Crimes that are not prosecuted as civil rights offenses, per se may still involve the infliction or intended infliction of harm, which was motivated by the victim's race, color, religion, alienage or the victim's exercise or enjoyment of any right or privilege secured by the laws of the United States or the Constitution.

In March, 1989, two San Diego, California men were charged with killing two Mexican farm workers with a semi-automatic weapon. The two victims, Hilario Castenada Salagado and Matilde Macedo de la Sancha, legal residents of the U.S., were shot a total of 11 times. One of the two perpetrators, Kenneth Kovzelove was not prosecuted for civil rights offenses.

A crime, such as the one mentioned above, wherein the defendants are not prosecuted for civil rights offenses still merits the same or a comparable structure and/or adjustment level as the guidelines in offenses involving individual rights (part H, part 1 of chapter 2.) The NAACP maintains that this rationale will result in more consistent sentencing by judges.

III. The Commission should provide general adjustment in chapter 3 where offenses have been committed by public officials (under color of law) or otherwise under the cloak of official duty or authority that is different from § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

An additional adjustment should be instituted for chapter 3 because an adjustment regarding offenses by public officials under color of law or cloak of official duty may be applied to a wide variety of offenses, e.g., voting fraud conspiracies to bribe voters by precinct registrars and/or intimidation by local election officials.

Although statutes and laws alone cannot eradicate hate crimes, strict enforcement of existing laws and tougher sentencing will indicate to racists that racially-motivated violence will not be condoned in this country.

Respectfully submitted,

Althea T. L. Simmons/tnd

Althea T. L. Simmons
Director/Chief Lobbyist

ATLS/tnd

CHARLIE E. VARNON
CHIEF U.S. PROBATION OFFICER

650 CAPITOL MALL SUITE 8558
SACRAMENTO, 95814-9888
(916) 551-2641 (FTS) 460-2641

REPLY TO: Sacramento
(650 Capitol Mall)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
PROBATION OFFICE

5777 MADISON AVENUE, SUITE 240
SACRAMENTO 95841-3309
(916) 978-5491 · FTS 460-5491

800 TRUXTUN AVENUE, SUITE 205
BAKERSFIELD 93301-4728
(805) 861-4203 · FTS 961-4203

1130 "O" ST., SUITE 1000
FRESNO 93721-2201
(209) 487-5221 · FTS 467-5221

401 N. SAN JOAQUIN, SUITE 209
STOCKTON 95202-9998
(209) 946-6321 · FTS 463-6321

1900 CHURN CREEK ROAD
SUITE 200
REDDING 96002-0245
(916) 246-5350 · FTS 450-5350

217 SOUTH LOCUST STREET
SUITE 5B
VISALIA 93291-6250
(209) 734-0978

March 27, 1990

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

ATTN: Communications Director

Here are a few suggestions regarding
Sentencing Guidelines Proposed Amendments:

Page 13 Section 1B1.8 - Provided the government make known to the Court and probation officer the nature and extent of the defendant's cooperation prior to sentencing.

Page 14 Proposed Amendment to Commentary to Section 1B1.3, Application Note 2 - Excellent - helps resolve problems created by Restrepo decision. I agree that the current language of the guideline at Section 1B1.3(a)(2) is clear, but this clarification will help to take the probation officers in the Ninth Circuit area out of a very confusing situation.

Page 19 (9) Section 2B3.1(b)(1) should delete "robbery or attempted robbery of", not just "robbery or attempted robbery".

Page 20 I prefer Option 2 - This option would give the defendant incentive to plead guilty to a single count rather than go to trial where multiple counts are involved. At the same time, the offense level would be enhanced whether one or five robberies were committed. The difference could be made up by placement in the guideline range.

Page 15 If an individual is operating a sales force of drug dealers in a school, he should receive a greatly increased sanction. Section 2D1.2 should be amended to distinguish cases in which only a portion of the drugs involved meets the criteria of this guideline.

Page 60 **Acceptance of Responsibility** - I think the present expression of this concept in the guidelines is good. If a defendant enters his guilty plea, it should be an indication but not all sufficient for a decrease in offense level. I would like to see a one-point additional potential reduction in cases of extraordinary tangible demonstration of acceptance of responsibility; i.e., the theft of government property defendant who makes complete restitution expresses remorse and pleads out early on in the investigative process. This would allow defendants in certain exceptional cases an opportunity to be granted probation when they otherwise would not.

Submitted by: Don Durbin
DONALD L. DURBIN
U. S. Probation Officer

DORIS MCGREW
26275 TOPANGA WAY
SUN CITY CA 92381 29AM

WESTERN UNION | MAILGRAM®

4-026523S088 03/29/90 ICS IPMRNCZ CSP WSHD
7146793670 MGMB TDRN SUN CITY CA 21 03-29 0456P EST

US SENTENCING COMMISSION
1331 PENNSYLVANIA AVE 140
WASHINGTON DC 20004

I AM IN FAVOR OF HEAVIER SENTENCING FOR PORNOGRAPHERS.
DORIS MCGREW

16:57 EST

MGMCOMP

5241 (MM 10/89)

To reply by Mailgram Message, see reverse side for Western Union's toll-free numbers.

1757 Kent Pl.
Vista, CA 92074
March 27, 1990

U.S. Sentencing Commission
1331 Pennsylvania Ave., Ste. 1400
Washington, D.C. 20004

Dear Commissioners:

We strongly support stricter sentencing for pornographers and sex offenders.

Sincerely,
Alice M. Getz and
William J. Getz

Mrs. Ron W. Shepelwich
5505 Asbury
Fort Worth, Texas
March 28, 1990

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

Dear Communications Director:

I would like to be counted in favor of more severe punishment for crimes of sexual exploitation of children.

I am very much in favor of passing Amendments 22, 23 and 24. I do feel it is a deterrant and offers some protection to our children.

Thank you for counting my opinion.

Sincerely,

Mrs. Ron W. Shepelwich

Mrs. Ron W. Shepelwich

March 2, 19
Muscatine, Io
52

United States Sentencing Commission
1331 Pennsylvania Ave N.W
Suite 1400
Washington, DC - 20004

Attention: Communications
Director

Dear Sir:

I strongly support Amend-
ments 22, 23 & 24 on the New
Proposed Sentencing Guidelines.

I am involved in a local
group - Muscatine Citizens against
Pornography. This is not time
enough to contact all of them -
but I have 20 people (9 of them
their spouses) who would gladly
have sent in similar requests

Sincerely
Rosemary Levinson
513 Chestnut
Muscatine, Ia - 52761

3804 Floyd Dr
Fort Worth Texas
76116
28 March, 1990

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

Dear Communications Director,

I strongly support amendments 22, 23 and 24.

I cannot believe that we do so little to keep felons who destroy our children - to keep them away as much as they are!

Sincerely,
Mrs. Alicia L Tamez

CITIZENS AGAINST PORNOGRAPHY
Concerned Citizens Committee
P.O.Box 331784 76163
6263 McCart • Fort Worth, Texas 76133 • (817) 294-4199

March 27, 1990

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

Dear Sirs,

I represent 380 people who have been fighting pornography in our area and through the U.S. Legislature. We are shocked by the number of child abusers that seem to get away with terrible crimes against our little ones. Concerning the new proposed Sentencing Guidelines, we strongly support Amendments 22, 23, and 24 raising the current levels of penalties for sexual exploitation crimes.

We believe these new guidelines, if taken into account when sentences are decided, will save children's lives.

Sincerely yours,

Betty Hildebrand
President

(Mrs John W.)

March 27, 1990

Dear Sirs:

We strongly support amendments 22, 23, 24 for increasing the penalty for sexual exploitation of children.

Our children the hope of our future are at great risk. Please give this matter careful consideration.

Sincerely,

Fran & Randy Howe
1025 Orchard Ave.
Muscatine, Iowa 52761

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PROBATION DIVISION

JOHN P. MEYER
CHIEF PROBATION OFFICER

TOWNE CENTRE OFFICE BUILDING
SUITE 202
TWO EAST MAIN STREET
P.O. BOX 726
DANVILLE 61834-0726
TEL: 217-431-4810

March 28, 1990

HAL LANGENBAHN
SENIOR PROBATION OFFICER
PHYLLIS J. NELSON
RANDY S. FOCKEN
PROBATION OFFICERS

FEDERAL BUILDING SUITE 108
P O BOX 5013
SPRINGFIELD 62705
TEL: 217-492-4215
FTS: 955-4215

PLEASE REPLY TO:

Springfield

U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Attention: Communications Director

Dear Communications Director:

This correspondence is in reference to the two proposed options which are being considered for handling probation and supervised release revocation cases.

