.E.A. agent says he heard that defendant told an informant that

> he would deliver 5 kilograms. The defendant is sentenced for 5 kilograms and an ounce because the district judge found by a preponderance of the evidence that this could happen.

We believe that the Commission should raise the standard of evidence required to include, in creating the sentencing range, conduct beyond the offense of conviction. We suggest that the Commission should require, at minimum, clear and convincing evidence.

Unlike pre-Guidelines sentencing, where the Judge had the option to take other conduct into account, now, when the Probation Officer plugs the unconvicted conduct into the Guidelines, the Judge must sentence in the Guideline range for 5 kilos and 1 ounce.

This is clearly the single, most significant fairness issue raised by the Guidelines and these amendments. We hope that the Commission will respond affirmatively to the Federal Defender suggestion and raise the evidentiary standard to clear and convincing.

4, Page 15 -- §2A2.1

We object to this Amendment which significantly raises the Guidelines levels for this offense.

There is no documented information provided that supports this increase, i.e., upward departures, correspondence from judges, and surveys of guideline sentencing for this offense.

5, Page 16 -- §2B1.1

We object to the staff's suggestion here, and in subsequent provisions that the so-called anomolous differential among these statutes should be cured by raising the lower base offense level (BOL) to the higher BOL. Since three provisions contain the lower BOL and only one provision the higher, why not bring down the higher to correct the anomaly?

The "Reason for Amendment" provides no comprehensible justification.

6, Page 17 -- §2B1.1

We object to the Amendment inserting a new Application Note 3 that eliminates even the present-minimal standard for the court ascertaining the loss. The proposed new standard, is "only make a reasonable estimate of the range of the loss".

The "Reason for Amendment" says that this "clarifies Application Note 3." We beg to differ -- it completely eviscerates it. Present Note 3 speaks of "reasonably reliable information" -- something tangible and meaningful. The proposed "reasonable estimate" sets no standard of reliability for the information.

We believe that the Guidelines should clearly state that the parties have a right to a hearing on the issue of loss when that factor is in dispute.

7, Page 18 -- §2B1.3

This provision alters charged-based sentencing to offense-based sentencing. Any such Amendment should be tied to the "clear and convincing" standard of evidence, previously discussed.

#10, Page 19 -- §2B3.1

This increase for multiple robbery offenses comes on top of last year's increase. The Commission's staff has not even been provided time to gather experience under last year's change.

Have there been upward departures in these types of cases? If yes, on what grounds? Again, the staff has not provided the necessary background data.

Neither option is appropriate.

Again, if any change is made, the clear and convincing evidence standard should apply to all "non-conviction" offenses.

#11, Page 20 -- §2B3.2

We object to raising the extortion BOL to that of robbery. There are significant differences between the two offenses; robbery is more serious as the Commission recognized in raising

that BOL in 1989. The "Reason for Amendment" provided by the staff, to conform it to robbery, is not a valid justification.

#12, Page 12 -- §2B1.1

The Commission should define "substantially" in such a way as to carry out Congress' intent to limit this punishment to major episodes of criminality. We assume this would not apply to the teller whose $10,000 embezzlement pushed the bank to insolvency.

Further, why is level 24 selected; to what other offense is it comparable? Again, a reason has not been provided.

#15, Page 23 -- §2D1.2

We believe that §2D1.2 should be amended to distinguish cases in which only a portion of the drugs involved meets the criteria of this guideline The specific facts of each episode should determine the BOL.

#16, Page 23 -- §2D1.6

We object to this change uncapping the BOL for this crime.

The "Reasons for Amendment" assumes, incorrectly, that United States Attorneys are not following Attorney General Thornburg's memorandum and other Justice Department orders to engage in "honest" plea bargaining.

The "reasoning" in the last paragraph on Page 24 states, incorrectly, that a prosecutor can reach a desired result by a "stipulation" to the underlying conduct. That is not accurate, since any such stipulation is not binding on the Probation Officer or the Court.

Again, the "Reason" lacks supportive data, other than an undocumented suspicion of improper plea bargaining.

#17, Page 25 -- §2D1.11

Comment will be provided in the March 30, 1990, Final Paper.

#19, Page 26 -- §§2F1.1

We object to the change in Application Note 8 which eliminates any standard for proving loss.

#23, Page 29 -- §2G2.2

We object to the increased penalties for this non-violent conduct wherein selling certain obscene materials would result in more severe punishment than the commission of some robberies (BOL 20).

