Item 50. The proposed revision of the Role guideline does not solve the two most pressing problems associated with that guideline. First, the guideline remains complicated and unduly inflexible. Second, the new guideline, like its predecesor, fails to provide a sufficient reduction for the so-called "mule" or "minnow", an individual whose role in the offense is so minor that it is unjust to even consider the full scope of the criminal enterprise at his sentencing.

Item 51. There appears to be no justification for altering the relationship between sections 3B1.1 and 3B1.3. Such a change would result in increased sentences and is therefore objectionable for the reasons set forth in the body of the testimony.

Item 53. It appears sensible for the Commission to describe with more specificity the contours of the obstruction guideline. It would be useful, however, to have a fuller accounting of experience under the current guideline. Presumably courts have brought their wisdom to bear on this question during the two years the guideline has been in effect, and a summary of the case law would allow for better informed public comment.

That said, it is still possible to offer an opinion of which factors should constitute obstruction and which should not. In our view, items 1-4, 6, 9, 12 and 13 are serious enough to warrant the enhancement.

Item 58. The A.B.A. endorses an acceptance of responsibility guideline that accords more weight to a defendant's decision to plead guilty. At the very least, there should be a presumptive discount for pleading guilty.

Item 64. The Commission has not provided an evaluation of empirical data with respect to Criminal History category VI, so it is impossible to know if a new category VII is warranted. It would be useful to know, for example, whether there have been a significant number of upward departures based on 4A1.3 for offenders with lengthy records, and whether defendants sentenced under category VI tend to be sentenced at the high end of the sentencing range.

The amendment would add 43 additional boxes to the current 258 boxes in the sentencing table, increasing the perceived complexity of the guidelines and the illusion of science for which these guidelines have been justifiably criticized. Also, it is hard to see why the Commission addressed the problem of extremely high criminal history scores by creating a category that itself only covers 13 to 15 points. The proposed amendment doesn't solve the perceived problem and should be rejected.

Item 66. This is a desirable, simplifying amendment. Indeed, the fine guideline could be rendered even more simple and sensible if the "cost-of-imprisonment" add-on were instead incorporated as one of the factors to be considered within the applicable guideline range.

Item 69. Neither option is entirely satisfactory, and we urge the Commission not to promulgate guidelines for probation and supervised release violations at this time. If compelled to choose between the two options presented, Option 2 is preferable, although the guideline should only apply to conduct punishable by more than one year.

Option 1 is objectionable because it would result in extreme disparity. Dissimilarly situated individuals - for example, individuals who violate supervised release by possessing marijuana and those who engage in violent behavior - will receive similar terms of imprisonment under option 1. This option also results in severe "cliffs": a theft of under $200 is to be considered a Class III violation and receive no more than 7 months additional imprisonment, but a theft of more than $200 is a Class II violation and would result in 12 to 18 months imprisonment.

Finally, it is unclear what statutory authority the Commission is relying upon to promulgate binding procedures for probation officers.

NACDL

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STATEMENT OF

**BENSON WEINTRAUB**

ON BEHALF OF THE

**NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

BEFORE THE

**UNITED STATES SENTENCING COMMISSION**

PUBLIC HEARING ON PROPOSED AMENDMENTS

TO THE UNITED STATES SENTENCING GUIDELINES

WASHINGTON, D.C.

MARCH 15, 1990

**PREPARED REMARKS OF BENSON B. WEINTRAUB ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) AT A PUBLIC HEARING BEFORE THE UNITED STATES SENTENCING COMMISSION ON MARCH 15, 1990**

**Judge Wilkins and Members of the Commission:**

I am a partner in the law firm of Sonnett Sale & Kuehne, P.A. with offices in Miami, Florida. My practice is substantially limited to the representation of offenders in connection with matters relating to application of the sentencing guidelines, direct appeals and habeas corpus proceedings. For the past five years I have served as the Chair or Vice Chair of the NACDL Sentencing Committee and have had the pleasure of working with members of the Commission and its staff in matters concerning drafting of the guidelines and proposed amendments. I also have the distinct privilege of serving on the Commission's Practioners' Advisory Group.

In preparing these remarks, I have considered the consensus of opinion on behalf of the constituency which I am pleased to represent, more than 20,000 criminal defense lawyers who practice in every State and Federal District throughout the nation.[1/] Quite candidly, my colleagues have not only expressed substantial objections to the guidelines generally but to these amendments specifically.

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1/ NACDL is the only national bar association devoted exclusively to the defense of criminal cases. Its goals are to assure justice and due process for persons accused of crime, to foster the independence and expertise of the criminal defense bar, and to preserve the adversary system of criminal justice. The membership of NACDL and its 40 State and Local affiliates includes criminal defense practitioners, public defenders and law professors.

I will comment on salient portions of the proposed amendments. At the outset, however, I must relate certain procedural objections to the Commission's rulemaking process. Under 28 U.S.C. §994(x), Congress deemed the notice and comment provisions of the Administrative Procedure Act applicable to the Commission's rulemaking function. 5 U.S.C. §553. However, the APA merely provides that "general notice of proposed rulemaking shall be published in the Federal Register" and such notice shall include the time and place of the public hearing and the subject matter of the agency's proposals. Parties interested in preparing substantive comment, testimonial or otherwise, have simply had insufficient time within which to prepare for today's hearing.

NACDL concurs with those who have expressed the position that proposed amendments being considered for the May 1st submission to Congress should be circulated and published no later than December 15th of the preceding year. Interested parties should be provided with annotated versions of the full text of any proposals at the time of the notice.

Before addressing the substantive proposals, those members of NACDL who have studied the amendments have identified several relevant themes of general application.

First, the Commission is dutybound to conduct extensive empirical research in monitoring sentencing trends under the guideline system in order to best reflect how the new process is working. Prior to undertaking development of the initial set of guidelines, the Commission reviewed previous sentencing practices

through statistical analysis based upon summary reports of approximately 40,000 convictions and 10,000 Presentence Investigation Reports.[2/] As one of our colleagues succinctly stated, "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." Consequently, it is difficult, if not impossible, to evaluate the need for many of these amendments based upon the Commission's generalized statement of reasons published in the Federal Register. Similarly, we have not discerned any evidence that the Commission has or is considering guidelines which "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. §991(b)(1)(C). Moreover, since the vast majority of substantive changes appear to lengthen the amount of actual prison time required to be served under the guidelines, we have not been made aware of substantial evidence indicating that the Commission has complied with its statutory mandate to consider the impact of the guidelines and amendments on prison population. See generally 28 U.S.C. §994(g).

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[2/] Interestingly, NACDL has been seeking access to the Commission's raw data for several years, especially that data upon which the original set of guidelines was based. NACDL has sought to avail itself of the Commission's rule relating to public access to Sentencing Commission documents and data and we have been consistently frustrated in accessing specific data concerning FPSSIS through the Inter-University Consortium for Political and Social Research.

Through these amendments, the Commission seeks to further limit the traditional exercise of the Court's discretion at sentencing by proposing changes to guidelines where the Court might otherwise employ a departure in an appropriate case. These sweeping changes are too broad and remedial action, if indicated, can frequently be obtained through departure.[3/]

As a final introductory note, NACDL has noted with interest the apparent impact of the Department of Justice on this judicial agency. This is best seen through a full-time staff position occupied by an AUSA. Why not have a full-time defense advocate serve on the Commission's staff to contribute much needed insight and balancing to the deliberative process?

Proceeding to the merits, I will address certain amendments which have been proposed. However, no inference should be drawn with respect to any amendment which is not specifically addressed as we have not had sufficient time within which to prepare a comprehensive response.

1. Reference to the proposed amendment to Chapter One, Part A is correlated with the pagination of the December 16, 1989 draft of "1990 Amendments 001" at 1.7. Under subsection "(b) Departures.," NACDL feels it would be inappropriate to delete the

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[3/] According to the Commission's 1988 Annual Report, 82.3% of all sentences imposed were within the guidelines; 2.91% were above; 9.1% were below; and 5.7% of the sentences were below the guidelines based upon USSG §5K1.1. Does the Commission believe that the departure rate is too high? Too low?

language: "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." The next sentence should also remain and be modified to reflect: "At this time, however, the Commission does not so limit the courts' departure powers." The spirit of full faith and credit, without limitation, should be accorded the concept of "'judicially-created' departures." United States v. Summers, 893 F.2d 63 (4th Cir. 1990) (Wilkins, J.). 18 U.S.C. §3553(b). Judicially created departures may sometimes override the Commission's self-imposed limitation on the availability and extent of departures purportedly proscribed by USSG §§5H1.1-.10.