After giving both options careful consideration, it is my opinion that Option 2 would be the easiest and most efficient way to handle revocation proceedings. Option 2 merely calls for the guidelines to be applied as we are presently applying them. The defendant's criminal history is recalculated and all relevant factors which were initially considered are also considered for purposes of reestablishing the appropriate guideline. This option appears to allow more sentencing uniformity.

Regarding Option 1, the guideline ranges are pre-determined as to each Class (type) of violation and it appears that no variables regarding the nature of the instant violation are taken into consideration, thereby not reestablishing the appropriate range subsequent to the offense of conviction.

The range of each Class which has been established does allow for a variance in sentencing. However, these ranges were not derived by applying the guidelines and could appear to be somewhat arbitrary. Re-applying the guidelines in revocation proceedings provides for more consistency which I believe is the main thrust of the Sentencing Reform Act. Therefore, it would only seem reasonable to maintain that consistency.

Thank you for considering my brief comments.

Sincerely,

Phyllis J. Nelson

Phyllis J. Nelson
U.S. Probation Officer

PJN/nj

JOHN STEER

FEDERAL SENTENCING REPORTER

A Project of the
Vera Institute of Justice

[illegible]roadway
[illegible]ork,
NY 10013
212-334-1300
Fax:212-941-9407

March 28, 1990

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

Dear Judge Wilkins and Members of the Commission,

We write to suggest three major changes in the manner in which the Commission proposes guideline amendments for public comment. First, the Commission ought to provide a complete explanation of the shortcoming of each current guideline to be changed, the research, case law and analysis supporting each proposed change, and its impact. Second, amendments ought to be offered in a form which can be readily understood. Third, at least three months should be provided for public comment.

These observations reply to your February 16 notice of proposed amendments, including a call for comment by March 30 "on all proposals, alternative proposals, and any other aspect of the sentencing guidelines, policy statements, and commentary."

Our concerns go beyond the particular amendments. We believe that the Commission should promulgate rules and regulations, as required by the Sentencing Reform Act, that reflect the legislative character of this important process. 28 U.S.C. §994(a) & 995(a)(1). This is especially important because Congress has by its inaction indicated that Commission amendments are nearly certain to become law without further review. Regulations should therefore provide a fair opportunity for bench, bar and public to participate in the development and review of guideline amendments.

1. Reasons

Amendments ought to be explained by the Commission with at least the degree of reasoning that trial and appellate courts are expected to provide in applying, departing from or reviewing sentencing guidelines in individual cases. The Commission's amendment process should set a model of thoughtful analysis to support its own departures from current sentencing rules.

* The Commission should identify the problem with the current guidelines as a predicate for each proposed amendment.

* The Commission should justify each proposed change with case law, empirical and literature research, and thorough analysis.

* The Commission should explain the expected impact of each amendment on the need to reduce the complexity of the guidelines, the need to give sentencing judges adequate flexibility to individualize sentences, the need to preserve a viable plea bargaining process, and the need to avoid prison overcrowding.

2. Form of Public Presentation

The current amendments as published in the Federal Register are difficult to read. Two types of proposals are especially cryptic. Amended versions of long and important textual statements, such as the introductory policy statements in Chapter 1 (Amendment 1, see also Amendment 67), are presented in full text without any indication of where the text has been changed. And a number of amendments direct the reader to delete some words and add others: these are impossible to follow without a separate text, which then needs to be marked by the reader. E.g. Amendment 68.

Proposed amendments ought to be "Ramseyered" like a congressional bill. The amendments should be set out in a clear, consistent and complete form so that the proposal and its reasons can be understood from the Federal Register text without reference to separate documents.

3. Notice

We concur in the recommendation of the American Bar Association that the time allowed for comment on proposed amendments is "clearly inadequate" and should be significantly enlarged. Moreover, the Commission itself ought to reserve more than 30 days from the end of the comment period to evaluate, debate and respond to comments.

Congress required the Commission -- like other administrative agencies -- to promulgate rules and regulations to govern its process. The time has come for the Commission to promulgate proposed rules and settle on a legislative process to govern future amendments, and no new amendments should be submitted to Congress until this is done.

Sincerely,

Dan Freed

Daniel J. Freed
Yale Law School

Marc Miller

Marc Miller
Emory Law School

CITIZENS AGAINST PORNOGRAPHY
Concerned Citizens Committee

~~6263 McCart~~ • Fort Worth, Texas ~~76133~~ • (817) 294-4199

P.O. Box 331784 76163

March 28,1990

United States Sentencing Commission
Attention: Communications Director
1331 Pennsulvania Ave. N.W. Suite 1400
Washington, D.C. 20004

RE:Amendments 22,23,24

Dear Sir:

My letter comes to advise you of my strong support for three amendments which I understand you are considering as new tougher sentencing guidelines that would increase the penalty for sexual exploitation of children.

I would urge you to strengthen the sentencing guidelines by adopting Amendments # 22, # 23, and # 24. Adults who sexually exploit children need for their own sake as well as for their victims' sake to be stopped from continuing such frightfully damaging practice , and then certainly treated psycholocally as well. Repeat offenders are doubtless harder to treat with counselling and discouraging problems facing a judge over and over again, but there is no good reason to refrain from imposing increased sentences to discourage them. The cross reference requirement in Amendment # 23 is very important.

Amendment # 24, providing an increase of almost 50% in the penalty for those convicted of distribution of"adult" obscenity for pecuniary gain could have a decisive effect on those distributors if strictly enforced. Of course, an attack on the pocketbooks of such distributors is intelligent and long overdue. Where money is the motive, remove the source of that money.

Please, please use the power of your Commission to curb the evil, totally hurtful actions of persons who so flagrantly take the lives of others into their own depraved and vicious darkness.

Sincerely,
Priscilla Bradford Holland
Priscilla Bradford Holland

3575 Hamilton St.
Fort Worth,Texas 76107

Jeff and Linda Hitch
247A Virginia Pl.
Costa Mesa, CA 92627

March 28, 1990

U.S. Sentencing Board
1331 Pennsylvania, Ste. 1400
Washington, D.C. 20004

Re: Public Comment

We are writing to express our view that we should have much stiffer penalties for both pornographers and for sex offenders. There are few deterrents to such people but stiffer penalties would certainly help. It would also give their victims a sense that some justice has occurred.

Very truly yours,

Jeff & Linda Hitch

Jeff and Linda Hitch

BIRCHMAN BAPTIST CHURCH
"Sounding Forth the Word of the Lord"

Church (817) 244-6590
Home (817) 244-6544

Miles Seaborn
Pastor

9100 N. Normandale
Ft. Worth, Texas 76116

March 29, 1990

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

Attn: Communications Director

Dear Sir:

This letter is to affirm the new tougher sentencing guidelines that increase the penalty for sexual exploitation of children.

I, personally, and we as a church family strongly support Ammendments 22, 23, 24.

We prayed about this in our Prayer Service last night, and we want to encourage you to stand firm against all forms of abuse to our precious children and families.

Hopefully, Amendment 24 will help stem the tide of pornography that is engulfing our society on all levels.

Please know that we fully support tougher sentencing guidelines for crime, and especially so against children.

Sincerely,

Miles Seaborn
abm

Miles Seaborn

MS:abm

US Sentencing Commission
1331 Pennsylvania Ave., Ste. 1400
Washington, D.C. 20004

WILLIAM-GLENWINKEL
2520 MAJELLA RD
VISTA CA 92084-1627

Dear Sirs:

I understand you are inviting public comment on the sentencing of pornographers.

I have experienced injury in my life due to pornography and know the life-long devastation it can cause.

Pornographers are raping America in the name of First Amendment Rights. This is a flagrant abuse of our Constitutional freedoms.

Please take steps to end this major assault on the emotional and mental health of our nation. Give the most severe of penalties to pornographers. Their works are destroying our nation. This is not a victimless crime!