The "Reason for Amendment", at Page 31, states only the need to better reflect the severity of more grievous offenses. Again, the Commission's staff has not provided justifiable background or supportive material.

#24, Page 31 -- §2G3.1

We object for the same reasons set forth in #23.

CHAPTER 2 -- Part H (Civil Rights)

#s 25 and 26, Pages 32 et seq.

We recognize and appreciate the seriousness of these offenses; nevertheless, we question the justification for raising the BOLs in #25.

As to both #s 25 and 26, what is the past experience? How many of these cases have been prosecuted? What sentences? Any departures?

We hope that answers to the above questions, and responsive comments to the Commission will provide the data necessary to provide a comprehensive resolution of those issues.

#27, Page 34 -- §2J1.6

We object the this change that equates failure to report for service of a sentence with escape, a totally disparate and potentially violent offense.

There is no equivalence, and there should not be an amendment.

#28, Page 34 -- §2K1.4

We object to this proposal which removes the element of "knowingly" creating a substantial risk. "Knowingly" should be a critical element in raising the BOL. We also object to raising the offense levels.

The "Reason for Amendment" is boilerplate -- "does not adequately reflect the seriousness of the offenses."

Where are the statistics? Where's the data? "Where's the meat?"

#31, Page 36 -- §2K2.6 (Armed Career Criminals)

We object to the Commission's response to the Armed Career Criminal Statute.

We propose that the Commission urge Congress to amend the 15 year mandatory minimum statute to restrict the coverage because it is unjustly applied in many instances.

Specifically, we believe that:

(1) the statute should redefine crime of violence to exclude consideration of prior breaking and entering convictions.

(2) the statute should require that the catchment of three prior crimes must have been committed within the past 15 years unless the defendant has been incarcerated for at least 10 of those 15 years.

(3) the statute should limit the prosecution offense to where the defendant uses the gun, or is involved in committing a violent act while in possession of it.

An example of the inequity of the statute: a retired, 60 year old, Chrysler worker living in a high crime area, keeps a rifle at home. As a youth, he was convicted 42 years ago for breaking and entering, 40 years ago for a second B&E, and 25 years ago for possession of marijuana. He was never sentenced to jail, has since raised a family and worked regularly for 25 years. This man must be sentenced to 15 years in jail. This is unjust.

We object to the Commission's proposal to use the 15 year mandatory minimum as a foundation upon which to build even more severe sentences. We believe that any sentence of more than 15 years should require a departure from the Guidelines.

We believe that the Commission should clearly state its objection to mandatory minimum sentence statutes. The essence of Guideline sentencing conflicts with that type of legislation.

We object to both Options 1 and 2. Option 2 offers the scenario of a 46 level BOL--more than life--for an Armed Career Criminal who used a dangerous weapon in his prior convictions or his present conviction.

No "Reasons for Amendment" are provided other than the 15 year statute. We agree; there are no reasons for these proposals.

Finally, responding to the questions proposed on Page 40:

1. No enhancement.
2. No amendment.
3. Don't use criminal history to provide higher adjustments; it would be double counting.
4. No additional history enhancements.
5. No additional adjustments for priors.

#32, Pages 40-41 -- §2K2.1(b)(3)

We object to the enhancement for the loaded firearm/ available ammunition. We believe this to have been assumed in setting the high BOL.

We also object to double-counting prior drug offenses or violent felonies in §2K2.1.

#35, Page 42 -- §2L1.1(b)(2)

We object to using the number of aliens smuggled to increase the B.O.L. We believe that the key law-enforcement issue is, "was the person the organizer?".

With regard to §2L1.1(b)(2)--documents, we contend that the existence of documents which can easily be duplicated into large numbers, is not the issue. The issue should be how many were used. This is not analogous to counterfeiting where all of the money is negotiable on its face. Documents require filling in names, pictures, and additional individualized preparation.

#38, Page 45 -- §2M5.2

We note, with concern, the lack of any research or data to support the staff's Reason for Amendment boilerplate, "serious nature of this type of offense."

#42, Page 46

Comment will be provided in the March 30, 1990, Final Paper.

#44, Page 47 -- §2P1.1

We propose a reduction from a level 13 to level 8 when the escape is from non-secure custody, to wit, a CTC half-way house, or a CCC.

