written with witness-killing defendants in mind but which are applied indiscriminately against even the most non-violent defendants, study rapidly changing statutory and case law, and, yes, even actually try cases.

My most respected colleagues spend hours and hours getting to know their clients, including a sketch of their lives, their educational and vocational skills, their mental and physical conditions (including drug or alcohol dependence or abuse), employment history, family ties, community ties, and even the areas of their lives where they have shown strength and success in contributing to society such as military, civic, charitable, or public service. In other words, a good attorney expends a great deal of time and effort learning about the matters that the Commission has determined "are not ordinarily relevant in determining whether a sentence should be outside the applicable Guideline range."

That same attorney, even when there is no defense to the material elements of the charge, seeks to make his participation in the case an effective intervention against the parts of a client's life that are not working either for the client or for the community. He is part expert at client confrontation, part friend, part lay counselor, and part a referral source to experts who can interrupt a defendant's mismanagement (only part of which is normally criminal mismanagement) of his life.

The reader of the excellent article by Judge Sally H. Gray and Dr. Timothy J. Kelly, Counseling the Alcoholic--An Opportunity to Make a Difference, "Res Gestae" (March, 1989), will find a rare blueprint for what the responsible attorney regularly spends enormous efforts trying to accomplish with his clients, and often with great success.

For all of the rhetorical flights in modern-day politics that would lead the public to believe that judges are spineless, prosecutors incompetent, and defendants versions of Willie Horton (whatever we are lead to believe Mr. Horton represents), as you know, most people succeed on probation and respond favorably to these efforts.

But back to the emergency. Because only about a quarter of my practice (or perhaps less) is devoted to federal criminal defense, I would normally anticipate that studying, interpreting, and advocating regarding the Sentencing Guidelines would be a very small part of my practice. About federal sentencing I now feel lost. No, I am lost. I experience my clients' sentencing hearings in federal court as something of a lottery where the result is announced to me by people who, although themselves professing to be lost, know a little bit more by attending seminars, retreats, and structured readings of manuals.

But among my fellow criminal defense lawyers, I am what is called an expert. My colleagues call me. They think that I know something and can tell them something to advocate for their clients, or failing that, at least more deftly observe for human rights violations.

More often than not, federal criminal defendants in our mid-sized city are represented by attorneys appointed under the Criminal Justice Act, attorneys who may have only one or two federal criminal cases a year. These attorneys, although well-intentioned, are heard to ask laughable questions like "But if they're only guidelines, why would the judge get reversed if he doesn't follow them?" Studying five versions in four years of what constitutes "more than minimal planning" or "relevant conduct" is never reached.

None of this is to detract from the incredible effort all of you have expended on your amendments. It is simply too great an effort for the mortal practitioner (by which I include judges, prosecutors, and probation officers who, in my experience, also cannot keep up) to handle.

In all sincerity, I pause from my work to tell you that your commitment to amendments is not working.

As you know, many responsible observers have doubted that this attempt to mathematize the criminal justice system is even possible. Can even the grinding of the teeth between the statutory wheels and the Guideline wheels ever cease? Just last month I had a sentencing in a criminal contempt case under 18 U.S.C. § 401. As you know, that statute authorizes a sentencing court to fine a defendant or imprison him, but not both. Under Guideline 5E1.2(a), the Court is required to impose a fine in all cases (except where a defendant establishes that he is not able to pay). Did you mean the Guidelines to require a fine and thus preclude consideration of any imprisonment? (Please promise me you won't enact an amendment to answer this.)

The people with whom I work (criminal defense colleagues and others) may not be geniuses but they are serious-minded people. I think that it is fair to say that the consensus among them is that there is more disparity and more inexplicable sentencing under the Guidelines than there ever was before, and that all the tinkering in the world is not going to change that. The disparate sentences often required by the mechanistic approach of the Guidelines very often leave us wondering, or muttering, whether we should believe "science" or our lying eyes.

Worst of all, there is no accountability. Defense lawyers tell their clients that the prosecutor names the charge that pretty much determines the penalty. Prosecutors say they are just bringing the charges and that the judges sentence. Judges say that their hands are tied by the Guidelines. No one even asks what the right sentence should be--or what a right sentence is.

We used to have people who asked just that, and we called them judges. Right or wrong, they had the courage and responsibility to look at the facts, hear the arguments, and actually decide that a particular sentence was the most allowable under the law.