Very sincerely,
Sharon Glenwinkel

4008 Aragon Dr.
Ft. Worth, Texas

United States Sentencing Commission
1331 Pennsylvania Ave. N. W.
Suite 1400
Washington, D.C. 20004
Att: Communication Director

We, the undersigned do urgently ask you to pass Ammendments 22, 23 and 24. Parents and relatives who abuse their children should be severly punished! Repeat offenders should never be released on society again!!
All of the ammendments are needed. Please stand firm!!

Yours truly,
Lloyd H. Shaw
Edna Mae Shaw

Muscatine, Iowa
March 28, 1990

U.S. Sentencing Comm:
133 Penn Ave N.W
Attention Comm Director

This note is to inform you that I strongly support Amendments 22, 23, 24

Please give this action your consideration.

Sincerely,
R.L. Hanson
1311 James Place
Muscatine, Iowa 52761

3/27/90

Dear Commissioners,

Thank You for accepting public opinion Regarding Sentencing for pornography AND Sexual Abusers..

My wife AND I ARE IN FAVOR OF STRICT SENTENCES FOR THOSE ACCUSED OF Pornography violations especially child pornographers. We also ARE IN FAVOR OF Harsher Sentences For Repeat Mentally Disordered Sex Offenders - We have THREE Children 1 boy + 2 girls We've taken this time IN An effort to protect them..

Thank You

Dean M Mesa

DEAN M. MESA

Brenda R Mesa

Brenda R. Mesa

March 27, 1990

United States Sentencing Commission
1331 Pennsylvania Ave. N.W.
Suite 1400
Washington, DC 2004
atten. Communications Director

Dear Sir:

Please we need tougher sentencing to increase the penalty for sexual exploitation of children.

Do please support Amendments

Amendment # 22

Amendment # 23

Amendment # 24

Urgently & Sincerely,

Mrs. Jack Hallcrook
5513 Durham
Fort Worth, Tx. 76114

my voting family with children join me. Thank you!

March 29, 1990
Ft Worth, TX,

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

Gentlemen:

We encourage you to vote for tougher sentencing guidelines on the penalty for sexual exploitation of children. We must have support of these three Amendments: 23, 22, and 24.

If we are to stop the increasing exploitation of children we must provide the penalty for those convicted and of those distributions of adult obscenity for pecuniary gain.

Thank you.

D & D Cropper

Mr. & Mrs. Dale Cropper

March 29, 1990

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

Attention: Communications Director

Dear Sir:

In reference to Amendments 22, 23 and 24 regarding tougher sentencing for sexual exploitation of children, I heartily concur with each and every one of the proposed Amendments.

I think what has been allowed to happen to the children of this country has been disgustingly approved by not doing anything about it.

Luke 17:1-2

"Then said He unto the disciples, it is impossible but that offences will come: but woe unto him through whom they come! It were better for him that a millstone were hanged about his neck, and he cast into the sea, than that he should offend one of these little ones."

Sincerely,

Scottie L. Spurlock

Scottie L. Spurlock
8644 Stonewood Drive
Fort Worth, Texas 76179

IN APPRECIATION

Melinda Brogan
6057 W. 86th Pl
Los Angeles, CA. 90045

Dear Sirs,

I want very much to lend my support to the prospect that pornographers will receive stiffest possible sentencing for their contribution to the progressing deterioration of our society. It appears from the onslaught of such materials and the easy availability of it from womb to tomb that they operate quite happily free of any threats to their freedom. Too many people are suffering horribly because NO one scares them. It's time we scared them.

Sincerely,

Melinda Brogan

March 28, 1990

United States Sentencing Commission
1331 Pennsylvania Ave., N.W.
Ste. 1400
Washington, D.C. 20004
Attn: Communications Director

Dear Sir;

I am writing to you to in order to give my full support of the new sentencing guidelines, Ammendments 22, 23, and 24.

I feel that these Ammendments will most surely help protect those in our society who are least able to protect themselves. The future of our nation depends on our stopping the pornography that has invaded our homes, our cities and the the lives of our children. Those who murder the minds of our youth should be punished as if they had committed physical murder.

Sincerely,
Barbara Lapsdale

3937 Clayton Rd. West
Ft Worth, Texas 76116
March 31, 1990

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

Attention: Communications Director

Dear Sir:

Of all the crimes rampant in our country today, none is as vicious as the sexual exploitation of children, which occurs largely because of the proliferation of adult and child pornography. It is a known fact that obscene magazines are used in connection with crimes of child abuse, as well as other sex offenses.

Please urge your members to support Amendments 22, 23, and 24, requiring tougher sentencing guidelines and much heavier penalties for all sex offenders, in proportion to the number of crimes each has committed against children.

It is time to stop the soft-hearted sympathizing with these criminals, who, in all probability never can be rehabilitated; & the sympathy should be on the side of the helpless child victims and their families.

In the past, a blanket of protection was thrown around children. Now they are unsafe for one minute out of sight of a parent or other responsible adult. Please encourage your committee members to act!

Sincerely,
Irene Mueller
(Mrs. Harold E. Mueller)

UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND
PROBATION OFFICE

March 29, 1990

DAVID E. JOHNSON
CHIEF U.S. PROBATION OFFICER
ROOM 6-100, U.S. COURTHOUSE
101 W. LOMBARD STREET
BALTIMORE 21201-2689

BRANCH OFFICE:
PRESIDENTIAL BUILDING
SUITE 500
6525 BELCREST ROAD
HYATTSVILLE 20782

PLEASE REPLY TO:
BALTIMORE OFFICE

FTS: 922-4741

Mr. Paul K. Martin,
Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Martin:

I am submitting comments on the Sentencing Guidelines Proposed Amendments which are due to Congress in May, 1990.

Amendment 53 - Obstructing or Impeding Investigation, Prosecution, or Sentencing of the Instant Offense. Points (13) and (14) should be expanded to include failing to cooperate with the probation officer during the preparation of the presentence report. This would include the defendant knowingly failing to provide information to the probation officer or refusing to provide information to the probation officer after it has been requested.

Amendment 58 - Acceptance of Responsibility. We would recommend that every effort be made to simplify this adjustment. Determination of this matter is highly subjective and is frequently a matter of contention. The computation should be deleted from the probation officers report, and the judge should make the adjustment at time of sentencing if it is felt to be appropriate.

Amendment 62 - Vacated, Set Aside, Expunged and Pardon Convictions. Expunged convictions should be treated the same as "Set Asides". Rule 32 of the Federal Rules of Criminal Procedure requires that the probation officer gather the information if it is available. Thus, an expunged conviction should be counted.

Amendment 66 - Fine Provisions. The new fine provisions do not seem to address the issue of mandatory minimum fines.

Amendment 69 - Violations of Probation and Supervised Release. Option number one is preferred, but it would be better to have a mixture of the two options that would keep the process closer to the current practices for probation violation. There is also a question as to whether a period of supervised release should be imposed to follow the term of imprisonment imposed upon revocation of probation or supervised release. Imposing supervised release following a revocation prison term could precipitate a never ending cycle of imprisonment and supervised release. Such a cycle goes far beyond the intent of the sentencing court to punish the defendant for the original offense.

Yours truly,

David E Johnson

David E. Johnson, Chief
U.S. Probation Officer

DEJ/ms

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
PROBATION OFFICE

ROBERT L. THOMAS, ED.D.
Chief Probation Officer
2417 U. S. Courthouse
Phoenix 85025

Phoenix

Deputy Chief Probation Officer
44 E. Broadway, Rm. 202
Tucson 85701

March 29, 1990

U. S. Sentencing Commission
1331 Pennsylvania Ave. N. W. #1400
Washington, D. C. 20004

Atten: Communications Director

Re: Proposed Amendments

Please find attached comments relating to the recently published proposed amendments to the sentencing guidelines.

I respectfully ask that you carefully examine these comments as they come from those individuals primarily responsible for enforcing the spirit and intent of the Congressional guideline legislation and your agency's mandate.

We appreciate the opportunity to address the relative merits of the proposed amendments.

Sincerely,

DR. R. L. THOMAS
CHIEF U. S. PROBATION OFFICER

Attachments

UNITED STATES GOVERNMENT

memorandum

DATE: March 26, 1990

REPLY TO ATTN OF: Janice M. Lowenberg, U.S. Probation Officer

SUBJECT: SENTENCING GUIDELINE PROPOSED AMENDMENTS

TO: Rossie E. Turman, Jr., SUSPO

As you requested, I have reviewed pages 1-26 of the Proposed 1990 Amendments. In most cases, the amendments make only small changes to the existing Guideline Manual to clarify wording and interpretations. I have listed those amendments I feel are significant for comments.