We do not believe that the reduction should take into account the offense for which the defendant is confined--that will have already been factored in by his original sentence.

We believe that the 96 hour (4 day) period set forth in 2P1.1(b)(2) should be extended to one week.

We believe that failure to return from a furlough from a secure institution should be distinguished from a non-secure institution. The reduction for failure to return from a furlough should only be from a level 13 to a level 11.

#47, Pages 49-50 -- §2x5.1

We object to the proposed amendment and the application notes.

Where the Commission has failed to carefully craft a specific Guideline, after the many years of Guidelines, there is good reason to allow the district judges to return to the implementing statute. The "Reason for Amendment", that it is to "assist the court", is belied by the Application Note 1 that lists over 15 confusing areas that can be applied. We believe that when, as here, it is not critical to add more Amendments, the best resolution is, "When in doubt, leave it out."

#49, Page 50 -- §3A1.4

While we deplore "hate crimes", we object to this Amendment.

Initially, we object because this proposal permits sentencing for a "hate crime" based on a mere allegation of intention meets the preponderance standard.

This allows a person to be sentenced on rumor and innuendo when there is not sufficient evidence to prosecute an individual for the charge. If there is a case to be prosecuted, the Federal Government has done so in the past and will do so in the future.

We believe this factor may form the basis for a departure in a specific case, rather than become a separate general Guideline.

#50, Pages 51-54 -- §3B

We object to this Proposed Amendment in its entirety. It is unnecessary. It is confusing. And most of all, it is harsh in its interpretation of the Guidelines.

We object to the narrowing of the potential for comparative conduct in the first full paragraph on Page 52. We

believe that relative culpability should take into account the overall criminal enterprise.

On Page 53, #4, re §3B1.1(a), we object to the attempt to pad the number of participants to reach the 5 person level by including "unwitting participants". This defies the plain language of the Guideline.

On Page 54, we oppose proposed Application Note 2 to §3B1.2 which severely restricts eligibility for the mitigating role adjustments. If the defendant "mule", a mere carrier in a narcotics case induced a friend to drive her to the airport, she would not be eligible for a mitigating role reduction, even if it was a one-time trip for a huge drug organization.

Further restrictive is the second sentence in #2 which focuses on the commission of the offense instead of the criminal scheme.

Also, Application Note 6 on Page 55, insofar as it refers to Note 2, acts to cut back on the availability of this provision.

Finally, we believe that the Commentary to §3B1.2 captioned "Background" should not be deleted. It is helpful to understanding the Guideline.

#51, Page 55 -- §3B1.3

We believe that this provision should not be piggy-backed on top of §3B1.1.

We do not believe there is any need for specifying types of conduct.

#53, Pages 55-57 -- §3C1.1

We object to providing these many, creative and wide-ranging examples of what conduct could be included. This matter is best left to the Courts.

We question whether many of these examples are indeed willful obstruction matters that warrant taking account in sentencing.

We have serious objection to #s 7, 8, 9, 11, 13, 14. As to #6, this is prosecuted as a separate offense.

A few specifics.

1. #9 negates the "Exculpatory No" exception recognized by some Court of Appeal.

2. #11 opens up the possibility of turning every one-sided police interrogation into a sentence upgrade.

3. #13 would turn a defendant's forgetfulness about his or her criminal record into a sentence up-grade.

4. #14, as to providing incomplete information, is the best example of the pro-prosecution, one-sided nature of all of these examples.

Finally, we object to a separate guideline for reckless endangerment for flight. Where appropriate, the conduct forms the basis for a separate criminal prosecution.

#58, Page 60 -- Acceptance of Responsibility

We believe that this Guideline may well apply when it is first evidenced after adjudication of guilt.

We believe that there should be a presumptive application of this Guideline when a defendant pleads guilty.

We believe that a minimum of three points should be provided for acceptance of responsibility because of the relevance with regard to future criminal behavior. Further, we believe that where the base offense level is over 20, there should be a five level reduction for acceptance of responsibility to appropriately reflect the impact of the acknowledgment of guilt.

#59, Pages 60-61 -- Criminal History

We object to the proposed Background paragraph on page 61 because it contains a one-sided interpretation of Baldasar v. Illinois, 446 U.S. 722 (1980). The sentencing judge should interpret that decision.

#62, Pages 62-64

We believe the Commission should retain the current treatment of expunged convictions.