Regarding the second full paragraph of 1.8, "(c) Plea Agreements.," we feel that the elimination of the last full sentence is unwarranted ("Since they [Courts] will have before them the norm, the relevant factors (as disclosed in the plea agreement), and the reason 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.") 1.8-1.9. Elimination of this sentence would be inconsistent with the spirit of 18 U.S.C. §3553(b).

As a general observation with respect to plea agreements, the prosecutors' unbridled ability to manipulate the guidelines through charging decisions is capable of gross abuse. This position is in marked contrast to the statement at 1.6 (last paragraph, second sentence) which states "Of course, the

defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence." Ibid. (emphasis supplied). That statement is erroneous because the standard of evidence relating to a finding of guilt radically differs from the standard governing resolution of disputed facts or factors relevant to sentencing. Moreover, through multiple count charging, the prosecutor can immediately upgrade guideline units and bring relevant conduct within the scope of the count to which the defendant may plead guilty pursuant to a plea agreement. The Commission must proceed cautiously and carefully, taking into account the views of both prosecutors and defense lawyers regarding the effect of the guidelines on plea practices.

The Commission purports to have considered the "Sentencing ranges in light of their likely impact upon prison population." 1.11. However, we feel that it would be disingenuous to rely upon data generated in 1987 with respect to current and future prison population, particularly in view of the guideline amendments and legislative changes which have taken their course in the interim.

2. USSG §1B1.8. NACDL strenuously opposes the modification and in its place offers a proactive amendment proposal. This amendment unnecessarily serves to vest even more discretion than before in the prosecutor. By requiring the contours of USSG §1B1.8 to be construed only in the context of a plea agreement, even more so than through the existing provision, it unfairly and adversely

impacts upon a defendant seeking to cooperate and plea bargain in good faith by allowing statements to be admitted into evidence in the Government's case-in-chief should the plea negotiations break down.

In a case in which I was recently consulted, immediately upon his arrest a defendant made uncounselled statements regarding the nature and extent of his activities and the activities of others in an attempt to cooperate. Ultimately, the case proceeded to trial and the defendant's statements came into evidence notwithstanding a motion to suppress. The defendant was told by an FBI Agent at the time that it would be in his "best interest" to waive his Miranda rights and tell all he knows. An Assistant United States Attorney was on the arrest scene and took the statement. Subsequent plea negotiations through counsel for the defendant and the government never reached fruition and the FBI Agent testified at trial as to the defendant's statements regarding an additional load of drugs about which the government had been unaware. The impact upon the sentence as well as the conviction is self-evident.

This is fundamentally unfair and, in our view, contrary to the plain terms of Rule 11(e)(6), F.R.Cr.P. ("Inadmissibility of Pleas, Plea Discussions and Related Statements") and Rule 410(f), F.R.Cr.P. which excludes "any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty...").

While the proposed changes appear minor, USSG §1B1.8 needs to be strengthened rather than weakened to give substance to the principles which lead to its enactment in the first instance. The guideline assumes that a plea agreement or cooperation agreement has already been executed. In many instances, the Defendant, with or without counsel, must make an instant decision to cooperate even in the absence of an agreement. To encourage early cooperation rather than to penalize it, statements made by a Defendant in this regard should never affect the guideline calculations except as provided in the existing provisions of subsection (b).

The guidelines should be amended to expressly provide, in the text rather than through the Commentary, that statements made by a Defendant pursuant to this section "shall not be used in determining the applicable guideline range or as a basis for upward departure or adjustment expect under USSG §3E1.1."

The proposals codified at subsection (b)(2) and (b)(4) should not be adopted. Since the Commission recognizes in the Commentary that the Defendant's prior conviction(s) will generally be obtained from the USPO "independent of information the Defendant provides," such information from the Defendant should not be used in computing the guidelines absent official documentation. Regarding the proposal to subsection (b)(4), the caselaw is replete with instances of the Government breaching plea agreements. Therefore, a Defendant should not be penalized in [further proceedings] by having statements made under USSG §1B1.8 rendered

admissible in the event that the Court determines the Government has breached the agreement and the plea is vacated.

NACDL is aware that USSG §1B1.8 should be read in conjunction with 18 U.S.C. §6002 regarding immunity. However, the policies and social interests furthered by the guideline and the statute are separate. In summary, NACDL opposes the proposed change to USSG §1B1.8 and urges the Commission to expressly include language indicating that statements made under this section (1) need not be governed by a cooperation agreement, particularly in the absence of counsel; and (2) statements made pursuant to this section shall not be used in computing any adjustment or departure under the guidelines with the exception of USSG §3E1.1.

3. NACDL opposes the modification to USSG §1B1.3. The hypothetical in the proposed "Application Note" assumes that the Government can establish, by an appropriate quantum of proof, that all alleged acts and omissions would constitute factors which warrant consideration under the multiple counts rule. In this regard, it is NACDL's position that disputed facts or factors relevant to sentencing should be established by the Government under the standard of clear and convincing evidence. Finally, NACDL is not unmindful of the Ninth Circuit's action granting en banc consideration in the matter of United States v. Restrepo, 883 F.2d 781 (9th Cir. 1989).

4. NACDL opposes inclusion of USSG §2A1.5 as a new guideline. The proposed base offense level, 28, appears arbitrary. Has the Commission considered sufficient empirical data to justify this new guideline and base offense level? The same comment applies to USSG §2A2.1.

5. Noting the "anomalous" result, why not employ the principle of parsimony by resolving the differences through application of the lower level for purposes of conformity?

6. With specific reference to proposed Application Note 3, this appears to further dilute the standard of evidence applicable to the resolution of factual disputes. Again, NACDL urges adoption of the clear and convincing evidence standard. Notwithstanding this position, the Commission's use of the term "reasonable estimate" does not even appear to satisfy the preponderance standard through critical indicia of reliability.

10. NACDL does not support either of the options proposed. See NACDL comment at item 3, supra.

11. NACDL opposes the two level increase. See comment 5, supra.

12. NACDL believes that there is insufficient empirical data to justify the proposed specific offense characteristic

relating to federally insured financial institutions. We believe that the Commission's statutory mandate to consider this factor might best be served through a departure under appropriate circumstances. Moreover, this proposed specific offense characteristic appears to be inconsistent the principle of parsimony codified at 18 U.S.C. §3553(a). See United States v. Denardi, 892 F.2d 269 (3d Cir. 1990) (Becker, J., concurring in part and dissenting in part).

16. NACDL strenuously objects to correlating the base offense level of USSG §2D1.6 with the offense level from USSG §2D1.1. NACDL expressed strong opposition to this amendment last year. In practice, prosecutors rarely agree to charge bargaining for a telephone count in large scale cases. However, the window should be left open for plea bargaining under this guideline for an appropriate case. Quantity and quality can still serve as a basis for departure without overly restricting the application of this guideline.

17. The proposed new guideline, USSG §2D1.11, appears to lack proportionality because a Defendant merely possessing "certain equipment" e.g. scales, paraphernalia, etc. would be held as accountable as a principal involved directly with narcotics. The social harm which this amendment addresses is different from other provisions of the ADAA.

19. See comment 6, supra.

23-24. NACDL agrees with other commentators objecting to these sections principally on the ground that the Commission cites no empirical research concerning the relationship between sexual abuse and selling obscenity. Moreover, these proposals would constitute a wholesale revision of the obscenity guidelines under which dramatically increased punishment would result without adequate factfinding and research.

27. NACDL opposes the proposed amendment of USSG §2J1.6.

28. NACDL opposes the proposed amendment to USSG §2K1.4. In particular, since scienter is a measurement of culpability, subsection (a)(1)(A) should relate to a Defendant who has knowingly "created a substantial risk..."

31. NACDL does not favor either of the options proposed by the Commission. This is an example of how Congressionally prescribed mandatory minimum sentences are inconsistent with guideline sentencing. While NACDL acknowledges the seriousness of problems posed by "armed career criminals," we have not seen sufficient empirical data to justify such wholesale revisions of the guidelines. Finally, the Commission seeks to take into account the nature of the Defendant's prior convictions by assigning a minimum category III criminal history category. If the Commission

is actually going to consider the nature of the prior convictions, instead of just the number, it must also consider how remote in time such prior convictions are in determining whether and under what circumstances to apply the ancient prior record doctrine.