1. The entire subparts 2-5 are deleted and revised. Mostly updates the previous manuals and also clarifies and makes other editorial changes in the section. Nothing controversial or substantial.

2. Adds additional wording to the text to clarify the references. Does add an interesting twist to the defendant's criminal history by specifically adding a Guideline that permits the use of unrestricted information regarding the defendant's criminal history. Previously, this was only a note in the commentary. This Guideline will add strength for using reliable information about the defendant's criminal behavior without necessarily having a criminal conviction. This Guideline provision should eliminate a lot of objections from defense attorneys about the use of this type of information in the presentence reports and using such information for departures.

3. Adds an additional example to clarify the issue of multiple-count grouping and multiple counts of an Indictment in direct response to United States v. Restrepo mis-interpretation. The application of the multiple count rules for grouping does <u>not</u> require the defendant to be convicted on multiple counts of an Indictment. Therefore, in drug cases, even if a defendant is convicted of one count of the Indictment, all counts specifying amounts of drugs can be added under the Guideline Rules for Multiple Count and used to obtain the offense level.

   The amended commentary should help to clarify this interpretation.

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114
☆ U.S. GPO: 1988—201-760/80028

4. Restructures Guideline 2A2.1 and re-names it as Attempted Murder and Assault. Adds a new Guideline (2A1.5) for the Conspiracy or Solicitation to Commit Murder. It increases the offense level for Attempted Murder and assault to reflect the seriousness of the conduct.

5. This amendment changes the order of specific offense characteristics in four Guidelines: Theft, Stolen Property, Property Destruction and Forgery. By doing so, it makes the resulting offense level the same for the four offense categories if the loss is the same. This is good reasoning and will avert objections from defense if Guideline comparisons are made between these offenses. This amendment will provide consistency and solid reasoning in achieving the offense level for four similar offense types.

10. The Commission asks for comments on two options in amending the Guideline for Robbery. They are specifically focusing on Bank Robberies. Under Option I, each bank robbery would add an additional offense level <u>even if</u> the defendant were <u>not</u> convicted or pled to additional robberies. There was no limitations as to the number of robberies or offense level that could be added. If the defendant pled to more than one count of bank robbery, the multiple count calculation would be used instead. In Option II, a cap of only two offense levels can be applied in such cases.

    Personally, I think Option II is more reasonable. This provision will undoubtedly cause controversy especially considering the Commission increased bank robberies last year and received criticism, now they are proposing additional increases. I think Option II is simpler and will involve less confusion to apply. In Option I, in theory, there is no limit to the number of levels that can be added.

12. The Commission is attempting to conform to statutory directive. However, in this proposal no definition of the term "safety and soundness" is offered and will undoubtedly lead to mis-interpretation and confusion in applying the increased offense level.

16. Adds wording for guidance for the departures in telephone solicitation of drugs. The departure would be based on the amount of drugs negotiated and would specifically address the amount of departure. As it stands now, there is wide disparity in the Courts for these offenses. Telephone solicitation charges are attractive as the statutory maximum is lower than for drug conspiracies. This provision would direct departures based on the amount of drugs and would eliminate some of the "game playing" in plea negotiation when the actual offense conduct involves drugs.

UNITED STATES GOVERNMENT

memorandum

DATE: March 28, 1990

REPLY TO ATTN OF: Marlene B. Barratt, U.S. Probation Officer MBB

SUBJECT: SENTENCING GUIDELINES PROPOSED AMENDMENTS

TO: Robert L. Thomas, Chief U.S. Probation Officer

The following comments are submitted in response to your request regarding the proposed amendments to the Sentencing Guidelines:

3B1.3 (Abuse of Trust)

It is recommended the definition of "abuse of trust" be expanded and further clarified. Does this section apply to the parental role in such cases as sexual abuse of a child or step-child? Is this Guideline general enough to include certain occupations and relationships such as bankruptcy trustee, accountant for a firm, baby-sitter, etc.

It is my opinion this section should be applicable without regard to the application of 3B1.1. The defendant's role in the offense, i.e., organizer, manager or minimal participant does not encompass their actual position, i.e., occupation or familial. Position of trust more often assumes the position is irrespective of criminal involvement. The difference in roles is significant enough to warrant point assignment.

3C1.1 (Obstruction)

It is recommended the Commission consider a distinction between types of conduct that warrant the enhancement under this section. Possibly a level system might be appropriate. Recommendations may include: two points be applied for failure to provide information or providing misleading information as well other more minor offenses. Three points might be added for mid-severity offenses such as providing false information, concealing evidence and other similar offenses. A four-point enhancement might be appropriate for such conduct as threatening a codefendant, juror, etc. or other more severe violations.

It is this officer's recommendation that there be a separate Guideline area for information occurring at the time of arrest, i.e., false name or ID, flight, etc. These appear to be distinct enough offenses from the investigation/judicial proceedings sections to classify them separately. Offenses such as avoiding or fleeing from arrest, endangering the safety of another in fleeing from arrest, providing a fraudulent identification at the time of arrest and providing a false name at arrest, appear to be more a part of the offense conduct, not viewed in the same light as obstruction of justice.

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

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It is also recommended the following conduct be included in the two-level enhancement criteria in this section:

1. Threatening, intimidating or otherwise unlawfully influencing a codefendant, witness or juror, directly or indirectly, or attempting to do so;

2. Testifying untruthfully as to a material fact, or suborning or attempting to suborn untruthful testimony as to a material fact;

3. Producing a false, altered or counterfeit document or record during an investigation or judicial proceeding, or attempting to do so;

4. Destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an investigation or judicial proceeding (e.g., shredding a document or destroying a ledger upon learning that an investigation has commenced or is about to commence), or attempting to do so;

5. Attempting to conceal, throw away, or otherwise dispose of evidence contemporaneously with arrest (e.g., attempting to throw away a weapon or controlled substance), except where such conduct results in a material hinderance to the investigation or prosecution of the offense;

6. Escaping from custody before trial or sentencing, or attempting to do so; or willfully failing to appear, as ordered, for a judicial proceeding;

7. Providing materially false information to a law enforcement officer that significantly obstructs or impedes the investigation of the offense (e.g.,a defendant upon questioning admits guilt in a credit card scheme, but provides false detailed information that diverts law enforcement officers from apprehending co-conspirators who are thereby able to continue the operation of the scheme and flee the country);

8. Providing materially false information to a judge or magistrate (including false information as to the defendant's identity);

9. 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);

10. Providing misleading or incomplete information, not amounting to a material falsehood, in respect to a pretrial or presentence investigation. It is recommended that failure to provide necessary information or refusal to sign release of information forms be included in this area.

Part E - Acceptance of Responsibility

It is this officer's recommendation that varying weights be given to "acceptance of responsibility", perhaps by distinguishing at what phase acceptance occurs, and what actions have been taken by the defendant. I recommend the two-point reduction not be assigned if the defendant first accepts responsibility after adjudication, or if the defendant only accepts to assist him in receiving a lighter penalty. A guilty plea alone should not be the basis of the reduction. It is difficult to differentiate between acknowledgement of participation and true acceptance of responsibility.

If the defendant recognizes his wrong-doing, feels remorseful, and attempts to correct his actions by making restitution, or turns himself in prior to criminal investigation, it seems appropriate to reduce the offense level by more points, perhaps four.

Full acknowledgment of guilt for the offense conduct (not only that which is in the Plea Agreement) coupled with a sincere admission of remorse might warrant a mid-level reduction. This would include cooperation with authorities, if coupled with the acknowledgement of guilt. Included in this mid-range could be Application Notes A, B, C, E, F and G.

A full acceptance of personal responsibility for the offense, in a Plea Agreement or in a trial, without justification of actions might receive minimal points under the acceptance of responsibility Guideline. This would include the defendant who accepts responsibility in order to plead guilty, or after the trial is completed. The probation officer should feel the sincerity of the admission and should not feel the defendant is attempting to justify his behavior in any way.