I offer even that observation advisedly because it invites the opposite of what I am recommending. I recommend absolute, unqualified, exceptionless, aggressive inertia. The Guidelines should be left alone long enough so that reasonable people (yourselves included) can try to see what we have and what the effect is on the criminal justice system, crime, and the general respect for law in society.

The punishment-oriented model of the Sentencing Guidelines seems to be either far behind, or perhaps far ahead, of the learning curve elsewhere. I ask that you please each, if you have not already done so, find a copy of the Winter, 1992 issue of "Criminal Justice," the publication of the Section of Criminal Justice of the American Bar Association. The articles there, particularly Americans Behind Bars: Why More People are Locked Up Here Than in Any Other Nation, seem now to reflect not just the opinion of criminal defense lawyers but the opinion of prosecutors as well. More and more people seem now at least vaguely suspicious that imprisonment has no more helpful effect over crime than an attempt to make sentencing a science has over the justness of sentencing.

Instead of amending 250 Guidelines this year I suggest you study these questions and any connection you can see between them and the Guidelines.

Consider also that if this large-scale experiment called the Sentencing Guidelines is to be evaluated, some of the variables need to be isolated. There cannot be 100, or even ten, amendments a year. No responsible social scientist could stop laughing at the idea of a review of your work that never sits still and thus presents as a kind of man-made instance of the Heisenberg uncertainty principle. By the time you look at it, it's gone.

Perhaps if the Guidelines could be left alone for a reasonable period (which in my opinion would be a minimum of three years given all the necessary judicial construction), the entire idea would then be seen as brilliant. Perhaps each of the 434 amendments

would be regarded as having made the whole idea incrementally even more brilliant. Perhaps the punishment model of reacting with an intentionally reflexive sanction to a certain class of misconduct (however much it seems most of our clients were raised by such ego-dismantling models) would be shown to bear fruit.

My own suspicion is that we would find that successful crime control and successful drug control require abandoning the notion "more government is the answer"; that we have been asking all the wrong questions (e.g., Does a one-time small-time marijuana seller's "relevant conduct" include the quantities of marijuana sold by thrice-removed drug dealers he never met but whose larger dealings were objectively foreseeable, but not subjectively foreseen, by him? or, as the Eleventh Circuit actually addressed in a published opinion on March 20, 1992, does the Sentencing Commission's amendments to a Guideline commentary, as opposed to a Guideline itself, nullify earlier contrary judicial interpretations of the Guidelines?); that we have been asking virtually none of the right questions (e.g., Why are our children poisoning themselves?); and that the greatest service that the Commission could perform would be to report to the public that there never has been and never will be much of a penological solution to these problems, only a penological response.

Interestingly, a typical federal drug case in Indiana often involves dealing in "ditch weed"--marijuana plants descended from massive crops planted by the federal government a half century ago. With no disrespect for the good intentions that are driving all of today's "policy," it may also turn out to be much more problem than solution.

The most intoxicating, addictive, simple, and wrong notion of all may turn out to be that attempted federal regulation of drug supply is a substitute for teaching our children one-by-one to love and esteem themselves, and thus not to ingest poison. My personal opinion--based on hundreds of cases of clients who have abused drugs, many of whom today spread the contagion of recovery--is that the simplistic appeal to federal criminal regulation to solve this problem is ultimately a dangerous hoax that worsens the problem immeasurably.

But we can never know any of this--one way or the other--unless and until the blizzard of amendments stops. We can never know anything unless and until the Commission distinguishes itself as one of the rare examples of government regulation that paused long enough from its mad pace of internal workings to invite objective evaluation of its original purpose and its ensuing degree of success.

Thank you for considering these thoughts.

And remember, please stop.

Sincerely,

Chas A Asher

Charles A. Asher

cd

MAYER, BROWN & PLATT

CHICAGO
LONDON
NEW YORK
HOUSTON
LOS ANGELES
TOKYO
BRUSSELS

2000 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006-1882

202-463-2000
TELEX 892603
FACSIMILE:
202-861-0473

LLOYD S. GUERCI
202-778-0637

March 2, 1992

By Hand Delivery

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

Re: Proposed Amendments to the Sentencing Guidelines for Offenses Involving the Environment (Section 2Q)

Dear Sir or Madam:

These comments are submitted in response to the notice of proposed amendments to sentencing guidelines published by the Commission in the Federal Register on January 2, 1992, 57 Fed. Reg. 90, 97. The comments are submitted on behalf of Chevron USA Inc. and its employees, and other persons who have asked not to be identified.