38. The proposed amendment to USSG §2M5.2 is based upon a politically unrealistic premise. "This base offense level assumes that the conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States." What about a prosecution brought under this section for licensing or exporting violations to friendly nations? By dealing with this problem through a downward departure, is the base reference point still not too high? Finally, how many prosecutions have been brought under this section to warrant a change in the base offense level. Was the base offense level reasonable in the first instance? On what data does the Commission base this proposal?

43. While NACDL has not had sufficient time within which to review the cited caselaw, the inclusion of these legal authorities are helpful to the rulemaking process.

49. NACDL does not believe that there are enough cases to warrant inclusion of such factors as a victim related adjustment. This would serve to unnecessarily lengthen the guideline calculation process.

50. NACDL strongly opposes the proposed amendment to Chapter 3, Part B. We believe that an offender's role in the offense is frequently significant for purposes of sentencing. However, both the current and proposed methods of analyzing role appear to be inadequate and rigid. Relative culpability should be viewed in the context of the overall criminal activity rather than assessing a Defendant's culpability relative to other participants within the perameters of his or her own relevant conduct. If an individual is merely an offloader, that status should be measured against the relative culpability of the financiers, principals, middlemen, brokers and facilitators. The offloader's culpability should not reflect that individual's culpability in the microcosm of other offloaders. Courts should be granted greater leeway in recognizing mitigating offense factors and characteristics.

51. USSG §3B1.3 (Abuse of Trust) should not be amended either to specify the types of conduct which this adjustment covers or to make it cumulative to any adjustment under USSG §3B1.1.

53. If any examples are to be included in this section, the Commentary should specifically note that the provision of lawful criminal defense representation and services is beyond the scope of activities proscribed this section.

58. Regarding the adjustment for Acceptance of Responsibility, USSG §3E1.1, the guidelines should not be amended to

preclude such adjustment when a Defendant exercises his or her rights incorporated into the Fifth and Sixth Amendments to the United States Constitution. Clearly, a Defendant may manifest conduct and a contrition of spirit warranting adjustment under this section following a trial. Second, NACDL believes that there should be an automatic adjustment under this section for pleading guilty. Where the base offense level is between 1-24, a 3 level downward adjustment should apply. Where the base offense level is 25 or higher, a 4 level downward adjustment should apply. This would take into account the impact of the sentencing guidelines on an ever increasing prison population. It would also serve to reinforce the values sought to be furthered by this section. Finally, recognizing different indicia of accepting responsibility, post offense conduct, including rehabilitative efforts, should be taken into consideration and rewarded through a graduated scale.

64. Especially in the absence of empirical data indicating the frequency with which USSG §4A1.3 is applied, NACDL opposes such a radical revision of existing policy and guidelines.

Thank You.

U.S. Department of Justice

*Washington, D.C. 20530*

STATEMENT

OF

PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

AMENDMENTS TO THE SENTENCING GUIDELINES

ON

MARCH 15, 1990

Mr. Chairman and members of the Commission:

I am pleased to appear before you today to discuss the amendments recently proposed to the sentencing guidelines. We find that many of the amendments will improve the implementation of the guidelines. We applaud the Commission's efforts in several important areas, including the amendment of the arson guideline, the revisions made to the guidelines relating to child pornography, and the addition of a new criminal history category for serious offenders. These amendments will foster the purposes of sentencing set forth in the Sentencing Reform Act and assure that serious offenders are punished appropriately. We urge the Commission to adopt these amendments for submission to the Congress by May 1. There are several areas, however, where we believe further work is needed before amendments are submitted to Congress.

Acceptance of Responsibility

The first area I would like to address is the guideline for acceptance of responsibility, guideline §3E. The Commission has asked whether the guideline should be amended expressly to provide that a reduction for acceptance of responsibility is not warranted when the defendant first evidences such acceptance after adjudication of guilt. Amendment No. 58. We believe very strongly that the guideline should be amended to establish a deadline for acts evidencing an acceptance of responsibility but would establish an earlier deadline than the time at which guilt is adjudicated, as suggested by the Commission. Specifically,

the guideline should require that a defendant enter a plea or conditional plea of guilty or nolo contendere prior to the commencement of the trial in order to be eligible for the guideline reduction based on acceptance of responsibility.

It is clear to us that there is a pressing need to fine-tune the guideline relating to acceptance of responsibility. From discussions with prosecutors throughout the country, we have learned that too many judges grant the two-level reduction as a matter of course to defendants who proceed to trial, are adjudicated guilty, and then merely state that they accept responsibility for the offense. It is difficult to reconcile an asserted acceptance of responsibility for committing an offense with a defendant's decision to proceed to trial in order to challenge the government's case. For this reason we believe that the guideline authorizing a reduction for acceptance of responsibility should require the guilty or nolo plea before the commencement of trial rather than simply before the adjudication of guilt. To allow a defendant to assess the strength of the government's case during the trial and remain eligible for the acceptance reduction would undermine the intent of the guidelines to grant a lower sentence to a defendant for whom the need for punishment and incapacitation is reduced by a sincere acknowledgement of wrongdoing.

The role of the conditional plea of guilty is important in this context. A conditional plea may be entered only with the approval of the court and the consent of the government, and the

plea is subject only to the right to appeal any adverse determination of a pretrial motion and, if successful, to withdraw the plea. Rule 11(a)(2), Federal Rules of Criminal Procedure. It is used to litigate legal issues, such as the constitutionality of a search and seizure, in connection with an offense charged. If a defendant insists upon proceeding to trial in order to litigate such an issue, his or her decision would appear inconsistent with a true acceptance of responsibility. Such a defendant could have availed himself of the conditional plea and thereby have manifested an acceptance of responsibility for the acts charged, subject to the resolution of the legal issue.

We recognize that there are some situations in which a court may wish to depart from a guideline that requires a defendant to enter a guilty or nolo plea prior to the commencement of the trial in order to be eligible for the reduction for acceptance of responsibility, and the Commission may wish to acknowledge factors relevant to such a departure. However, an asserted acceptance occurring after the commencement of the trial should not simply reflect a calculated decision by the defendant to express regret for the offense after assessing the strength of the government's case and should be consistent with the reduced need for punishment generally reflected by the acceptance guideline. A court may determine that a departure is warranted, for example, when a defendant changes his plea soon after the commencement of the trial upon advice of newly appointed counsel. In general, if the courts authorize departures for acts

demonstrating acceptance of responsibility after the commencement of the trial, any unwarranted departures by the courts could be appealed by the government, subject to a reasonableness standard. See 18 U.S.C. §3742.

We also believe that assertions of acceptance of responsibility before an adjudication of guilt are distinguishable from those that occur after such an adjudication and that limitations on the reduction, even based on departure, must be more stringent for the latter than the former. We would suggest that the Commission clearly preclude the application of the acceptance reduction, even by way of departure, to a defendant adjudicated guilty except in the rare case of a defendant whose conditional plea is approved by the government but not by the court. In the case of such a defendant who proceeds to trial after rejection of a conditional plea, a downward departure, not to exceed two levels, may be warranted because the defendant accepted responsibility through his attempt to enter a conditional plea.

The Commission has also asked whether it should more clearly indicate the weight that should be assigned to the entry of a guilty plea. We believe that the entry of a guilty or nolo plea should be considered significant evidence of acceptance of responsibility, and the Commission should so state in its commentary to the acceptance guideline. However, mere entry of a guilty or nolo plea should not guarantee a reduction.

Firearms

The guidelines relating to firearms offenses need strengthening. There is currently no guideline applicable to the "armed career criminal" provision of federal law, 18 U.S.C. §924(e), and the Commission has published two proposed alternative guidelines to cover the provision. Amendment No. 31. We strongly urge the Commission to adopt the second option.