It is recommended that points should not be deducted for acceptance viewed only as a benefit to the sentence, or through government cooperation in cases where the defendant is attempting to receive a lighter penalty.

Chapter 4, Part A (Criminal History) 4A1.2 - Application Notes

It is strongly recommended the Commission address "un-counseled convictions" (more importantly, those where counsel cannot be verified) to permit inclusion in this score. As we know, many defendants "don't remember" if they had attorney representation or more often, if they waived attorney representation. Existing court records often do not include this information. The proposed amendment seems to be permitting inclusion of convictions whether counseled or un-counseled, if constitutionally valid. What specifically does constitutionally valid mean? Is the assumption that to be constitutionally valid a defendant must have been afforded attorney representation?

It is suggested a paragraph be considered regarding automatic inclusion in a state where attorney representation is automatic in all offenses.

Addressing 4A1.3 (Adequacy of Criminal History), it is recommended the Commission reconsider treatment of expunged convictions be treated the same as "set aside" or pardon convictions. This should specify exclusions are reasons of innocence or legal defect.

I hope these comments have been helpful in consideration of proposed amendments. I would be pleased to provide further assistance if requested.

MBB/grf

Mario Moreno

COMMENTS REGARDING

PROPOSED GUIDELINE AMENDMENTS

1. Proposed Amendment: §2L1.1

In §2L1.1, the greatest impact is an amendment which will consider the number of aliens in transporting, smuggling, and harboring illegal alien offenses. The increase in offense levels is based upon the number of illegal aliens involved and can be increased from two to eight levels.

Proposed Amendment: §2L2.1

In §2L2.1, the number of documents involved, will have an impact on the offense level. The offense level will be increased from two to eight levels based on the number of documents involved in offenses involving trafficking in evidence of citizenship or documents.

These two major amendments to Chapter L of the Guidelines will be useful as there are numerous instances where these adjustments will be applied. The amendments are needed to give a greater offense level according to the size of the operation.

2. Guideline §2M5.2

The amendment proposes a single offense level of 22 instead of the current options of an offense level of 22 and level 14. The Commission feels these violations are serious enough to warrant a single offense level.

By creating one offense level, the application becomes simpler. As the Guideline currently reads, it must be established that sophisticated weaponry was involved to apply the base offense level of 22. With the proposed amendment, only one option is available.

3. Guidelines §§2N1.1, 2N1.2, and 2N2.1

The proposed amendments to §§2N1.1 and 2N1.2 contain a cross-reference which is added to take into consideration behavior involving extortion by force, or threat of injury, or serious damage.

The cross-reference amendment will allow the probation officer to consider more serious behavior and increase the offense level accordingly.

As to §2N2.1, the Commission notes the recent statutes involving anabolic steroids. The Commission intends to create a Guideline to address anabolic steroids based upon type and amount involved.

4. Guideline §2P1.1

The Commission seeks comment regarding whether there should be any reduction for voluntary return on escape offenses.

Instead of having a reduction for voluntary return, the Commission should consider an increase in offense level if the escapee does not voluntary return. Also, defendants who do not voluntary return, should not be eligible for an adjustment for acceptance of responsibility.

5. Chapter Two, Parts S, T, and X

Minor amendments to Commentary are made which clarify and update the meanings of the Commentaries.

6. Chapter Three, Part A

A victim-related adjustment is proposed to include victims due to race, color, religion, alienage, or national origin, or on account of exercise of federal rights.

The Commission has proposed this amendment to provide enhancement for "hate crimes."

7. Chapter Three, Part B

A new Commentary is added to replace the previous Commentary.

The proposed Commentary gives examples and a more thorough explanation of role in the offense.

62. Vacated, Set Aside, Expunged and Pardoned Convictions -

Section 4A1.2(j) should be written as follows:

1. Sentences resulting from convictions that have been vacated, "set aside" or expunged, or for which the defendant has been pardoned, are counted. "Sentences resulting from convictions that have been reversed or vacated because of errors of law, or because of subsequently-discovered evidence exonerating the defendant, are not to be counted."

Presentence officers have addressed those proposed amendments thought to have significant bearing on future application.

RET/grf

UNITED STATES GOVERNMENT

memorandum

DATE: March 29, 1990

REPLY TO ATTN OF: Bruce Hesse, Supervising U.S. Probation Officer

SUBJECT: **GUIDELINE AMENDMENTS**

TO: Robert L. Thomas, Chief U.S. Probation Officer

I have reviewed the proposed amendments and believe they will continue to improve the Guideline sentencing process.

I am particularly impressed with the following amendments. My comments are as follows:

Amendment #3 discusses relevant conduct. This amendment clarifies the issue, which was needed when considering Restrepo. The overall relevant conduct is considered - over and above the count of conviction.

Amendment #10 relates to multiple robberies. This amendment also takes in all relevant conduct. This change will correct a serious imbalance from before.

There are two options in this amendment. I favor option one. The counts or conduct are not grouped but counted as separate convictions. This will impose an increased penalty on a serious offender.

Amendment #16 relates to 21 USC 843 - the telephone count in drug cases. The amendment will tie the offense level to the offense conduct rather than the ridiculously low level of 12 as is now set. This amendment is overdue.

Amendment #35 aggravates alien smugglers based on the number of aliens involved. An excellent aggravator for big time smugglers.

Amendment #50 addresses the defendant's role in the offense. In particular, the Commentary on page 54, No. 2, identifies a very real problem in single defendant cases. This clarifies the issue and effectively eliminates arbitrary assignment of mitigation points.

Amendment #53 expands the examples pertaining to obstruction. The expansion examples are excellent and should clarify an area that has been too vague.

BH/grf

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

* U.S. GPO: 1989-241-175/90051

United States Government

MEMORANDUM

Date: March 28, 1990

From: Jim Eaton, SUSPO
Fred Chilese, USPO

Re : Sentencing Guidelines of Supervision Violations

To : Bob Thomas, CUSPO

Probation/Supervised Release Violations

Sentencing Options

To compare the two suggested options in supervision revocations, the following comments and scenarios are presented for your consideration.

Special Considerations

For certain drug offenses, the Court may impose up to life on supervised release. However, revocation of supervised release and re-incarceration is limited by 18 USC 3583(e)(3) to:

Class A	-	Up to the length of supervision imposed
Class B	-	not more than three years
Class C and D	-	not more than two years.

Class E felonies are limited to the one year imposable.

Before any calculations of Probation/Supervised Release Violation amounts, the constraining statutes must be consulted. For a drug-based violation, both 18 USC 3565 and 3583(g) require that the Court revoke supervision and imprison the defendant for at least one third of the period of imposed supervision, but not to exceed the limits shown above.

Problems Anticipated

Option I- The PO, and thereby the Court, may not tailor the consequences to be congruent with the circumstances of the offense or the offender.

Option II- Far more work is involved. The incidence of objections by defense may increase. The Court will be forced to rule on Acceptance of Responsibility, Role in Offense, and Drug Amount issues, just as for PSRs.

A policy decision must be made as to whether dirty UAs constitute simple possession or something less. The decision will affect the scoring of the violation as a Class I, II or III, with attendant changes in consequences.

Advantages

Option I- By far, the more simple method. Fewer issues to decide.

Option II- Behaviorally, a person's behavior would have commensurate consequences. This also presents to the lay-people a sense of justice in the system.

Scenarios

1. The defendant is placed on five years probation for embezzlement. The Criminal History Category was II. Within one year, the defendant violates by embezzling $1,000.

	Option I	Option II
Off Level/PV Class(i)	II	6
Crim Hist(ii)	NA	III
Inc Range	12 - 18 Months	2 - 8 Months

(i)- Offense Level includes all adjustments for specific offense characteristics and Acceptance for Responsibility
- Class of violation, I, II, or III. See 7A1.1.

(ii)- Criminal History includes two point enhancement for being on supervision at time of new crime.

2. The defendant is placed on five years probation for embezzlement. The Criminal History Category was II. Within on year, the defendant violates by have three dirty UAs for cocaine.

Assuming Dirty UAs are Class II violations

	Option I	Option II
Off Level/ PV Class(i)	II	4(ii)
Crim Hist	NA	III
Inc Range	20 - 60 months	20 months (iii)

(i)- See above
(ii)- Dirty UAs scored as simple possession, base offense level 6.
(iii)- The Guideline range calculated to 0 - 6 months, but the statute required one third of supervision period.