We object to the deletion of the first sentence of Application Note 6 to §4A1.2. We believe it correctly amplifies the proper approach.

#63, Page 64 -- §4A1.2

We believe that there is no reason to develop a specific guideline enhancement for prior similar conduct.

We believe that the problems in §4A1.2 application are inherent in Guideline application and cannot be corrected by more specific Application Notes.

We do not believe that Note 3 is too inclusive.

We do not believe that §4B1.2 should be amended to provide a separate set of instruction re prior crimes of violence or controlled substance offenses.

Finally, we do not believe that the Commission should develop a specific guideline enhancement for prior similar conduct.

#64, Page 64 -- Sentencing Table

We oppose creating an additional more severe criminal history category. We have not found judges hesitant to depart in that very rare case when he or she believe Category VI does not adequately sentence for the particular offense.

The Reason for Amendment does not provide sufficient data to warrant this significant Amendment.

#65, Page 66 -- §5E1.1

We object to the proposed amendment that would require (shall) restitution in every case, instead of the present "may" language.

There are already many restrictions and requirements imposed in every case. We believe the Commission can leave it to the judge's discretion.

#67, Pages 71 et seq. -- Specific Offender Characteristics

We believe that the Commission should recommend to Congress that it amend 28 U.S.C. §994(e) to permit the Guidelines, in appropriate cases, to take into account family ties and responsibilities, and community ties of the defendant.

We believe that these factors are highly relevant to a humane sentence.

We object to the proposed Amendment to §5H1.1 that limits the relevance of age to the disabled. No data is provided in support of this change.

We object to the Amendment to §5H1.4 on Page 72 that suggests home confinement. The sentencing judge can develop a proper "other than imprisonment" sentence.

We object to the proposed new paragraphs to §§5H1.5 and 5H1.6 because of our previously-stated belief that this information should be relevant with regard to both the sentence and to a sentence within the range.

#68, Page 73 -- §5K2.0

We object to deleting the third sentence in the first paragraph. It is important in the scheme of the Guidelines. We believe that it is important to reaffirm that the controlling decision with regard to departures can only be made by the judge at the time of sentencing.

We object to deleting the fourth paragraph. We believe it is very relevant to the issue of departures. The "Reason for Amendment" is pure boilerplate, "deletes surplus language, and improves the clarity of the policy statement." In fact, the Amendment is substantive.

#69, Pages 74 et. seq.--
Probation & Supervised Release Guidelines

We oppose this proposal to extend the Guidelines to these matters without further study and prior special hearings as was done with regard to Organizational Sanctions.

We believe that this increased Guideline coverage will further overwhelm judges, probation officers, prosecutors and defense attorneys with the highly complicated Guideline system without sufficient corresponding benefit to society.

We suggest a cost-benefit analysis prior to setting forth any specific proposals. In the meantime, we believe that the judges can continue to deal effectively with these matters.

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STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

ON BEHALF OF
THE
AMERICAN BAR ASSOCIATION

BEFORE THE
U.S. SENTENCING COMMISSION

CONCERNING
PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES

WASHINGTON, DC
MARCH 15, 1990

Mr. Chairman and Members of the Commission:

My name is Samuel J. Buffone. I appear today to testify on behalf of the 350,000 members of the American Bar Association in my capacity as Chairperson of the A.B.A.'s Committee on the United States Sentencing Commission. I am pleased to have this opportunity to convey the views of the A.B.A. with respect to the proposed 1990 amendments to the federal sentencing guidelines.

Our Committee has testified before the Commission on numerous occasions, and many of our comments have concerned the process by which the Commission promulgates guidelines. We have praised the Commission when its process has been most deliberative and receptive to the comments of interested observers, as in the case of guidelines for organizational defendants. But we have never hesitated to criticize the Commission when its process has been characterized by haste and inaccessibility. Today, I am compelled to convey the A.B.A.'s disappointment at the process by which the proposed 1990 guideline amendments are being promulgated. Our concerns lead us to urge that many of the proposed amendments not be transmitted to Congress.

Our position on the proposed guideline amendments is based upon our Standards for Criminal Justice (Standards). The

Standards envision a guideline process that has at its core an expert administrative agency with broad authority to draft and refine sentencing guidelines. The provisions of the Sentencing Reform Act reflect a similar view of the Commission. The Act grants broad authority to the Commission to promulgate and amend guidelines. The legislation, however, places limits on the amendment process.