The Federal Register notice proposed an amendment to Section 2Q1.2 (Mishandling of Hazardous Substances) to eliminate double counting where the offense involves a permit violation. The notice also presented two additional issues: 1) whether to increase the offense levels of Section 2Q1.2(b)(1), and 2) if Section 2Q1.2 is amended, whether a comparable amendment should be made to the parallel guideline Section 2Q1.3 (Mishandling of Environmental Pollutants). Our comments follow.

1. Proposed Amendment to Section 2Q1.2

The Commission proposed to amend Section 2Q1.2(b)(4), "Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering and Falsification" to clarify that this specific offense characteristic should not be applied if an adjustment under Section 2Q1.2(b)(1) applies. 57 Fed. Reg. at 97. The reason for this proposed amendment is to eliminate "double counting." Double counting has occurred when some courts have increased the offense level under Section 2Q1.2(b)(1) based

upon a "discharge, release, or emission" without a permit or in violation of a permit and also increased the offense level under Section 2Q1.2(b)(4) where the discharge occurred "without a permit or in violation of a permit." The notice recognizes that in many cases the "discharge, release, or emission" is not a violation of law unless it occurs without or in violation of a permit.

We support the Commission's proposal. The proposal would correct improper and unintended interpretations of the guidelines. The Commission should also assure that double counting does not arise through an application of 2Q1.2(b)(4) and the base offense. Many criminal cases are brought under environmental statutes that require permits, as is evidenced by reports and statistics issued periodically by the Government. The base offense in such cases includes a discharge, release, emission or other activity involving the management of hazardous wastes without a permit or in violation of a permit. Double counting would be avoided if Section 2Q1.2(b)(4) were not applied where the base offense involves a permit violation.

2. Increase in Offense Levels

The Federal Register notice stated that the Commission is reconsidering the appropriate adjustment for offenses involving a release of a pollutant. The notice did not set forth any basis for an increase in the offense level. An increase in the offense levels under Section 2Q1.2(b)(1) is not justified. The record on sentences imposed to date is very limited. To increase the level, there would have to be a finding that the guidelines underpenalize criminal behavior. There is no basis for such a conclusion.

3. Possible Parallel Amendment to Section 2Q1.3

If Section 2Q1.2(b)(4) is amended to eliminate double counting, we believe that a comparable amendment to the parallel guideline, 2Q1.3, is necessary. Section 2Q1.3 is similar to Section 2Q1.2 except the former applies to offenses involving conventional pollutants. The two guidelines are parallel except

for the lower offense levels in 2Q1.3. The reasoning set forth in point 1 above applies to 2Q1.3 as well.

Conclusion

We support the amendment of Sections 2Q1.2 and 2Q1.3 to eliminate double counting in imposing sanctions for offenses done without a permit or in violation of a permit. We oppose increasing offense levels under Section 2Q1.2(b)(1).

Respectfully submitted,

Lloyd S. Guerci

United States District Court
For the District of Oregon
United States Courthouse
620 S.W. Main
Portland, Oregon 97205

#40

Chambers of
James A. Redden
Chief Judge

March 5, 1992

The Honorable William W. Wilkins, Jr.
United States Sentencing Commission
1331 Pennsylvania Avenue NW, Suite 2400
Washington, D.C. 20004

Dear Judge Wilkins:

I write simply to express my agreement with the comments made by Katherine Zimmerman, Deputy Chief Probation Officer, United States District Court of Oregon. They were contained in her letter of February 28, 1992, addressed to you. We trust that you and the Commission will give them due consideration.

Very truly yours,

James A. Redden
Chief Judge

JAR:jp
CC: The Honorable Vincent L. Broderick
David R. Looney
Katherine Zimmerman

#38

Natural Resources Defense Council

1350 New York Ave., N.W.
Washington, DC 20005
202 783-7800
Fax 202 783-5917

March 2, 1992

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

re: Proposed Amendments to Sentencing Guidelines --
Environmental Crimes (57 Fed. Reg. 90, January 2, 1992)

Dear Members of the Commission:

The Natural Resources Defense Council (NRDC), Friends of the Earth, and the National Audubon Society are pleased to submit the following comments on proposed amendments to the Sentencing Guidelines that affect environmental offenses. (57 Fed. Reg. 90, January 2, 1992.) Collectively, these organizations represent approximately one million members and supporters nationwide who advocate stronger laws and stricter enforcement of laws designed to protect human health and the environment.