Assuming Dirty UAs are Class III violations

	Option I	Option II
Off Level/PV Class(i)	III	4(ii)
Crim Hist	NA	III
Inc Range	1 - 7 months	6 - 12 months(iii)

(i) - See above
(ii)- See above
(iii)- Actual Guideline range was 0-6 months, but 7A1.2(c) mandates the 6 - 12 month range.

3. The defendant was sentenced to 10 years prison on a Class C felony. Criminal History was II. Supervised release is three years. Within one year of release, the defendant violated by committing a burglary.

	Option I	Option II
Off Level/PV Class(i)	II	17
Crim Hist	NA	III(ii)
Inc Range	12 - 18 months	30 - 37 months

(i)- See above
(ii)- Criminal History includes 2 points for being on supervision and 1 point for recency of release from incarceration.

4. Same defendant as above, but violates by possessing one ounce of cocaine.

	Option I	Option II
Off Level/PV Class	I	14
Crim Hist	NA	III
Inc Range (i)	20 - 24 months	21 - 24 months(ii)

(i) - Drug violations require at least one third incarceration, but Class C felonies have a two year cap on revocation incarceration.
(ii)- Actual Guideline range is 21 - 27 months, but Class C felonies have a two year cap on revocation incarceration.

Conclusions

From the examples, no one option clearly stands out as more feasible, but it appears that Option II more realistically addresses violative conduct.

Option II is more time-consuming to calculate and someone with expertise will have to assist the field officer, thereby adding another responsibility to the investigative unit. Conceivably, both officers would have to attend subsequent hearings and, as previously indicated, Option II will more readily lend itself to objections by defense counsel.

MORALITY IN MEDIA, INC. 475 RIVERSIDE DRIVE, NEW YORK, NY 10115 (212) 870-3222

March 29, 1990

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

Att: Communications Director

Re: Proposed Amendments to
Sentencing Guidelines for
Child Pornography and
Adult Obscenity Offenses

Morality In Media has the following comments:

Proposed Amendment to Section 2G2.1

We support the increase to 4 levels for children under the age of 12 and the increase of 2 levels under the age of 16.

We also support the increase of 2 levels where the defendant was the parent, relative or legal guardian etc.

We further support the proposed Special Instruction.

We support these increases because of the heinous nature of the crime involving as it does the sexual exploitation of children. The existence of the Federal Child Pornography Law and the similar laws of the various states has in our opinion reduced child pornography to a "cottage industry". It is no longer purveyed to our knowledge, in the shops such as the Times Square Porn shops and adult book stores throughout the country. The focus, therefore, should be on this cottage industry production. These amendments further that end.

Proposed Amendment To Section 2G2.2

We believe that the proposed amendments to the Base Offense Level are inadequate and that the Base Offense Level itself should be increased to 15.

We understand that the existence of the Federal Child Pornograpy Law was bottomed on preventing the sexual exploitation of children following the example of New York whose law had been upheld in the Ferber case. The Supreme Court in that case clearly said that the governmental objective of the State of New York was not to punish "Obscenity", but to dry up the market for child pornography. Certainly the prohibition against possession, receipt or advertising advances that goal. By punishing these offenses, we prevent the sexual exploitation of children. By treating them more leniently than the transportation and distribution of the material, we propose a non-sequitur. It sends a message that you can stimulate the market by advertising for child pornography or receive it through the mail and be treated more leniently. The Ferber Court said:

> "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."

We also object to the use of the word "mere". It should be eliminated. It gives the impression that somehow this is not an important offense.

We further object to the Section relative to "distribution for pecuniary gain", not in its increase to level 15, but for failure to recognize that the term "pecuniary gain" is inadequate and requires that the government prove that a profit was made. We know from examining the cases that much of the child pornography "underground industry" relies on a "swapping" concept. Typically, Pedophiles exchange this material or "swap"it. This peculiarity of the industry should be recognized. It would be difficult in such circumstances to show "pecuniary gain". The word "pecuniary" contemplates an exchange of money and comes from Latin "pecuniarius" or the French "pecunia", both of which are related to money. In fact, Webster defines "pecuniary" as "consisting of or measured in money." If, therefore, the pedophile exchanges child pornography for any thing other than money, enhancement does not apply. In fact, he could swap it for diamonds or gold, or gold bars, or even for a car and there would be no "pecuniary gain". The same is true of anybody who is in the business of dealing in child pornography, provided he doesn't take "money" for his product. This is an obvious hole that should be plugged.

It behooves the Sentencing Commission to check with the National Obscenity Enforcement Unit to determine how many of the convictions obtained under the Child Pornography Statute involved the element of "pecuniary gain". Our guess would be very few, which adds to the requirement that the swapping concept or the exchange for other than money be included at this point.

We applaud the increase of 4 levels for sadistic, masochistic or violent depictions, but suggest that depictions of oral or vaginal or anal sex relations involving a child may be just as heinous. After all, a child could be bound, but not sexually abused and by binding him or her, there is an increase of 4 levels, but no corresponding increase for sexual intercourse. The same is true, if the child were being spanked, since this is a violent act. There is a serious discrepancy here which should be attended to.

Proposed Section 2G3.1

Our first recommendation would be to raise the Base Level from 6 to 8 for reasons outlined in our prior Comments attached in response to your proposed Temporary Emergency Amendment to Section 2G3.1. [See especially pages 7 and 8].

We also bring your attention to our prior comment above, about the inadequacey of the phrase "pecuniary gain" and we ask that this be modified to reflect the fact that any type of payment or exchange of assets, whether in money, property, [real or personal] be included in the phrase "pecuniary gain". In fact, the whole question of "gain" is more or less irrelevant to the governmental interest involved.

At least this move from 11 to 15 is a move in the right direction, but the wording of the phrase "pecuniary gain" needs further elucidation.

We also draw your attention to our Comments on the inadequacy of the the enhancement for retail value of obscene matter. Our comments can be found in the prior document submitted which is attached at pages 8 and 9.

We again point out to you that the enhancement for sadistic, masochistic or violent depictions is inconsistent with the governmental interest involved. The Obscenity Law exists basically because the distribution of these depictions offends the sense of decency and morality of the citizens of the United States. They also tend to break up marriages and stimulate persons, especially children to

commit antisocial acts. If these are the proposals, then "merely" including sadism, masochistic conduct or violence for enhancement is again a non-sequitur. There are many things that should be included under this guideline for enhancement, not the least of which would be bestiality or necrophillia. I now give you a list of items that you might consider for inclusion at this point. These are:

Annalingus
Artificial Vagina Display
Beaver shots
Bestiality
Circus Orgies
Coitus
Coprophagy
Coprophillia
Cum-shots
Cunnilingus
Daisy Chain Copulation
Dildoe Display
Ejaculation
Exhibitionism (of the Genitals)
Fellatio
Fetishism
Flagellation
French Tickler Displays
Frottage
Golden Showers
Incest
Orgasm
Masochism
Masturbation
Necrophillia
Pederasty
Voyeurism
Piquerism
Reaming
Sadism
Sadomasochism
Sapphism
Sixty-Nineing
Sodomy
Triolism
Urolagnia
Zooerasty

We trust that this will be of assistance to you.

Paul J. McGeady
General Counsel

PJM:mm
Enc.

P.S. We also include our Comments of April 5, 1989 in accordance with the invitation in the last paragraph of your notice and request for comments.

COMMENTS REGARDING THE PROPOSED TEMPORARY, EMERGENCY AMENDMENT TO SECTION 2G3.1 (OBSCENITY) OF THE FEDERAL SENTENCING GUIDELINES

Prepared by:
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INTRODUCTION

Morality in Media welcomes the opportunity to submit Comments to the proposed Temporary Amendment to Sentencing Guideline 2G3.1, pertaining to violations of 18 U.S.C. Sections 1460-1463, 1465-1466 (obscene matter). Part I of the Comments discusses the policy basis for treating obscenity offenses more severely than the existing Guidelines direct. Part II discusses appropriate base offense levels for these offenses.

I. POLICY CONSIDERATIONS

A. Obscenity Regulation Becomes Dormant

As we noted in our Comments submitted in April 1989, the prosecution and sentencing practices during the period from 1966 - 1986 are not an adequate basis for determining appropriate sentencing ranges for obscenity offenses.