The Commission is first required under 28 U.S.C. 994(x) to comply with the notice and comment procedures of the Administrative Procedures Act. 28 U.S.C. 994(o) provides authority to the Commission to amend and revise the guidelines "in consideration of comments and data coming to its attention." That same section sets out a process for solicitation of comments on the operation of the guidelines by interested segments of the criminal justice community. Finally, one of the statutory purposes of the Commission as set out at 28 U.S.C. 991(b)(1)(C) is to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."

The Standards' vision of an expert sentencing commission acting as an informed and responsive administrative agency is consistent with the Supreme Court's Mistretta opinion. In affirming the constitutionality of the Commission, the Court relied on the legislative standards for exercise of delegated authority and the status of the Commission as a true expert administrative agency.

Consistent with our view of the Commission as an expert administrative agency, we renew our suggestion that the Commission promulgate internal regulations to govern the guideline amendment process. We note that 28 U.S.C. 994(a) envisions that the Commission will promulgate and amend its guidelines pursuant to "its rules and regulations."

This model for the Commission's deliberative process also furthers another major goal recognized in the Standards. The Commission must develop the confidence of those who work in the criminal justice system. The development of institutional credibility should be a priority for the Commission. If judges, probation officers, prosecutors and defense attorneys recognize the fairness and thoroughness of the process by which guidelines are developed, implementation will be smoother.

We fear that the proposed amendments stray far from this model of decision making in at least three respects. The Commission has offered little time to respond to complex amendments. The proposals lack meaningful statements of reasons for their adoption. Perhaps most significantly, the proposals do not appear to be grounded in an empirical analysis of current guideline practice.

Turning first to the issue of timing, I wish to express the A.B.A.'s dismay at the very short comment period the Commission has established for this set of amendments. Less than 30 days

have passed since these highly complex proposals were published in the Federal Register. We are aware that the comment period will remain open until March 30, but that allows for only 42 days during which the federal bench and bar are expected to discover, decipher and comment on the significance and desirability of the proposals. This period is clearly inadequate, and may account for the paucity of witnesses at today's hearing.

It must be remembered that the Sentencing Commission is a quasi-legislative body. In the absence of Congressional intervention, this Commission writes law, but does so without the benefit of the legislative process. These proposals will probably not be the subject of committee hearings, or a committee report, or debate on the floor of the House or Senate. In light of the importance of the Commission's work, the underpublicized nature of the amendment process, and the large number of judges, lawyers and citizens who have a stake in the guidelines, it would not be unreasonable to suggest that the Commission initially circulate proposed amendments by December 15 of the year preceding the May 1 submission to Congress.

Our concern over the abbreviated comment period is exacerbated by the absence of meaningful explanations accompanying the proposed amendments. Some of the proposals are merely technical or clarifying and do not warrant an extended rationale, but many others represent far reaching changes in the structure of the guidelines and the scope of criminal punishment. Yet there is

little in the Federal Register that explains the reasoning underlying the Commission's substantive proposals. If the Commission relied on current practice data or social science research or studies of any kind in support of its work, one would not know that from reading the perfunctory explanations accompanying these proposals. As a result, it is exceedingly difficult to evaluate the need for many of the proposed amendments or their efficacy.

Many of the proposals would alter offense levels, resulting in harsher sentences. Why should this occur? Does empirical research demonstrate that current sentences are too low? Are these lengthier sentences based on a deterrence rationale or a retributive rationale, and are they justified by either rationale? In an era of dangerously overcrowded prisons, a heavy burden of persuasion rests on anyone who would advocate longer periods of incarceration, and the Sentencing Commission has not met this burden.

In the absence of supporting data or explanatory position papers, we can only assume that these amendments reflect the normative views of the four remaining Commissioners. Is robbery more serious than extortion? Is two years enough punishment for selling obscenity? Congress created a commission of social scientists, correctional specialists and judges: in short, a commission of experts. Congress anticipated that this expert commission would seek objective answers in the literature of

penology, in legal precedents, and in the experience drawn from the application of the guidelines. This commission's work product does not, as far as we can tell from this set of amendments, draw upon any of these sources.