We were disappointed that the Commission elected last year not to submit to Congress proposed sentencing guidelines for organizations convicted of environmental crimes.[1] Moreover, we believe that the existing sentencing guidelines for individuals convicted of environmental crimes contain more comprehensive flaws than are addressed in the January 2, 1992 proposal. Based on research conducted by NRDC in connection with a law review article in the George Washington Law Review,[2] we concluded that sentences imposed for environmental crimes are well below the level sufficient to deter these crimes in the future.

Consequently, we question whether it is appropriate to address a single, isolated issue outside of the context of the broader review necessary to address environmental crimes adequately. We understand that the Commission is in the process of creating an advisory committee to assist the Commission in such a review, and request that the nonprofit environmental advocacy community be

---

[1] See Comments of NRDC et al. on Sentencing Guidelines for Organizations, dated April 9, 1990 and January 10, 1991, which we ask to be incorporated herein by reference.

[2] "Environmental Crimes: Raising the Stakes," 4 G. Wash. L. R. 781 et seq. (April 1991). Copies of this article are enclosed for the Commission's convenience.

40 West 20th Street
New York, New York 10011
212 727-2700
Fax 212 727-1773

71 Stevenson Street
San Francisco, CA 94105
415 777-0220
Fax 415 495-5996

617 South Olive Street
Los Angeles, CA 90014
213 892-1500
Fax 213 629-5389

212 Merchant St., Suite 203
Honolulu, Hawai'i 96813
808 533-1075
Fax 808 521-6841

represented in this process, so that an adequate diversity of interests is considered.

If the Commission proceeds with its proposed changes at this time, however, we have the following comments:

Sections 2Q1.2 and 2Q1.3

We oppose the proposed addition of language at the end of sections 2Q1.2(b)(4) and 2Q1.3(b)(4). The existing guidelines do not result in double-counting because subsections (b)(1) and (b)(4) address different types of aggravating conduct or effects.

The baseline offense levels for both 2Q1.2 and 2Q1.3 apply to any crimes involving mishandling of environmental pollutants, including not only releases, but reporting, recordkeeping, equipment and facility maintenance, etc. Other portions of these sections add or subtract from the baseline levels based on different indicators of conduct or harm. Subsections (b)(1) address the result of the conduct, which is release of pollutants into the environment. Subsections (b)(2) address the nature of the conduct, which is release without a permit or in violation of a permit.

It is true that, in some cases, no offense has been committed unless the release occurred without or in violation of a permit. In other cases, however, such as the discharge of DDT under the Clean Water Act, an offense has been committed independent of permitting requirements, because the discharge is prohibited altogether. Ironically, under the current system the release of a pollutant that is prohibited entirely receives a lower offense level than the release of a pollutant which may be released if permitted (and in accordance with that permit). Moreover, we believe that releases without any permit warrant higher upward adjustments (for example 6 levels) than releases in violation of a permit, because in the latter case the defendant showed some intent to act within the regulatory system. To address these issues comprehensively, a different hierarchy than either the existing guideline or the proposed revision appears appropriate:

1. Baseline offense for any violation involving pollutants;

2. Increase offense levels based on environmental result:

    a. where the violation resulted in a release to the environment (maintaining the current distinctions between hazardous and other pollutants, and between continuous, repetitive or single releases) (b)(1);

b. where the release resulted in a substantial likelihood of death or serious bodily injury (b)(2);[3] and

c. where the release resulted in disruption of utilities, evacuation or costly cleanup ((b)(3)).

3. Increase offense levels based on conduct, scaled according to the nature of the conduct:

a. highest increase for discharge of pollutants that are prohibited entirely;

b. next highest increase for discharge without a required permit;

c. next highest increase for discharge in violation of a permit;

d. next highest increase for monitoring, recordkeeping or reporting violations with intent to conceal substantive offense; and

e. no additional increase for simple monitoring, recordkeeping or reporting violations.