In 1966, the United States Supreme Court handed down its Fanny Hill - Memoirs decision which required, in order to prove obscenity, that the U.S. Attorney show that the material was "utterly without redeeming social value." In rejecting this test in 1973, the Court in Miller v. California said it "called on the prosecution to prove a negative--a burden almost impossible to discharge under our criminal standards of proof." As noted by Morality in Media General Counsel Paul J. McGeady in a statement to the Attorney General's Commission on Pornography (Chicago, Ill., July 24, 1985):

> "This Fanny Hill case made it a practical impossibility to convict from 1966 to 1973, and a policy of non-enforcement set in at the U.S. Attorney level. Miller, of course, rejected this

test and gave us a workable definition, but Justice apparently has never recovered from its lethargy."

In 1970, The President's Commission On Obscenity and Pornography issued a report which was accurately described in the Hill-Link Minority Report of the Presidential Commission as a "Magna Carta for the Pornographer." Among other things the Commission leadership and majority recommended repeal of obscenity laws for "consenting adults." In commenting on the work of this 1970 Presidential Commission, the 1986 Final Report of the Attorney General's Commission on Pornography stated:

> "[B]y the late 1960's obscenity regulation became essentially dormant. This trend was reinforced by the issuance in 1970 of the Report of the President's Commission on Obscenity and Pornography, which recommended against any state or federal restrictions on material available to consenting adults. Although the Report was soundly rejected by President Nixon and by Congress, it nevertheless reinforced the tendency to withdraw legal restrictions in practice, which in turn was one of the factors contributing to a significant growth from the late 1960's onward of the volume and explicitness of materials that were widely available." (emphasis supplied)

In the 1970's, America also witnessed what has since been described as a "sexual revolution." This "sexual revolution" did indeed prove costly. As New York Daily News columnist Bill Reel put it in a June 16, 1983 article:

> "The legacy of liberation is AIDS, herpes, gang rape and sexual abuse of children.
> ....
> The sexual revolution was supposed to liberate society, to provide harmless outlets for repressed urges. The opposite has occurred. An explosion of raw sex in magazines and movies has been accompanied by a scary upsurge of violence.
> ....
> 'Who will deny that there is something new and sinister in the air?' Michael Gallagher wrote recently.... 'And is it unfair to indict pornography for some share of the blame?'
> ....
> Gallagher, who works for the U.S. Catholic Conference, urges citizens to demand enforcement of anti-pornography laws. That's a beginning.... The sexual revolution has brutalized many innocent

victims. How many more will follow? Where are our leaders?"

B. Growing Concern

On March 28, 1983, at the behest of Morality in Media President Morton A. Hill, S.J., President Ronald Reagan--along with the Attorney General, Postmaster General, Commissioner of Customs, and FBI Director--met with a group of religious leaders and heads of major anti-pornography organizations. It was estimated that the religious and organizational leaders present represented a constituency of 100 million persons. Of that meeting, President Reagan stated in a July 7, 1983 letter to Fr. Hill:

> "I was pleased to have the opportunity on March 28 to meet with you and other leaders in the drive against pornography and to discuss methods to improve enforcement of our federal anti-obscenity laws.
>
> We share a deep concern about the ever more extreme forms of pornography being distributed throughout our land.
>
> In response to the recommendations made at that meeting, I have directed that a working group be established here at the White House to coordinate investigation and enforcement of the Federal anti-obscenity laws."

And, in a May 22, 1985 letter to a conference on pornography sponsored by Morality in Media, President Reagan stated:

> "Just two years ago I had the opportunity to meet with Father Morton Hill and other national leaders to discuss the spread of ever more extreme forms of pornography across the land. Our meeting made clear that ... efforts by law enforcement agencies and private organizations to deal with the problem were in need of renewal.
>
> [T]hat renewal is now well under way. Parents, schools, churches and community groups are joining forces to combat pornography and to urge public officials to take the steps within their power to control its production and distribution in their communities. This activity is truly encouraging ....
>
> ... Last week ... Attorney General Meese announced the formation of the Commission on

Pornography.... This Commission will study the full dimensions of the pornography problem.... I look forward to reviewing the work of the Commission when it reports its findings next year."

C. Final Report of the Attorney General's Commission on Pornography Marks Turning Point In Obscenity Law Enforcement

In July 1986, the Attorney General's Commission on Pornography released its Final Report, revealing the explosive growth of pornographic materials in America since 1970, as well as the degenerative change in their content. Pursuant to its Charter Mandate and consistent with "Constitutional guarantees," the Commission made recommendations for both government and private action.

At an October 22, 1986 press conference to announce the Justice Department's response to the Commission on Pornography, Attorney General Meese outlined a seven-point program to curb the growth of obscenity and child pornography, promising to pursue "with a vengeance" and prosecute "to the hilt" those trafficking in obscenity. The seven points of the Justice Department's program included:

(a) A center for obscenity prosecution;
(b) A task force of attorneys to work closely with the center;
(c) An enhanced effort by each U.S. Attorney's office concentrating on interstate trafficking in obscenity;
(d) An enhanced effort by the Organized Crime and Racketeering Strike Forces against organized criminal enterprises involved with obscenity production and distribution;
(e) A legislative package to be introduced in the next Congress.

On February 10, 1989 Attorney General Edwin Meese announced the creation of the Obscenity Enforcement Unit within the Justice Department consisting of two components--a Task Force and Law Center. In addition, Mr. Meese stated that all 93 U.S. Attorney's Offices would have at least one lawyer trained in obscenity matters.

On November 10, 1987 President Reagan unveiled the "Child Protection and Obscenity Enforcement Act." In his transmittal message, the President stated that the purposes of the Act were two fold:

(a) To update Federal law to take into account new technologies and ways of doing business employed by pornographers; and

(b) To remove loopholes and weaknesses in the laws "which have given criminals in this area the upper hand for far too long."

On February 2, 1988, the Child Protection and Obscenity Enforcement Act of 1988 was introduced in the 100th Congress, 2nd Session, and on Friday, October 21, 1988, in the closing hours of its legislative session, Congress passed the Child Protection and Obscenity Enforcement Act.

D. Enforcement of Federal Obscenity Laws Now A Priority.

In the brief time since the National Obscenity Enforcement Unit was formed, many milestones in obscenity prosecution have been reached. Although statistics have not yet been released for the 1988 fiscal year, there was an 800% increase in federal obscenity prosecutions in the 1987 fiscal year. In 1987 the Justice Department also obtained the first federal conviction against "dial-a-porn" companies and the first conviction under the federal R.I.C.O. law where the predicate offenses consisted of obscenity violations. In October 1987 a federal grand jury in Las Vegas also indicted Reuben Sturman on RICO/obscenity charges.

In 1988, a federal grand jury in Los Angeles returned a 12-count indictment against two men and two companies for alleged violations of RICO and obscenity laws. The Justice Department and the Postal Service announced that criminal charges had been brought in eight states against 20 persons and 14 corporations for using the mails to advertise and distribute obscene materials. As of May 1989, Project Postporn had resulted in 18 convictions for mailing obscene material in 11 districts.

On March 13, 1989 the Justice Department announced that a Washington, D.C. corporation pled guilty to violating the federal RICO statute where the predicate offenses consisted of obscenity violations.

In another case tried in Nashville, Tennessee, three Chicago men pled guilty on June 1, 1989 to using the U.S. mail to distribute obscene materials.

The above "chronology" of obscenity prosecutions is by no means an exhaustive list of obscenity investigations and prosecutions initiated or completed

since 1986. They do show that enforcement of the federal obscenity laws has become a Justice Department priority since 1986, and the new Justice Department head, Attorney General Dick Thornburgh, has made it clear that obscenity enforcement will remain a priority. President Bush has expressed his full support of obscenity enforcement efforts, and last, but not least, opinion poll after opinion poll show that the American people want obscenity laws enforced.

E. The Child Protection and Obscenity Enforcement Act of 1988 Does Provide a Basis for Providing Stiff Sentences for Obscenity Offenders

Congress' action in passing the Child Protection and Obscenity Enforcement Act of 1988 is the clearest indication that Congress fully shares the concerns of the Reagan/Bush administrations and of parents and decent citizens about the proliferation of hardcore pornographic material in American society and that Congress means business about dealing with those who traffic in such materials.