The armed career criminal provision of the federal firearms laws is an enhanced sentencing provision for a violation of the prohibition against possession of a firearm by a convicted felon, 18 U.S.C. §922(g)(1), in the case of a defendant with three previous convictions for a violent felony or a serious drug offense. The provision requires a 15-year minimum prison term and leaves the maximum to the discretion of the court. We believe there should be a guideline applicable to sentences subject to the armed career criminal provision that includes a range of factors and is consistent with the fact that Congress established 15 years as only the minimum sentence available under this provision. In light of the current absence of guidelines addressing the armed career criminal provision, the 15-year statutory minimum would normally become the guideline sentence. Higher sentences would be authorized only if a basis for departing from the guidelines existed in accordance with the departure standard set forth in the Sentencing Reform Act, 18 U.S.C. §3553(b).

The offense to which the armed career criminal statute applies is receipt, possession, or transportation of a firearm by a convicted felon. The enhanced sentencing under the armed career criminal statute is based solely on the number and nature of the past convictions creating the prohibition against possession of a firearm and does not require a current act of violence. It reflects the view that felons with convictions for violent felonies or serious drug offenses should be sentenced to significantly longer terms of imprisonment than other convicted felons in possession of firearms. The former present a special danger to society when in possession of guns and must be deterred from engaging in this form of illegal conduct or incapacitated when not deterred.

Option two addresses the concerns raised by the statutory provision more fully than does option one. In keeping with the statutory scheme, the second option increases the sentence depending upon the nature and seriousness of the past violent or drug offenses giving rise to the application of the statutory minimum. By contrast, option one increases the sentence primarily on the basis of any current underlying offense that occurs in connection with the unlawful possession of the firearm by a convicted felon and on the basis of the existing criminal history provisions. However, the criminal history provisions in the guidelines are only an approximate measure of past criminal behavior. They do not distinguish between violent and non-violent offenses in the defendant's background, nor do they

distinguish between particularly heinous and less serious violent offenses. Simply to employ the existing criminal history scoring techniques, which may be acceptable for the average offender, to armed career criminals does not work.

An offender who has committed a heinous murder or a series of particularly violent offenses, one who has used firearms in connection with past violent offenses, or one who has engaged in very large drug transactions should receive a harsher penalty when in possession of a firearm than an offender whose past offenses were brawls resulting in little or no injury. The armed career criminal statute would be given little effect if offenders with particularly violent backgrounds only received higher than the mandatory minimum sentence when caught committing a new violent offense. The statute has a preventive purpose and does not require a new violent offense or use of a firearm in connection with any new offense. Defendants sentenced under the armed career criminal provision are potentially among the most dangerous defendants in the federal system. It is important for the Commission to take special care in setting the correct sentences for this group even if extra investigation into the background of these offenders is required.

We would be pleased to offer our assistance to the Commission and expect to provide views on other issues raised by the Commission in its proposed guideline amendments as it addresses these amendments in future deliberations. United States Attorney Joe Brown, Chairman of the Sentencing Guidelines

Subcommittee of the Attorney General's Advisory Committee of United States Attorneys, will address other important areas of concern. Again, I commend the Commission for its important efforts and look forward to working with you in the future.

STEER

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHAMBERS OF
JON O. NEWMAN
U. S. CIRCUIT JUDGE
450 MAIN STREET
HARTFORD, CONN. 06103

March 16, 1990

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

Dear Judge Wilkins:

Herewith are my comments on a few of the currently proposed amendments to the Sentencing Guidelines:

A. Amendment 10. I appreciate the Commission's concern to make sure that punishment adequately reflects multiple robberies, but I caution against moving too far towards "real offense" sentencing and away from the "modified real offense" approach that underlies most of the Guidelines. Option 1 takes the extraordinary step of treating as an offense of conviction (for purposes of multi-count analysis) offenses that did not result in conviction and may not even be charged offenses. And in doing so, it would result in having the multi-count analysis start with the offense level for the most serious of the robberies, even though that one was uncharged. That approach not only undermines the basic approach of the Guidelines but also poses an undue deterrent to plea bargaining. If option 1 is nonetheless preferred, I suggest it be modified so that the multi-count analysis always starts with the offense of conviction. However, I think option 2 is preferable, provided it is limited, as option 1 is, to robberies committed as part of the same course of conduct or common scheme as the offense of conviction. Without this limitation, robberies would become pure "real offense" sentencing, and hearings would be held as to all prior robberies, regardless of when or where they occurred. That is an undue burden on sentencing courts.

B. Amendment 49. The desire to enhance punishment when crimes involve group hatred or denial of constitutional rights is understandable, but I question whether it is appropriate to accomplish this objective by an offense adjustment, rather than by a departure. Again, my concern is to avoid the need for an excessive number of hearings. Whether considered as an adjustment or a departure, I also suggest that the requisite motivation test be "motivated in substantial part" rather than "motivated at least in part." I do not think the intent is to add punishment every time a criminal utters a racial slur in the course of committing a crime. White and Black criminals do that with some frequency. If, as appears, the focus is on "hate crimes," the phrase "substantial part" would better capture the idea and avoid the disparity that would otherwise ensue as some courts added two levels for racial slurs and some did not.

C. Amendment 58. My overall impression is that the acceptance of responsibility guideline should not be changed at all, at least not until sufficient experience demonstrates serious defects. If changes are to be made, I think it would be a serious mistake to try to indicate more clearly the weight to be accorded a guilty plea. As the Commission knows, there are serious constitutional issues lurking in this area, and there is little point in precipitating more constitutional attacks on the guidelines by making exercise of the right to a trial a basis for an automatic increase in punishment. Also, I strongly oppose any effort to give different weights to different indicia of acceptance of responsibility, if by this suggestion the Commission means to assign precise weights to particular forms of contrition. The Commission might wish to consider a revision that simply authorizes the sentencing judge to reduce the offense level anywhere from one to three levels, depending on the judge's assessment of the defendant's acceptance of responsibility. This avoids excessive fact-finding and might ameliorate some of the alleged reductions in guilty pleas.

D. Amendment 63. I would not favor a specific enhancement for prior similar conduct. The departure authority in § 4A1.3(e) seems adequate. See United States v. Coe, 891 F.2d 405 (2d Cir. 1989).

E. Amendment 64. I hope the Commission will resist the temptation to increase complexity by adding a seventh column to the sentencing table. There is no reason to think that criminal histories more serious than those in Category VI are not being handled by upward departures where warranted. Furthermore, if the addition of a seventh column means that the sentencing table must appear either on two pages or on one page but in smaller type, the extra column will surely not have been worth it.

F. Amendment 68. My major concern in the entire group of amendments is with the proposed deletion from § 5K2.0 of the fourth paragraph, which now reads:

> Harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the limitations set forth in § 1B1.3

In the first place, to say in the "Reason for Amendment" that this is a deletion only of "surplus language" is, in my judgment, highly misleading. This paragraph is what keeps the Guidelines consistent with the "modified real offense" approach that the Commission is using, if anything an approach that, as the Commission says, is closer to a "charge offense" system. Ch. 1, Pt. A(4)(a). I realize that a sentencing judge is authorized to consider any conduct, 18

U.S.C. § 3661, Guidelines, § 1B1.4, but the last paragraph of § 5K2.0 serves the valuable purpose of guiding the exercise of departure discretion so that the focus is on conduct relevant to the offense of conviction. Perhaps the Commission might wish to revise the wording slightly, but it should not be dropped entirely, and surely not dropped without a clear explanation of why this is occurring and what the Commission expects to happen in its absence.

Sincerely,

Jon O. Newman
United States Circuit Judge

United States District Court
Eastern District of Michigan
Detroit 48226

Julian Abele Cook, Jr.
Chief Judge

March 18, 1991

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

Dear Commission Members:

This letter is in response to your request for the views of federal judges on proposed amendments to the sentencing guidelines. Unfortunately, your request came late in the comment period and the format used to present the proposed amendments has made them somewhat difficult to comprehend. Nevertheless, I shall attempt to respond as insightfully as possible under the circumstances.

In an effort to analyze the proposed amendments, the judges on our bench went through a deliberative process in considering the proposed amendments. We first asked our Probation Office to comment. Thereafter, the United States Attorney and Chief Federal Defender, as a surrogate for the defense bar, were solicited for their comments. Our Pretrial and Probation Committee then considered the proposed amendments in light of the views and opinions of the three groups. Copies of these comments are attached.

The United States Attorney frequently stated that the Department of Justice had not yet taken an official position with regard to the specific proposed amendments. This response was especially disappointing since the Guidelines have worked a substantial shift in discretion from the judges to the local United States Attorney. The Chief Federal Defender, who currently serves as the chair of the American Bar Association Committee, is directly involved with the Guidelines. Thus, he has acquired a superior knowledge about the proposed amendments as well as a developed particular view.