Particularly if the Commission adopts the proposed amendment to address double counting in 2Q1.2(b)(4), however, we strongly support the proposal to increase adjustments by four levels each in sections 2Q1.2(b)(1)(A) and (B) (as well as 2Q1.3(b)(1)(A) and (B)).[4] For the reasons articulated in our previous comments and in the enclosed law review article, particularly the data on the adequacy of sentences that have been imposed to date for persons and organizations convicted of environmental crimes, increased offense levels are needed to address environmental crimes appropriately relative to other types of offenses. This proposed change also would more properly reflect the difference in severity between environmental offenses that result in releases of toxic and other pollutants, and other types of offenses (such

---

[3] In addition, this category should be expanded, or a separate provision should be established, to address serious harm to the environment -- such as loss of fish or wildlife.

[4] This would increase the adjustments under 2Q1.2(b)(1)(A) and 2Q1.3(b)(1)(A) to 10 levels, and the adjustments under 2Q1.2(b)(1)(B) and 2Q1.3(b)(1)(B) to 8 levels.

as recordkeeping, reporting, maintenance of equipment and facilities, etc.).

Section 2Q2.1

We support the proposal to expand the coverage of the guideline addressing Specially Protected Fish, Wildlife and Plants. We also understand the Commission's desire to specify the types of fish and wildlife subject to increased offense levels under 2Q2.1(b)(3)(B), to include the Marine Mammal Protection Act, the Endangered Species Act, and the Convention on International Trade in Endangered Species. However, we believe the proposed list is incomplete. Other statutes designed to protect defined populations (and for which criminal sanctions exist) include the Migratory Bird Treaty Act and the Wild Free-Roaming Horses and Burros Act. (It is possible that other statues and treaties should be listed as well.)

Thank you for the opportunity to comment on these proposed changes. We look forward to the Commission's more comprehensive review of sentencing guidelines for environmental crimes.

Very truly yours,

Robert W. Adler

Robert W. Adler
Senior Attorney

U.S. Department of Justice

United States Attorney
Western District of New York

United States Courthouse
Buffalo, New York 14202

#37

February 27, 1992

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

Re: Proposed Amendment to the Part 2Q1.2 Guidelines

Dear Chairman Wilkins & Commissioners:

On behalf of the Environmental Subcommittee of the Attorney General's Advisory Committee, I am enclosing comments opposing the proposed amendment to Section 2Q1.2 of the United States Sentencing Guidelines that was published in the January 2, 1992 Federal Register.

At a recent meeting of our Subcommittee, which was held on Monday, February 24, 1992, the proposed amendments were discussed. It was the unanimous opinion of all of the United States Attorneys who attended that we oppose these amendments. Although our opposition is consistent with the position being taken by the Department of Justice, we felt it important for you to understand the views of those who must implement these guidelines on a day to day basis.

As is more fully explained in the attached comments, the proposed amendments will only exacerbate problems that already exist in the application of these guidelines to environmental crimes. We urge the Commission to undertake a thorough re-evaluation of the Part Q Guidelines rather than adopt a piecemeal approach to amending the guidelines.

Thank you for your consideration. Please feel free to contact me if you have any questions about our position.

Sincerely,

DENNIS C. VACCO
United States Attorney

Chairman
Environmental Subcommittee
AGAC

DCV/taa

COMMENTS TO PROPOSED AMENDMENTS TO THE ENVIRONMENTAL GUIDELINES

Submitted by

Environmental Subcommittee

of the

Attorney General's Advisory Committee

On January 2, 1992, the U.S. Sentencing Commission published in the Federal Register a proposed amendment to Section 2Q1.2 of the environmental guidelines. The Sentencing Commission requested comments on three issues relating to this proposed amendment: 1) whether Section 2Q1.2 should be amended as proposed; 2) whether there should be an adjustment of the guidelines as they relate to offenses involving a discharge, release, or emission of a pollutant; and 3) whether Section 2Q1.3 should be amended to be consistent with the proposed amendment to Section 2Q1.2.

Critics of the Part Q environmental guidelines frequently complain that they provide neither uniformity nor consistent proportionality in sentencing - goals which were express purposes of the Sentencing Reform Act. The amendment as set forth in the January 2, 1992 Federal Register does nothing to remedy the problems encountered when attempting to apply these guidelines but instead will only exacerbate the problems. This proposed amendment is a patchwork attempt to "fix" the Part Q guidelines which would be better benefited by a thorough review. A piecemeal approach to revising the Part Q guidelines should be rejected and the Part Q guidelines should be re-evaluated in toto.