In the obscenity portions of the Act, Congress expanded the scope of federal obscenity laws to reach the sale of obscene matter on federal lands and the distribution of obscene material on subscription TV. Congress also made it easier to prosecute those who would use the channels of commerce as a "means of spreading [the] evil" of obscene matter [See United States v. Orito, 413 U.S. 139, at 144 (1973)] by:

a. Punishing those who receive obscene matter shipped interstate;
b. Punishing those who use a facility or means of interstate commerce to transport obscenity;
c. Permitting court ordered "wire taps" for obscenity violations;
d. Creating rebuttable presumptions to show that the channels of commerce have in fact been utilized; and
e. Facilitating cooperation between the Customs Service and U.S. Attorney's Office when both civil forfeiture of obscene material and criminal prosecution under 18 U.S.C. 1462 may be appropriate.

Congress also increased the penalty from misdemeanor to felony status for making obscene telephone communications for commercial purposes and authorized criminal forfeiture in obscenity cases.

Congress has chosen to exercise its authority to keep the channels of interstate commerce clear of obscene matter, has made all violations of the federal

obscenity laws felonies, has made property constituting or traceable to proceeds obtained from obscenity offenses subject to criminal forfeiture, and has defined "racketeering activity" in 18 U.S.C. 1961(1) to encompass obscenity offenses.

We think the Congressional intent is clear: obscenity offenses are serious offenses and sentences imposed on obscenity offenders should reflect that fact.

II. APPROPRIATE BASE OFFENSE LEVELS FOR OBSCENITY OFFENSES

A. Base Offense Level Where There Is No Distribution For Pecuniary Gain

The existing Guidelines permit a sentence range of between 0-6 months for obscenity offenses not related to distribution for pecuniary gain. This sentence can be satisfied soley by probation. Public comment is now sought as to whether the base offense level should be raised to 8.

There is an important lesson to be learned from the Constitutional analysis in determining whether there is a Sixth Amendment right to a trial by jury for persons charged with a particular offense. In it's recent Blanton v. City of North Las Vegas decision (57 L.W. 4314, 3/6/89), the United States Supreme Court wrote:

> In recent years ... we have sought more 'objective indications of the seriousness with which society regards the offense.' ...'[W]e have found the most relevant criteria in the severity of the maximum authorized penalty.'
> ....
> Primary emphasis ... must be placed on the maximum authorized period of incarceration. Penalties such as probation or a fine may engender a significant infringement of personal freedom, ... but they cannot approximate in severity the loss of liberty that a prison term entails.
> ....
> Following this approach...a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months. (emphasis supplied)

In the Court's own language, the primary indicator as to the "seriousness with which society regards the offense" is the maximum authorized period of incarceration. Offenses punishable by a maximum

sentence of six months or less are "categorized as 'petty.'"

We think Congress intends all obscenity offenses to be regarded as serious offenses. Raising the Base Offense Level to at least 8, and thereby permitting a maximum sentence of 8 months, is a step in the right direction.

B. Base Offense Level for Offenses Involving Distribution for Pecuniary Gain

Under the existing Guidelines, the Base Offense Level is increased to at least 11 if the offense involved an act related to distribution for pecuniary gain. Public comment is now sought as to whether the Base Offense Level for offenses involving pecuniary gain should be increased to either 12, 13, 14, 15, or 16.

We think the Base Offense Level should be increased to at least 18 for all offenses involving distribution for pecuniary gain, unless enhancements are provided for retailers and for wholesalers, distributors, manufacturers, and producers.

In regard to the seriousness of an offense, there is a difference between the person who sells a "few" obscene videotapes to a neighbor or co-worker and the person who retails obscene matter as a regular course of trade or business. For the former, we would recommend a Base Offense Level of at least 13; for the latter a Base Offense Level of at least 16.

There is also a difference between the retailer, on the one hand, and the wholesaler, distributor, manufacturer and producer, on the other. In New York and Pennsylvania, for example, a retailer who violates the obscenity law for the first time is guilty of a misdemeanor; the person who manufactures, sells or distributes for purpose of resale is guilty of a felony. Accordingly, we would recommend a Base Offense Level of at least 18 for those who sell, distribute, manufacture or produce obscene matter for purposes of resale.

C. Specific Offense Characteristics

(1) Retail Value of the Obscene Matter

As noted in our April Comments, providing an enhancement calibrated to the retail value of the material involved is of little value in most obscenity cases. Because of the requirement that the trier of

fact must make an obscenity determination for each item, prosecutors usually do not base an obscenity prosecution on large numbers of allegedly obscene items. In the recent, well-publicized Pryba case, for example, the RICO charges were based on seven counts of interstate distribution of obscene material and on fifteen prior convictions obtained against the corporate defendant for violating the Virginia obscenity statute. Yet, the dollar value of the obscene videotapes in the instant case was $105.30.

In obscenity cases, it makes more sense to provide an enhancement if the offender retails obscene matter and a greater enhancement for those who traffic in obscene matter for purposes of resale.

(2) Distribution of Obscene Matter to Minors

Again, we doubt that this enhancement will be of much use in obscenity cases. While youth do seem to have an uncanny ability to obtain pornographic materials, it is doubtful that retailers are an important source of it. Most youth obtain pornogrphic material "second hand." The one exception to this is "dial-a-porn," but Section 2G3.1 does not encompass dial-a-porn.

Also, it is not clear whether defendant must "knowingly" engage in a pattern of distributing obscene matter to minors.

CONCLUSIONS

Passage of the Child Protection and Obscenity Enforcement Act of 1988 does indeed provide a policy basis for amending Guideline 2G3.1 to increase the Base Offense Level for various obscenity offenses. In passing the Act, Congress responded to a ground swell of concern from the American people about the proliferation of hardcore pornography in the nation. The specific provisions of the Act indicate clearly the Congressional intent that obscenity offenses be treated as serious offenses.

Enhancements for retail value of obscene matter and distribution to minors will not significantly further the Congressional intent. The dollar value of obscene material at issue in an obscenity case is usually small and minors typically do not receive hardcore pornography from retail outlets. It would be better to provide an enhancement where defendant sells at retail obscene matter as a regular course of trade or business and a greater enhancement for those who traffic in obscenity for purposes of resale.

FIRST LIFE INSURANCE COMPANY
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ARLINGTON, TEXAS 76011

JOHN R. BOYD
PRESIDENT

March 29, 1990

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

Re: Ammendments 22, 23, and 24

Dear Sirs,

I am in favor of establishing much tougher sentencing guidelines that increase the penalty for sexual exploitation and abuse of children. The proposed Ammendments 22, 23, and 24 before you need to be approved and enforced.

I am strongly urging you to support Ammendments 22, 23, and 24, and make our nation a safer place for children.

Sincerely,

John R. Boyd
President

JRB/dtr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
PROBATION OFFICE

MARK W. FISHER
CHIEF PROBATION OFFICER

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March 29, 1990

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.; Suite 1400
Washington, DC 20004

Attention: Communications Director

Re: COMMENT ON PROPOSED AMMENDMENTS
TO SENTENCING GUIDELINES

Dear Mr. Martin:

This is submitted at the invitation of the United States Sentencing Commission for comments on the proposed 1990 Amendments to the Sentencing Guidelines.

I am primarily concerned with the proposed Amendments to Chapter Seven of the Guidelines regarding Revocation of Probation and Supervised Release. I have reviewed both options that have been proposed and offer the following comments:

First, I believe the Commission should make a distinction between violations of probation and violations of supervised release rather than group them together and apply the same rules for revocation proceedings as suggested in Option Number One and Option Number Two. Although, probation and supervised release are similarly structured in the way individuals are supervised and the conditions they must abide by, there are some fundamental differences.

The Sentencing Reform Act of 1984 specifies that granting a term of probation is a sentence that is available to the Court with certain limitations. Under old law (pre-guideline) the Court was required to suspend the imposition of sentence or the execution of sentence and impose a term of probation. The Sentencing Reform Act changed that approach and by imposing a term of probation the Court is in fact imposing a sentence. The guidelines place further limitations on the Court by setting the eligibility for probation based on the minimum guideline term of imprisonment of six months or less, unless the Court employs a downward departure. In either event a sentence of probation cannot be imposed if the defendant is required to serve any term of imprisonment. Therefore, if the minimum guideline range is