As a result of these collective opinions, our Pretrial and Probation Committee has reached the following conclusions:

1. A substantially better job could be done in presenting proposed amendments to the public for comment.

2. The proposed amendments are too complicated and lengthy for a detailed comment given the time constraints imposed.

3. A guidelines should be amended only (a) if there is a demonstrated need for change and (b) to clarify and simplify as well as to eliminate clear unfairness.

4. An amendment should not have the effect of lengthening a sentence or providing any additional limitation upon the discretion of a judge unless there is a good reason to do so. In general, the sentences under the current guidelines are too long and the discretion of the judge to consider offender characteristics, as well as the circumstances of the crime, are too limited.

5. Amendment 11 has merit. At the present time, there is too much of a reliance upon drug quantities in punishing drug offenders. In our judgment, Guideline 3B1.2 does not offer a sufficient basis for differentiating the hierarchy of culpability in multi-defendant conspiracies. The scale of drug quantities establishes a basis that is too simplistic for determining punishment in situations (a) where an offender's criminal expectations are unlikely or fulfillment and (b) when the offender is only a "mule."

Thank you for the opportunity to comment.

Very truly yours,

JULIAN ABELE COOK, JR.
Chief Judge
United States District Court

JAC:pf

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Attached are comments on various proposed amendments. For each proposal, the Probation Department's comments to the relevant amendment are included first, followed by the United States Attorney's Office's response and then the Federal Defender's Office's response.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 7A

From studies of the United States Sentencing Commission requested and received by this district, there appear to be no clear reasons for changing 2B3.1(b)(1), increasing the enhancement for the robbery of a financial institution. Why should the robbery of a financial institution be considered more serious or treated differently than any other robbery?

United States Attorney's Comment on
Proposed Amendment 7(A). Bank Robbery.

The Department of Justice has not yet adopted an official position on this proposed amendment.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 7(A)

We agree with the draft letter -- no clear reasons for changing 2B3.1(b)(1).

United States Probation Department
Eastern District of Michigan

Proposed Amendment 7B

An increase of two levels to the firearm offense characteristic appears to be the best alternative to lessen the disparity in those bank robbery cases where a firearm is used but due to prosecutorial discretion, an additional charge under 18:924(c) is not charged. Any larger increase in the enhancement would cause additional disparity in those cases of defendants in the higher criminal history categories.

**United States Attorney's Comment on**
**Proposed Amendment 7(B). Bank Robbery.**

The Department of Justice has not yet adopted an official position on this proposed amendment.

This office does take issue with the rationale behind the proposal. The reason the Commission gives for this proposed amendment is that the government has not been consistently prosecuting section 924(c) violations. The United States Attorney's Office in this district takes that obligation of consistency seriously. Although we do not have the data necessary to speak for other districts, we believe that we have been faithfully adhering to the policy of the Department of Justice not to bargain away section 924(c) charges that are "readily provable." On occasion a guidelines gun enhancement will apply even though the defendant has not pleaded to a section 924(c) violation. The reason is that the guidelines require proof by only a preponderance of the evidence (that a gun was used or possessed), but a section 924(c) violation must be proved by the higher standard of "beyond a reasonable doubt."

Federal Defender Office - Detroit, Michigan

Proposed Amendment 7(B)

We oppose the draft letter's support for a 2 level increase.

We concur in the U.S. Attorney's objection to the rationale provided by the Commission -- Justice Department shenanigans or ineptness.

Defender analysis:

The Commission's prime concern with the present weapon enhancement appears to be with prosecutorial handling of violations of 18 U.S.C. § 924(c). The Commission states that it is clear from the cases sentenced that, notwithstanding the clear intent of the Justice Department's 'Thornburg Memorandum' on the plea bargaining, prosecutors are not consistently charging 924(c) when a weapon is possessed during a bank robber. Therefore, the Commission faces a policy question whether it should act to eliminate or limit the resulting disparity.

The Commission, however, has no data about why prosecutors are not charging under § 924(c). A failure to charge may be based upon a variety of reasons, from a weak case to a perception that the penalty is sufficient without a mandatory 5 year consecutive term. Before making any change, the Commission should collect and analyze data about the reasons for failing to utilize § 924(c).

The Commission has also suggested that the weapon enhancement should be increased in order "to more closely accommodate Congress' view of the seriousness of committing a

felony while possessing a weapon". The Commission does not provide any evidence that the present enhancement fails to accommodate Congress' view about severity. The available evidence does not indicate that sentences in bank robbery cases where a weapon is used or possessed are inadequate. Commission data show that, in bank robbery cases under 18 U.S.C. § 2113(a) sentenced from January 1, 1989, through June 30, 1990, courts sentenced below or at the bottom of the guideline range in 39.1% of the cases (below = 8.6%; bottom = 30.5%), and above or at the top of the range in 32.2% of the cases (above = 5.8%; top = 26.4%). For cases sentenced after the November 1, 1989 amendment, the data is even more striking: Courts sentenced below or at the bottom of the range in 43.4% of the cases (below 6.7%; bottom = 36.7%), and above or at the top of the range in 30.0% of the cases (above - 6.7%; top = 23.3%).

United States Probation Department
Eastern District of Michigan

Proposed Amendment 7C

This proposed amendment recognizes and accounts for multiple bank robberies in guideline calculations even if they are not charged. It provides some structure and guidance to the Court which could eliminate the need for an unguided and unstructured departures in cases such as these.

United States Attorney's Comment on
Proposed Amendment 7(C). Bank Robbery.

The Department of Justice has not yet taken an official position on this proposed amendment. It does appear, however, that this amendment will be supported by the Department. It will help to ensure that bank robbers are held accountable for the entirety of their criminal conduct.

## Proposed Amendment 7C

We oppose the draft letter's support for this amendment for the following reasons:

The Commission, in proposed amendment 7C, seeks to address its concern that

> the guidelines may result in lower sentences in certain multiple robbery cases than under pre-guidelines practice, and that variations in plea bargaining practices in different U.S. Attorney's offices with respect to dismissing or not pursuing provable counts of bank robbery may result in unwarranted disparity.

The Commission apparently uses "may" because there is no data that indicate that sentences in multiple robbery cases are lower under the guidelines than under pre-guideline practice or that plea bargaining practices have resulted in unwarranted disparity.

There is, moreover, no evidence that the failure to account for uncharged or dismissed robberies is perceived by courts as resulting in sentences that are too low. The Commission's data is, at best, inconclusive. For example, while the upward departure rate for defendants with uncharged or dismissed

robberies is roughly twice that for defendants without uncharged or dismissed robberies, so is the downward departure rate.[1]

The special instruction is unnecessary because § 4A1.3, which recommends a departure if the defendant's criminal history score is inadequate, enables the court to account for dismissed or uncharged robberies. Further, the special instruction is a move towards a real offense system of sentencing, a system that the Commission has rejected as impractical and risking "return to wide disparity in sentencing practice."[2] If the Commission wants to move to a real offense system, it should amend Chapter 1, part A(4)(a) and § 1B1.2. The Commission should not, ad hoc and without further study, move toward a system in which the charge that the government must prove beyond a reasonable doubt is irrelevant to determining the sentence (other than setting a maximum).

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1 See, A. Purdy, Report of the Bank Robbery Working Group, at Appendix H.

The Commission staff menorandum concludes that "on balance it appears that in cases in which robberies were committed, but not reflected in the guideline range either because the charges were dismissed or not brought, the judges tended to sentence the defendant more harshly relative to the applicable guideline range--as compared to cases in which the guideline range was relatively higher because all robberies were accounted for by conviction." Id. at 20. The memorandum notes that "of those cases involving dismissed or uncharged bank robberies the sentences fell less often at the bottom of the guideline range than cases in which all robberies resulted in convcition (28.5% of cases with dismissed or uncharged counts versus 45.1% of cases with all robberies accounted for by conviction)." Id.

Appendix H of the staff memorandum, however, indicates that sentences below, or at the bottom of, the guideline range occurred in 58% of the cases with all robberies accounted for by convictions (below = 12.9%; bottom = 45.1%), and in 54.6% of the cases with uncharged or dismissed robberies (below = 26.1%; bottom 28.5%). Appendix H also discloses that sentences above, or at the top of, the guideline range occurred in 20.4% of the cases with all robberies accounted for by convictions (above-4.3%; top = 16.1%), and in 21.4% of the case with uncharged or dismissed robberies (above = 9.5%; top = 11.9%).