I. Specific Comments as to the Proposed Amendment to Section 2Q1.2

The proposed amendment consists of the addition of the following language at the end of the 2Q1.2(b)(4) specific offense characteristic: "Do not apply this adjustment if an adjustment from (b)(1) applies."

In other words, if the base offense level is increased pursuant to Specific Offense Characteristic 2Q1.2(b)(1)(A) or (B) due to the fact that the violation caused the release, discharge or emission of a hazardous or toxic substance or pesticide (on either an isolated or ongoing, continuous or repetitive basis) the base offense level cannot also be increased pursuant to Specific Offense Characteristic 2Q1.2(b)(4) because the conduct occurred without a permit or in violation of a permit condition. The stated reason for this proposed amendment is as follows:

> [I]n some cases, the "discharge, release or emission" is not a violation of law unless it occurs "without a permit or in violation of a permit." Accordingly, it has been contended that applying both of these subsections in the same case is inappropriate double-counting.

The articulated concern about "double-counting" reflects a misunderstanding of the total universe of crimes that are included as part of the Base Offense Level of Section 2Q1.2. Simply because it would not be illegal for someone to treat, store or dispose of hazardous waste unless they do so without a permit or in violation of the terms and conditions of a permit, does not mean that it is "double-counting" to apply both specific offense characteristics 2Q1.2(b)(1) and 2Q1.2(b)(4). Since the Base

Offense Level of this specific guideline is designed to cover conduct that encompasses varying degrees of seriousness -- including offenses that do no involve permits or permit conditions -- it is essential that the Specific Offense Characteristic stay in place until an overall re-evaluation of the guidelines is completed. To modify this provision now will result in inequities in the sentencing of less serious crimes that are encompassed as part of this guideline.

A. Legal Analysis

First, it must be remembered that the "base offense level" is not exclusively tied to elements of a specific crime. Rather, it is the threshold level - the "base" - for a group of different crimes that share some commonality. In the case of the 2Q1.2 guideline, the common link between the various statutory sections covered by this specific provision of the guideline is the fact that all of the listed crimes involve, in some way, the mishandling of hazardous or toxic substances and pesticides or recordkeeping requirements related to those types of substances.[1]

---

[1] Other examples of crimes that are grouped together with the same base offense level but which have different elements of the offense are found in U.S.S.G. §2A2.2, the guideline provision that covers aggravated assault. Pursuant to 18 U.S.C.§113(c) it is a crime for anyone to assault another person within the maritime or territorial jurisdiction of the United States with a dangerous weapon. The use of a dangerous weapon is an element of this offense yet U.S.S.G. 2A2.2(b)(2) provides an enhancement to the base offense level if a dangerous weapon is used in the crime. Similarly, pursuant to 18 U.S.C. §114 it is a crime for anyone within the maritime or territorial jurisdiction of the United States to pour scalding water, corrosive acid or caustic substances on another person with the intent to maim that person. The act of pouring the liquid will necessarily cause some bodily injury, yet that factor is also listed as a specific offense characteristic

The 2Q1.2 base offense level encompasses offenses involving the actual unpermitted treatment, storage or disposal of hazardous waste resulting in actual contamination of the environment as well as offenses involving the failure to file required reports or maintain records which do not necessarily involve any unpermitted treatment, storage or disposal or any environmental contamination. In fact, the 2Q1.2 section covers offenses as diverse as the dumping of hazardous waste in violation of RCRA, the improper storage of PCBs in violation of TOSCA, to decanting bulk pesticides into unlabeled containers for distribution in violation of FIFRA, and the falsification of shipping manifests.

Section 2Q1.2 also includes offenses for which proof of the violation of a permit is a prerequisite for conviction as well as offenses for which there is no permit requirement at all. In short, the base offense level is simply the starting point. Every defendant convicted of a violation covered by 2Q1.2 starts with a Base Offense Level of 8, even though many of those crimes have different elements, some implicating a permit requirement and others that do not, that make up the individual offenses.