To be sure, social science does not have all the answers -- Congress itself makes many normative judgements about the severity of criminal conduct without reference to the scholarly literature. We do not believe, however, that the Sentencing Reform Act of 1984 created the "junior-varsity Congress" Justice Scalia feared in his Mistretta dissent. The Act created an administrative agency to make decisions within legislative constraints based on technical material uniquely within the agency's ken. To justify its existence, the Commission must produce empirical research that supports each policy decision it reaches. Virtually all of the substantive amendments the Commission has proposed this year fail that basic test and therefore should not be adopted.

The proposed amendments fail a second test: they are not accompanied by research that predicts their likely effect. Specifically, they are not accompanied by prison impact statements.

The population of the federal prison system exceeds capacity by more than 50%. The Commission is not unaware of that fact but goes about its business as though it were not required to "take into account the nature and capacity of the penal, correctional

and other facilities" in promulgating guidelines. 28 U.S.C. 994(g). In fact, 994(g) mandates that the guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission." We do not know if the Commission complied with this directive, because its proposals are not accompanied by any prison impact analysis. This is another ground upon which a number of the proposals should be rejected.

Finally, the Commission is to be faulted for not encouraging the development of a common law of sentencing, one of the stated goals of the Sentencing Reform Act. There are two ways in which this goal could be furthered. First, when the Commission proposes to amend a guideline that the courts have already interpreted, the explanation accompanying the proposal should reference the published opinions on the subject. Hopefully the Commission is using the "feedback" process inherent in the guidelines system to inform its decision-making process, and interested observers should be able to comment on proposed amendments in light of the available case law. Second, there are a number of areas in which the Commission should not rush to respond to individual judicial decisions, but should instead permit courts to interpret the guidelines over a period of time. The Commission should encourage, not stifle, the ability of judges to influence the guideline system through the process of guideline interpretation.

Let me highlight three of the proposals to illustrate the concerns I have just expressed.

Items 23 and 24 would, if adopted, result in dramatically increased punishment for the crime of selling obscenity. The sole published rationale for this change is "to better reflect the severity of more grevious offenses." To be sure, many consider the sale of obscenity to be grevious conduct, but who is to say that the current guideline does not adequately reflect that fact? Are there cases in which courts have departed upward from the current guideline? Are there sentencing opinions in which judges have complained about the leniency of the guideline? Has the Commission conducted a survey of current obscenity sentencing practices? Has there been an increase in the sale of obscenity within federal jurisdiction since the current guideline became effective in November, 1987?

This proposal would provide for extraordinarily long periods of incarceration for non-violent conduct. Selling certain obscene materials would result in more severe punishment than committing most robberies. Specific offense characteristic (b)(3) in proposed 2G2.2 is especially troublesome, because it expands the real offense concept to unrelated conduct, no matter how remote in time. The Commission alludes to, but does not cite, social science research concerning a correlation between sexual abuse and selling obscenity.

The Commission's failure to provide all but the most boilerplate rationale for this proposal leads to the conclusion that it is not based on legal or penological research but instead has emerged, Athena-like, from the heads of four Presidential appointees sitting around a table in Washington. The Federal Communication Commission does not award broadcast licenses on such a basis. The Food and Drug Administration does not regulate new medications on such a basis. The United States Sentencing Commission should not increase punishment on such a basis.

Item 10 presents two options for amending the robbery guideline. Both options would alter the core of the Commission's widely-advertised modified real offense sentencing system by making 2B3.1 a pure real offense guideline. The explanation accompanying this major change is wholly inadequate and both proposed options should be rejected.

In the initial set of sentencing guidelines, the Commission explained with great clarity the all-important choice it faced between real offense and charge offense sentencing. In promulgating what it termed a modified real offense sentencing system, the Commission resolved a difficult issue in a reasoned, justifiable fashion. As Judge Breyer has written: " One may argue about the wisdom of the line the Commission has drawn, but we cannot say that the Commission has not drawn it." U.S. v. Blanco, 2 Fed. Sent. R. 144, 147 (1989). To continue Judge Breyer's

metaphor, if the Commission now chooses to move the line, it must explain why.

Most notably, the explanation does not inform the reader that the base offense level in 2B3.1 was raised in the last set of amendments partly in response to the argument that the then-current base offense level did not adequately reflect the case in which a defendant convicted of a single bank robbery has in fact committed multiple robberies. Now, a specific offense characteristic is proposed on precisely the same grounds to augment the increased base offense level.