2 See, United States Sentencing Guidelines, Chapter 1, part A(4)(a), intro. comment.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 11

There is a "gut" feeling in the field that greater differentiation is needed between leaders and less culpable members of large scale drug conspiracies. Leaders, having more knowledge of the criminal operation, are more apt to receive consideration for downward departure under Guideline 5K1.1. Less culpable members of a drug operation can end up serving more time because they do not have as much information to give authorities and therefore are not eligible for 5K1.1 departures. Although we are not sure that drug quantities are the area that should be targeted to correct or reduce this disparity, some means is necessary, besides departures, to recognize individuals who have little knowledge of and are less culpable members of large scale drug conspiracies.

United States Attorney's Comment on
Proposed Amendment 11. Comment on Drug Guidelines.

The Department of Justice has not yet determined what comment, if any, it will be offering with respect to the drug guidelines.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 11

We concur with the draft letter's support of a study relating to the Mitigating Role aspect of drug sentencing, given the reality that there is significant over-punishment due to over-reliance on the quantity of drugs.

We also believe that this study of mitigating roles should include other non-drug similar case scenarios, e.g., Ivan Boesky's secretary.

The Commission requests comment about whether the guidelines rely too heavily on drug quantity to determine punishment, particularly for less culpable aiders and abettors. We believe that basing the offense level primarily on quantity in drug cases results in an offense level for a minimal or minor participant that is often so high that the adjustments authorized by § 3B1.2 do not adequately reduce the offense level to reflect the defendant's lesser role.

Once a drug offense reaches a certain scale, no significant purpose is served by making the offense level of a minimal or minor participant dependent upon quantity. As a former Assistant U.S. Attorney has noted, "many drug defendants appear to be easily replaceable cogs in the vast drug distribution machinery. These defendants have quite different levels of culpability than the king pins who dominate the drug business."

United States Probation Department
Eastern District of Michigan

Proposed Amendments 21 and 22

Due to the similar nature of these offenses, these amendments are being discussed together except for number 3 as noted below.

1. These proposed amendments simplify and consolidate the current Guidelines. They eliminate duplication and confusion in the application of the current ones, particularly with respect to multiple cross references and the potential application of more than Guideline to the same statute.

2. From the studies of the United States Sentencing Commission, the current sentencing patterns show that sentences for these offenses have generally been in the upper end of the guideline range which supports a raising of the offense level. In addition, the raising of the offense level is also supported by the new statutes which increase the penalty for these offenses.

3. For Guideline 2K2.1, the preferred option is "convictions for a violent felony or serious drug offense", as this language tracks the definition used in 18:924(c). For Guideline 2K1.1, the option of "or explosive offense" is preferred as it takes into consideration other offenses which wouldn't necessarily be captured under the term "crime of violence".

4. This proposed amendment changes wording from "if the defendant is convicted" to "if the offense conduct involved" which limits the potential disparity caused by prosecutorial charging patterns.

5. An offense level enhancement of four is preferred to reflect the seriousness of unlawfully possessing a firearm in a federal court facility.

6. In addition, these proposed amendments consider the number of firearms and amount of explosives for crimes such as Felon in Possession which was one of the concerns expressed by practitioners in the field.

**United States Attorney's Comment on**
**Proposed Amendments 21 and 22. Firearms.**

The Department of Justice is in favor of these proposed amendments. The proposals will help narrow the gap between defendants who qualify for treatment as armed career criminals and those that fall one or two serious crimes short of career criminal status. For these intermediate career criminals, the proposed higher offense levels will help to ensure proportionality.

With respect to the third proposed comment in the court's letter, the government prefers using the option using the language "convictions for a crime of violence or controlled substance offense." This language is found later in the career offender definitions section. (Section 4B1.2). It is preferable for the sentencing guidelines to use language found elsewhere in the guidelines so that consistency is maintained. We also favor having increases in the offense level for the number of weapons possessed by a felon. This reflects the greater seriousness of an offense which is committed by a felon with multiple weapons.

Federal Defender Office - Detroit, Michigan

Proposed Amendments 21 and 22

We oppose the draft letters support of these amendments for the following reasons:

**Amendment 21 -- new § 2K1.1 (Unlawfully Trafficking in, Receiving, or Transporting Explosive Materials; Improper Storage and Failure to Report Theft of Explosive Material)**

The Commission proposes to combine present §§ 2K1.1, 2K1.2, 2K1.3, and 2K1.6 into a single guideline designated § 2K1.1. The Commission has indicated five objectives for proposed amendment 21 -- (1) to "address concerns raised by judges, probation officers, and practitioners and suggested by a review of presentence reports and case law"; (2) to "eliminate duplication and confusion in the application of the current guidelines, particularly with respect to multiple cross references and the potential application of more than one guideline to the same statute"; (3) to "reduce departures and potential sentencing disparity by relying more heavily on

specific offense characteristics and real offense conduct and less on the statute of conviction"; (4) to simplify "application of the guidelines by making the explosive materials and firearms guidelines more parallel"; and (5) to "avoid the need to revisit firearms and explosive materials guidelines".

We do not believe that any useful purpose would be served by this comprehensive rewriting of the explosive materials guidelines. There has not been a sufficient number of cases involving these guidelines to warrant such an extensive revision. The Commission staff memorandum reports on only 22 single-guideline cases under § 2K1.3 and 7 single-guideline cases under § 2K1.6; the memorandum does not report any cases under §§ 2K1.1 and 2K1.2.[24]

With regard to the Commission's first objective, the Commission has not identified what concerns of judges, probation officers, and practitioners are being addressed. Consequently, we cannot evaluate this objective.

The Commission's second objective is to eliminate "duplication and confusion in the application of the current guidelines". The statutory provisions notes indicate an overlap with regard to 18 U.S.C. 842(j) and (k).[25] While there is duplication, there should

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[24]See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix N, appendix P.

[25]The statutory provision note to § 2K1.2 lists 18 U.S.C. § 842(j), and the statutory provisions note to § 2K1.3 lists 18 U.S.C. § 842(k). The statutory provisions note of § 2K1.3 lists 18 U.S.C. § 844(b), which sets forth misdemeanor penalties for violating 18 U.S.C. § 842(j) and (k). Thus, statutory provision notes indicate that §§ 2K1.2 and 2K1.3 apply to 18 U.S.C. § 842(j)

be no confusion because the Commission has promulgated a guideline to deal with such situations -- § 1B1.2 ("Applicable Guidelines"). That guideline directs the sentencing court to apply the guideline that is most applicable to "the offense conduct charged in the count of the indictment or information of which the defendant was convicted". Thus, whether §2K1.2 or § 2K1.3 applies to a defendant convicted under 18 U.S.C. § 842(j), for example, will turn on what conduct is charged in the indictment". If the Commission wishes to clarify the matter, an amendment to the application notes or statutory provisions notes would seem to be preferable to a comprehensive revision of the explosives guidelines.

With regard to the Commission's third objective (to "reduce departures and potential sentencing disparity"), the Commission staff memorandum reports on only 29 single-guideline cases under §§ 2K1.1, 2K1.2, 2K1.3, and 2K1.6.[26] There is, therefore, insufficient data upon which to base a conclusion that departures are a significant problem.

The Commission's fourth objective, simplifying "application of the guidelines by making the explosive materials and firearms guidelines more parallel", would justify changes to bring the existing guidelines into conformity with each other, but would not justify substantive changes in the existing guidelines. Greater

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and that §§ 2K1.1 and 2K1.3 apply to 18 U.S.C. § 842(k).

[26] See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix N, appendix P.

parallelism does not adequately justify the sweeping substantive revisions of proposed amendment 21.

The Commission's final objective, avoiding the "need to revisit" the explosive materials guidelines", is laudable but based upon an assumption that there is a need to visit those guidelines in the first place. So far, nothing has been presented to justify such an assumption.