The Specific Offense Characteristics are designed to distinguish the various related but different crimes that are grouped in the 2Q1.2 subsection. These Specific Offense

---

that enhances the base offense level. See also: 18 U.S.C. §842(a)(2) and U.S.S.G. §2K1.3(b)(1) - use of false information to obtain explosives; 18 U.S.C. §1465 and U.S.S.G § 2G3.1(b)(1) - transportation of obscene material for purposes of sale.

Characteristics identify factors that in some way may make the specific crime at issue more, or in some cases, less serious than other crimes that are grouped in the same Base Offense level and thus deserving of a sentence outside the applicable guideline range. It is important to realize that not every specific offense characteristic is applicable to every potential environmental criminal statute encompassed by these guideline sections.

In Chapter One of the Guidelines, the Commission addressed specifically the relationship between the base offense level and specific offense characteristics when dealing with regulatory crimes.

> The structure of a typical guideline for a regulatory offense provides a low base offense level (e.g. 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level.

U.S.S.G, Ch1, Part A, Subsection 4(f).

This structure is followed in the Part Q Guidelines. Specific Offense Characteristic 2Q1.2(b)(1) addresses a specific harm that will not occur in all of the offenses covered by this guideline, namely the actual discharge, release or emission of a hazardous or toxic substance or a pesticide into the environment. Environmental contamination is clearly more egregious than a recordkeeping violation or a violation that is corrected before there is an actual discharge or release.

Specific Offense Characteristic 2Q1.2(b)(4) addresses an entirely separate and distinct harm, namely the absence of a required permit or violation of a permit condition. The permit requirement is not an element in all of the regulatory offenses that are part of the Base Offense Level. This specific offense characteristic addresses an aggravating factor and regulatory concern that is different and distinct from the actual release or discharge of a contaminant into the environment that is addressed in 2Q1.2(b)(1).

Permits in the environmental regulatory framework are not simply paper exercises or licenses to pollute. They are designed to be the result of an administrative process aimed at preventing pollution and contamination before it occurs. This process includes the collection of the best available information, the evaluation of potential environmental and health risks of the proposed activity, and notice to, and input from, concerned citizens who may be affected by the permittee's activities. The permit process can also be viewed as performing the function of a safety net. Once a company or individual is in the permit system, the permittee is subject to reporting requirements and periodic inspections. The permit process is thus the mechanism used to monitor ongoing activities that have the potential for causing environmental damage with the goal of stopping unsafe practices before they escalate out of control. Individuals or companies who avoid the permitting process entirely deserve to have their sentences enhanced because by avoiding the permit process they

subvert the entire regulatory scheme. When this behavior results in actual environmental damage, it should be subject to the most serious sentences.

Violators who are convicted of violating the terms of their permit are also subject to an enhancement pursuant to subsection 2Q1.2(b)(4). Although the harm to the regulatory system by permit violators is different than those who simply avoid the system altogether, there is still a regulatory interest in assuring that those who apply for and receive permits actually comply with the limitations and requirements in the permit. Clearly, if a defendant actually has a permit and simply ignores its limitations, that factor reflects both knowing intentional conduct and a disdain for the regulatory process.[2] Thus, as has been previously stated, the permit factors addressed in 2Q1.2(b)(4) are a completely separate aggravating factors that are not addressed by the 2Q1.2(b)(1) Specific Offense Characteristic.

---

[2] Some argue that the harm to the regulatory system by permit violators is not as egregious as the harm caused by those who avoid the system all together. However, the distinction between permit violators and those who avoid the system all together is not addressed by the proposed amendment.

Another argument that is sometimes made with respect to this subsection of the guidelines is that if a certain type of treatment or disposal activity is so bad that it would never be permitted by EPA, then this specific offense characteristic should not be applied. However, this interpretation of the guidelines would result in a lower base offense level for conduct that was so egregious that it would never be permitted than for conduct that would be allowed within a permit structure.

These are examples of a provision that could be re-evaluated if the Part Q guidelines were reviewed as a whole rather than in piecemeal fashion.