Both proposed options are defective. Option 1 would make this an exceedingly real offense guideline, because the offense of conviction would not even serve as an anchor for the court's consideration of other robberies. Thus, if the defendant were convicted of a bank robbery corresponding to level 21 but was found by a preponderance of the evidence to have committed a bank robbery corresponding to level 27, the operation of the multiple count rules would, in effect, require the court to use 27 as a base offense level. In short, the defendant's sentence for the level 21 robbery would not be augmented by a post-verdict finding that he engaged in a level 27 robbery; instead, he would be punished for a level 27 robbery that had never been proved beyond a reasonable doubt. This amendment is possibly unconstitutional, probably unwise, and certainly lacking a rationale.

Option 2 seems overbroad. This option would not even limit the court's consideration to robberies committed as part of a common scheme or plan with the offense of conviction. In light of its stated purpose, the option is also poorly drafted, because an individual convicted of one robbery would be worse off than an individual convicted of two robberies, because the latter, unlike the former, would not receive an augmented sentence even if both had committed many additional robberies.

The explanatory paragraph accompanying item 10 does not sufficiently explore the real offense/charge offense implications that flow from either option. For that reason alone, the amendment should be rejected.

These examples demonstrate the hazards of amending the guidelines in a vacuum. The issues raised by the proposals are central to the operation of the guideline system, but the Commission has either not considered these ramifications, or has not made public its decision-making process in a manner that would facilitate useful public comment. In either event, the Commission has not fulfilled its statutory responsibilities and should therefore refrain from making these substantive changes in the guidelines this year.

My written submission contains comments about several other proposed amendments. I would note, however, that our ability to comment on the proposals in a thoughtful, comprehensive fashion

has been hampered by the abbreviated comment period, the absence of meaningful explanatory statements, and the lack of supporting data. Indeed, many of the comments we have submitted are based upon these very troublesome process issues I have already raised.

At this point I would be pleased to answer your questions.

COMMENTS ON OTHER PROPOSED AMENDMENTS

Item 1. This amendment would revise the introductory chapter of the guidelines. This appears to be an unwise amendment. Chapter One is a historical account of the initial guideline promulgation process, and any changes in it, even if not intended to be substantive, will be interpreted as a change in the key compromises underlying the guidelines. The topics discussed in Chapter One include real offense sentencing, plea bargains, departures and consideration of offender characteristics. The Commission should send only the clearest signals in these important areas, and indeed should address each topic comprehensively. The proposed amendment of Chapter One may be read as an attempt to address these subjects through indirection, a problem complicated by the absence of meaningful statements of reasons throughout the amendment package.

Item 2. We view with disfavor any attempt to narrow the scope of 1B1.8. This important guideline serves to encourage defendants to cooperate with the government, and the current amendment runs counter to this important policy goal.

Item 4. This amendment would increase the penalty for attempted murder and assault with intent to commit murder. Because the proposed amendment is not accompanied by a meaningful explanation of the need for this change, the proposal should be rejected.

Item 5. The Commission has discovered an anomaly in the operation of several larceny-related guidelines. Certainly an amendment is

justified to correct this anomaly, but the explanatory paragraph does not tell us why the Commission chose this "fix." Specifically, why has the Commission chosen to conform the lower offense level in sections 2B1.1, 2B1.2 and 2B1.3 to the higher offense level in 2B5.2 instead of lowering the offense level in 2B5.2? Perhaps there is a technical drafting reason why the anomaly was corrected in this manner, but the Commission has not provided it.

Item 7. This amendment alters the Property Damage guideline, 2B1.3, in a manner that provides for real offense sentencing in cases of arson. Previously, the Commission had treated arson as a charge-based guideline: a defendant would have to be convicted under the specific criminal statute prohibiting arson before being punished for arson. That may or may not have been a wise policy -- the arguments for and against real offense sentencing are highly complex and therefore beyond the scope of these comments -- but it was where the Commission had drawn the line.

A one sentence explanation says that the Commission now considers the difference between property damage and arson to be analogous to the difference between robbery and armed robbery. This explanation begs several questions: What principles underlie these distinctions? What research supports them? What has the experience been with the current real offense/charge offense distinctions? Is this part of a broader movement toward real offense sentencing and, if so, what is the likely impact of that shift on the federal criminal justice system? The Commission should explain such an important policy shift, and until it does so the status quo should be maintained.

Item 11. This amendment conforms the base offense level for extortion to the higher base offense level for robbery. Faced with a choice between increasing or decreasing offense levels to smooth out unintended disparity, the Commission should be guided by the rule of lenity that governs courts in other areas of the criminal law. This amendment appears based on a rule of severity: when in doubt, increase punishment.