**Amendment 22 -- new § 2K2.1**
**(Prohibited Transactions Involving Firearms)**

The Commission proposes to combine present §§ 2K2.1, 2K2.2, 2K2.3, and 2K2.5 into a single guideline designated § 2K2.1. The proposed new guideline uses a "real offense" approach. Thus, proposed subsections (a)(2), (3), and (4) apply if a defendant is a "prohibited person" described in 18 U.S.C. 922(g), even if the defendant is not convicted under that provision.[27] The proposed new guideline also increases offense levels. For example, the base offense level for a defendant with a dishonorable discharge from the Air Force (a prohibited person as described in 18 U.S.C. § 922(g)) who is convicted under that provision of shipping a .22 caliber rifle to his wife, is 12 under present § 2K2.1(a)(2). The base offense level for the same offense under proposed § 2K2.1(a)(4) is [14-16] (the level is 20 under proposed §

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[27] See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at 13-15.

2K2.1(a)(3) if the defendant has a prior conviction of specified offenses, such as possession of marijuana with intent to distribute).[28] In addition, the defendant's base offense level would be enhanced [1-2] levels under proposed §2K2.1(b)(8) because of defendant's status as a prohibited person.[29]

We do not believe that any useful purpose would be served by comprehensively rewriting the firearms guidelines at this time. The Commission, effective November 1, 1989, extensively revised §§ 2K2.1, 2K2.2, and 2K2.3, increasing offense levels.[30] There has not been a sufficient number of cases involving the revised guidelines to warrant an extensive revision.[31] The limited data

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[28] See id. at 28-32.

[29] The proposed new guideline has double counting problems. If the defendant is in fact a prohibited person described in 18 U.S.C. § 922(g), the applicable base offense level depends upon whether the defendant has any prior convictions for specified types of offenses. With 2 such prior convictions, the base offense level is 24; with one such prior conviction, the base offense level is 20; and with no such prior conviction, the base offense level is [14-16] (proposed § 2K2.1(a)(2), (3), (4)). A prior offense counted in determining the base offense level, however, is also counted in determining the criminal history score. Moreover, the enhancement of proposed subsection (b)(8) is applicable only to prohibited persons.

[30] U.S.S.G. App. C at c.97 (amend. no. 189).

[31] There have been 59 single-guideline cases under the version of § 2K2.1 that took effect November 1, 1989; 17 single-guideline cases under the version of § 2K2.2 that took effect November 1, 1989; 29 single-guideline cases under the version of § 2K2.3 that took effect November 1, 1989; and 6 single-guideline cases under the version of § 2K2.5 that took effect November 1, 1989 See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix D, table I-A; appendix G, table II-A; appendix K; appendix L.

available, however, indicate that courts do not believe that the present guideline, as amended November 1, 1989, results in inadequate sentences.[32]

The Commission has indicated that amendment 22 has 5 objectives. They are, first, to "address concerns raised by judges, probation officers, and practitioners and suggested by a review of presentence reports and case law". The Commission has not identified what those concerns are, however, so we cannot evaluate this objective.

A second objective identified by the Commission is to "eliminate duplication and confusion in the application of the current guidelines, particularly with respect to multiple cross references and the potential application of more than one guideline

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[32]For § 2K2.1, in the 59 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was below the guideline range in 4 cases (6.8% of the cases) and at the bottom of the range in 25 cases (42.4% of the cases), and was above the range in 3 cases (5.1% of the cases) and at the top of the range in 14 cases (23.7% of the cases). Id. at appendix D, table I-A.

For § 2K2.2, in the 17 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was below the guideline range other than for substantial assistance in 4 cases (23.5 % of the cases) and at the bottom of the range in 8 cases (47% of the cases), and above the range in one case (5.9% of the cases) and at the top of the range in no cases. Id. at appendix G, table II-A.

For § 2K2.3, in the 29 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was below the guideline range in 4 cases (13.8% of the cases) and at the bottom of the range in 11 cases (37.9% of the cases), and above the range in 3 cases (10.3% of the cases) and at the top of the range in 3 cases (10.3%). Id. at appendix K.

For § 2K2.5, in the 6 single-guideline cases sentenced under the version that took effect November 1, 1989, sentence was at the bottom of the guideline range in 5 cases (83.3% of the cases) and above the top of the range in one case (16.7% of the cases). Id. at appendix L.

to the same statute". The statutory provisions notes to the present guidelines do not indicate that the latter problem exists.[33] It is not evident, moreover, that the proposal is less confusing and has fewer cross references than the present guidelines.

The Commission's third objective is to "reduce departures and potential sentencing disparity by relying more heavily on specific offense characteristics and real offense conduct and less on the statute of conviction". There are only 111 cases under the November 1, 1989 version of §§ 2K2.1, 2K2.2, 2K2.3, and 2K2.4 -- inadequate data upon which to base a conclusion that departures are a significant problem. The data available on § 2K2.1, the most plentiful data available, fail to indicate that departures are a problem.[34]

The Commission, moreover, deliberately chose a guideline system that is offense of conviction based, with limited real

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[33]Even if there were some overlap in the coverage of certain offenses, there is no indication that § 1B1.2 ("Applicable Guidelines"), the guideline that the Commission promulgated to deal with such situations, is inadequate. That guideline directs the sentencing court to apply the guideline that is most applicable to "the offense conduct charged in the count of the indictment or information of which the defendant was convicted".

[34]The downward departure rate under § 2K2.1 is 6.8%, and the upward departure rate is 5.1%. Id.

The data available for the other three guidelines involved are so limited as to make the departure rates meaningless. There are 29 cases under § 2K2.3; the downward departure rate is 13.8% and the upward departure rate is 10.3%. Id. at appendix K. There are 17 cases under § 2K2.2; the downward departure rate is 35.3% and the upward departure rate is 5.9%. Id. at appendix G, table II-A. There are 6 cases under § 2K2.5; the downward departure rate is 0% and the upward departure rate is 16.7%. Id. at appendix L.

offense characteristics, out of a concern that a real-offense system "risked return to wide disparity in sentencing practices".[35] It is not clear why it is necessary to rely on real offense conduct to a greater extent than the guidelines do at present. Greater reliance on real offense conduct is not needed in order to get adequately high offense levels. The data indicate that, under the November 1, 1989 version of § 2K2.1, courts are sentencing below or at the bottom of the guideline range in 49% of the cases (below = 6.8%; bottom = 42.4%), and above or at the top of the range in 28.8% of the cases (above = 5.1%; top = 23.7%) -- suggesting that the offense levels under the guideline are too high.[36]

The Commission's fourth objective is to simplify "application of the guidelines by making the explosive materials and firearms guidelines more parallel". This objective would justify changes to bring the existing guidelines into conformity with each other, but would not justify substantive changes in the existing guidelines. Greater parallelism does not adequately justify the sweeping substantive revisions of proposed amendment 22.

The Commission's final objective is to "avoid the need to revisit firearms and explosive materials guidelines". Nothing indicates that the Commission failed substantially to achieve this goal with the November 1, 1989 amendment.

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[35]U.S.S.G. Ch. 1, Pt. A(4)(a), intro. comment.

[36]See Memorandum to Sentencing Commission from Rich Murphy, Coordinator, Firearms and Explosive Materials Working Group, entitled "Firearms and Explosive Materials Working Group Reports" (Dec. 7, 1990), at appendix D, table I-A.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 29(c)

Option number one is preferred and 4A1.1(a)(b)(c) and (d) should apply to convictions pending appeal as the conviction stands until the Appellate Court rules. Since a defendant has been convicted, not awarding points in these cases creates a new area of disparity.

**United States Attorney's Comment on**
**Proposed Amendment 29(C). Criminal History for Cases on Appeal.**

Although the Department of Justice has not yet taken an official position on this proposal, it appears that the Department will be supporting the option that is favored by the court's letter. Defendants who have already been sentenced and are awaiting appeal should be treated the same as other defendants who have not been fortunate enough to have an appeal bond granted.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 29(C)

We oppose the draft letter's recommendation of option #1 for the reasons that follows:

**Amendment 29(C) -- § 4A1.2 (Definitions and Instructions for Computing Criminal History)**

The Commission proposes to add a new subsection to § 4A1.2 that would deal with prior sentences that are being appealed. The new subsection would direct counting such sentences unless execution of the sentence has been stayed pending appeal. The Commission proposes two options for dealing with sentences stayed pending appeal. The difference between the two options is whether to apply subsection (d) of § 4A1.1. Subsection (d) calls for adding 2 criminal history points "if the defendant committed the instant offense while under any criminal justice sentence". Under option one, subsection (d) would apply to sentences stayed pending appeal; under option two, subsection (d) would not apply.

The options address a problem that we do not expect to arise very often. In our judgment, option two is better because option one presents an insurmountable problem of application.

Option one is premised upon the assumption that the sentencing court can readily ascertain whether the defendant would have been "under any criminal justice sentence" at the time of the subsequent offense. That assumption, in our view, is incorrect. Suppose, for example, that a defendant is sentenced under the old federal law to a term of 18 months, appeals the conviction, and commits a second offense 16 months later. Would subsection (d) apply? No definite answer is possible. Subsection (d) would apply if defendant were on parole at the time of the later offense, because defendant would have been in the custody of the Attorney General at

the time of that offense. Subsection (d) would not apply, however, if defendant were not paroled, because defendant (by virtue of the good time rules) would have been discharged from custody and therefore not "under any criminal justice sentence" at the time of the later offense -- unless the defendant would have misbehaved in prison and forfeited all good time allowance.

Federal sentences will not be the only ones causing this problem. The problem will also arise with state sentences because state laws vary widely concerning good time, parole, and discharge form custody. Option one does not have the application problem.

United States Probation Department
Eastern District of Michigan

Proposed Amendment 30

The awarding or not awarding of criminal history points for "related cases" has been a difficult area to interpret. However, the three options offered under the amendment seem to complicate the matter rather than simplify it. Additional study may be needed to present other alternatives to solve this problem. For example, option number one is limited to crimes of violence. Option number two requires additional investigation of prior convictions by probation officers in order to apply the grouping rules. Option three makes use of "time served" as a measure of seriousness which may reflect prison overcrowding, jurisdictional differences, and other unknown factors.

**United States Attorney's Comment on**
**Proposed Amendment 30. Criminal History for Related Cases.**

The Department of Justice favors the second option for dealing with related cases. Some amendment is necessary to deal with the situation where sentences for unrelated offenses are artificially combined together in a criminal history calculation based on their consolidation for sentencing purposes. Prior sentences should not be considered to be part of related offenses where the offenses were separated by an arrest. Furthermore, as option number two provides, where the offenses would not have been grouped under the guidelines they should not be considered related for purposes of determining criminal history. The grouping rules were written to distinguish between offenses which are serious enough that they should not be grouped together in calculating offense levels. The same rationale applies when the offenses are prior criminal convictions. The advantage of using the grouping rules in this context is that they are already developed and will not require the creation of an entirely new standard. The test can be applied without having to look into the underlying circumstances of the prior crimes.

Federal Defender Office - Detroit, Michigan

Proposed Amendment 30

We agree with the draft letter's conclusion that additional study is needed, because all three options complicate rather than simplify.

The following analysis supports our position:

**Amendment 30 -- § 4A1.1 (Criminal History Category)**

Under present § 4A1.2(a)(2), the sentencing court must, for purposes of determining the defendant's criminal history score, treat as one sentence "prior sentences imposed in related cases". Application note 3 to § 4A1.2 indicates that "cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing."

The Commission has proposed three options for modifying the treatment of cases consolidated for trial or sentencing. Under all three options, sentences would not be considered related if they were for sentences separated by an intervening arrest. We see no reason to modify the related cases rule. None of the options will improve the ability of the criminal history score to predict the

likelihood of future criminal behavior, the function of the criminal history score.

The concern about the related cases rule may result from a failure to appreciate the purpose served by the criminal history score and what that score is intended to measure. The criminal history score is not intended to, and does not, measure simply the extent of a defendant's previous convictions. Rather, the criminal history score is intended to measure the likelihood of future criminal conduct.[37] Thus, certain prior convictions are not counted in determining the criminal history score -- stale convictions, foreign, tribal, and certain military convictions, and convictions for certain petty offenses.

Similarly, criminal history points are assigned for other than prior convictions. Two points are added if the defendant committed the offense while "under any criminal justice sentence", and two points are added if the defendant committed the offense less than two years after release from imprisonment exceeding 60 days.[38]

The criminal history score is based primarily upon the U.S. Parole Commission's salient factor score,[39] and the Sentencing Commission, when it adopted the initial set of guidelines, believed that the criminal history score would be predictive of future

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[37]See U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 41-44 (June 18, 1987).

[38]Only one point is added for the latter factor if two points are added for the former.

[39]U.S. Sentencing Com'n, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 43 (June 18, 1987).

criminal behavior.[40] Sentencing Commission data indicates that the Sentencing Commission was correct in its belief.[41]

The rule that two points are added if the defendant committed the offense less than two years after release from imprisonment exceeding 60 days applies is largely unrelated to the severity of the offense for which the defendant was serving the sentence. Unless the offense is minor (i.e., called for a term of less than 60 days imprisonment), two points are added whether the sentence was for tax evasion, for burglary, or for murder. This rule is based upon the premise that someone who commits an offense after recently undergoing a punishment experience is more likely to offend again upon release.

The part of the definition of related cases that looks to whether the cases were consolidated for trial or sentencing also focusses upon the punishment experience. Cases that are consolidated will result in a single punishment. For purposes of prediction, if the previous sentence is imprisonment for 60 days or more, it does not matter whether the sentence is for one offense or three offenses consolidated for sentencing.

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[40] Id. ("the high correlation between the two instruments [criminal history score and the U.S. Parole Commission's salient factor score] suggests that the criminal history score will have significant predictive power").

[41] See U.S. Sentencing Com'n Staff Working Document, Recidivism of Federal Offenders: Preliminary Report 3 (Dec. 1990) ("the criminal history categories used in establishing the federal sentencing guideline ranges do, in fact, predict future criminal behavior").

The Commission has presented no data indicating that the present rule results in sentences that are inadequate. Instead, the available data suggest that the present rule calls for appropriate sentences.[42] Moreover, the Commission has presented no data to indicate that any of the three options will improve the predictive power of the criminal history score.

The Commission's three options yield strange results. For example, defendant A served 15 years for murder and was released from prison three years ago. Defendant B served concurrent 14

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[42]The Commission staff memorandum reports that, based on "a 25% sample of monitoring cases", 17.3% of the upward departures for inadequacy of the criminal history score were due, in whole or part, to an inadequacy resulting from sentences that were consolidated for trial or sentencing. See Memorandum to Phyllis Newton from Jay Meyer, Work Group Coordinator, entitled "Revision of Chapter Four 'Related Cases' Definition", at 2-3 (Nov. 6, 1990). That data is interesting but not particularly relevant because it does not represent the rate of departure. What is missing is the total number of cases in which a court might have departed. Only with that number can the departure rate be calculated.

Another staff memorandum suggests that the departure rate is much lower than the overall upward departure rate. A Commission staff memorandum reports that out of some 35,000 cases sentenced between January 19, 1989 and June 30, 1990, 2,141 cases fell within criminal history category VI. J. Meyer, Report on Criminal History Categories "0" and "VII", at 3 (Nov. 20, 1990). That memorandum further indicates that there were 52 departures involving defendants in criminal history category VI. (Commission data show 13 departures in a representative sample of one-fourth of the 35,000 cases. Extrapolation yields 52 as the total number of departures for the entire 35,000.) Id. Assuming that the percentage of upward departures due, in whole or part, to an inadequacy resulting from sentences that were consolidated for trial or sentencing is constant for all criminal history categories at 17.3% (the figure calculated in Memorandum to Phyllis Newton from Jay Meyer, Work Group Coordinator, entitled "Revision of Chapter Four 'Related Cases' Definition", at 2-3 (Nov.6, 1990)), then the departure rate for criminal history category VI due to the consolidated for trial or sentencing rule is 0.4% (9 departures -- 17.3% of 52 -- in 2,141 cases). The overall upward departure rate is nine times that rate (3.5%). U.S. Sentencing Com'n, Annual Report 1989, at table B-6.

month terms for two embezzlements and was also released from prison three years ago. All three options result in defendant B getting more criminal history points than defendant A, who gets 3 criminal history points. If defendant B's offenses were separated by an intervening arrest, defendant B gets 6 points under all three options. If there is no intervening arrest, defendant B gets 4 or 5 points under option 1,[43] and 4 points under option 3. [44]

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43 The number of points depends upon what the Commission determines with regard to the number of points to add under proposed new subsection (f).

44 Option 2 aplies only if there is an intervening arrest.