Item 12. Congress instructed the Commission to provide for a "substantial period of incarceration" for certain fraud offenses. How did the Commission arrive at an offense level of 24? That offense level is the offense level that would be assigned to someone who had stolen $20 million. Has research demonstrated that $20 million is the "heartland" theft in such bank fraud cases? Or is this a normative judgment that five years (level 24, criminal history category 1 results in a guideline range of 51-63 months) constitutes a "substantial period of incarceration?" Clearly the Commission must respond to the congressional directive, but in the absence of research or explanation, and in light of the rule of lenity, it is hard to see why the offense level should be 24 rather than, for example, 20.

Item 14. The Commission is to be commended for a fairly thorough explanation of this issue, and for citing a court decision that addresses the issue. The Third Circuit's approach in Gurgiolo seems reasonable. The second option suggested by the Commission would undermine sound legislative judgments about the relative harmfulness of different controlled substances.

Item 16. This amendment presents a similar real offense/charge offense issue as Items 7 and 10 and should be rejected for the reasons stated in the body of the testimony.

Item 17. The 1988 drug bill created several new offenses for which the Commission is now promulgating guidelines. This particular proposal appears to lack proportionality: under the draft guideline, a defendant will receive the same punishment for possessing certain paraphenalia, such as drug scales, as if convicted of conspiracy to distribute drugs. Since the conspiracy guideline already results in the same punishment for conspiracy to distribute drugs as for actual distribution, these three different acts, each corresponding to different levels of harm and different degrees of culpability, result in equivalent punishment. This policy runs counter to established principles of proportionality and deterrence.

Item 25. This amendment is objectionable due to the procedural concerns expressed in the body of the testimony.

Item 26. Each of the three options set forth in this item is objectionable due to the procedural concerns expressed in the body of the testimony. The third option appears to be especially overbroad and ill-considered.

Item 28. This amendment would result in increased sentences without sufficient explanation. Proposed specific offense characteristic (b)(1) seems especially unclear and unnecessary.

Item 31. In this amendment, the Commission seeks to incorporate a mandatory minimum penalty into the guidelines and to establish the mandatory sentence as the floor within the guideline. Mandatory minimum sentences are coming under criticism throughout the federal judiciary on grounds of fairness and because they are understood to be inconsistent with a sentencing guidelines system. The Commission's decision to incorporate such a penalty into the guidelines represents an unwarranted endorsement of the statutory scheme, and will result in unduly harsh sentences above the minimum.

After putting forward two options, both of which are objectionable for the reasons stated above, the Commission asks a series of questions about the sentencing of violent career offenders. It seems more appropriate for the Commission to gather information in response to these important questions before proposing amendments that result in such severe guideline sentences.

Item 32. This proposal is objectionable for the reasons set forth in the body of the testimony. In addition, what is the rationale for providing a base offense level of 16 -- a level corresponding to a guideline sentence of about 2 years imprisonment for a first offender -- for an individual who is acknowledged to have possessed a weapon "solely for lawful sporting purposes or collection"?

Item 38. This proposal is objectionable for the reasons set forth in response to Item 4, above. What is "the Commission's view of the serious nature of this type of offense" based on? How have courts sentenced defendants under the current guideline? The Commission explicitly assumes that the heartland conduct under this statute is harmful or potentially harmful to national security. Intuitively, this assumption appears unreasonable. There's only one way to find out: the Commission should produce the needed research.

Item 43. The Commission is to be commended for including relevant legal precedents in the explanation of the amendment.

Item 44. The Commission asks whether distinctions should be made among defendants of different culpability convicted under the same escape statute. The answer is clearly "yes." In particular, the escape guideline should provide less punishment for the defendant who, for example, walks away from a non-secure worksite than for one who escapes from prison. Also, voluntary return should be distinguished from non-voluntary return. One distinction that appears to be irrelevant is the severity of the offense for which the defendant is serving a sentence.

Item 49. The Commission's concern about hate crimes is laudable, but a new Chapter Three adjustment does not appear to be warranted at this time. Data should be developed to determine how many of all federal crimes are motivated by the victim's status. If a significant number of such cases exist, perhaps a general adjustment is justified. If not, this factor might be made an explicit basis for upward departure in Chapter Five.