Nor is the structure of the Part Q Guidelines an anomaly when examined within the framework of other guideline sections. Rather the format is similar to guidelines that focus on other categories of crimes. Courts have addressed and rejected similar double counting arguments under other guidelines, for example, in United States v. Braxton, 903 F.2d 292 (4th Cir. 1990) the court rejected the defendant's argument that adding three levels because the victim was a law enforcement officer under 3A1.2 to a conviction for assaulting a federal officer in violation of 18 U.S.C. §111 "double-counted" the "federal officer" element of the underlying crime.[3]

If the application of both 2Q1.2(b)(1) and 2Q1.2(b)(4) constitutes double counting, then another example of "double counting" exists in the 2Q1.2 guidelines. Under the analysis which is the basis for the proposed amendment, it would also be double counting to decrease the final offense level pursuant to 2Q1.2(b)(6) in situations where the offense involved a simple recordkeeping or reporting violation only since the violation of falsification of records is wholly covered by the Base Offense Level.

Since subsections (b)(1) and (b)(4) address different regulatory concerns and different harms (i.e. aggravating factors), the application of both these factors to the same defendant does not constitute double counting. Although subsection (b)(4) may not be the perfect way to account for various aggravating factors that

---

[3] Other examples are given supra at footnote 1.

legitimately call for enhancement of a sentence, the proposed amendment not only fails to improve on the existing Part Q guidelines, but will only create additional problems.

B. Practical Ramifications of the Proposed Amendment

The significance of this proposed Amendment is apparent when examining guideline calculations in some actual cases and factual scenarios.[4]

1. U.S. v. Anthony St. Angelo, Crim. No. WN-91-0173 (D. Md.)

Anthony St. Angelo was convicted by a jury of four counts of illegal disposal of hazardous waste at his furniture refinishing business which was located in Ijamsville, Maryland. From December, 1987 through March, 1990, St. Angelo directed employees to dispose of spent solvents that were used in the furniture stripping and refinishing business at three different locations liquid waste from the stripping process was sometimes mixed with sawdust and then put into a trash dumpster and sent to a municipal landfill. On other occasions, the spent solvents were mixed with sawdust and the sawdust was spread on the floor of the building to allow the solvents to evaporate. Liquid wastes were also poured down the hillside on the southeast corner of the property with such frequency that a spillway was created down the hill. This same liquid waste was also poured onto the ground in the northwest

---

[4] For purposes of this analysis, reference is made only to application of the Part Q Environmental Guidelines. Thus a particular defendant's Final Offense Level might change depending on factors such as whether defendant was given credit for acceptance of responsibility, was determined to be the leader of criminal activity, or used a special skill.

corner of the site. During the execution of a criminal search warrant in March, 1990, soil samples confirmed the presence of spent solvents and high levels of lead in one area of the site.

St. Angelo was not a stranger to the requirements for safe disposal of hazardous waste. He had previously been cited in 1984 by the state for hazardous waste violations when operating a similar business at a different location. At that time, he was told how to properly store his waste and that he needed to get a licensed hazardous waste hauler to remove the waste. Company employees testified that St. Angelo had looked into the cost of properly disposing of the waste but rejected that option since it was estimated that it would cost the company approximately $1600 a month to legally dispose of the waste that was generated by their operation. During the time period he was in operation, St. Angelo made various misleading representations to the state regulators concerning the nature of his business and the quantity and type of waste he was generating specifically to avoid regulation of his business and detection of his activity.

In short, the overall picture which emerged as a result of evidence presented at the trial was that St. Angelo (1) knew he was dealing with regulated hazardous waste; (2) knew the proper way to handle the waste but deliberately chose to act illegally to save money; and (3) affirmatively attempted to conceal his illegal disposal.

Under the current guidelines, St. Angelo's guideline sentence would be calculated as follows:

§2Q1.2(a) Base Offense Level	8
§2Q1.2(b)(1)(A) - continuous or repetitive discharge of a hazardous or toxic substance	6
§2Q1.2(b)(4) - involved disposal without a permit	4
FINAL OFFENSE LEVEL	18

Assuming that St. Angelo has a Criminal History Category of I, his guideline sentencing range would be between 27 and 33 months.

Under the proposed amendment, the district court would have the option of choosing to apply either §2Q1.2(b)(1) or §2Q1.2(b)(4) since, arguably, the amendment does not specify which specific offense characteristic must be used. If the court calculated the adjusted offense level using §2Q1.2(b)(1), St. Angelo's Final Offense Level would only be a level 14, which translates to a sentencing range of 15 to 21 months. If the sentencing judge were to decide to apply a two level "guided" downward departure pursuant to Application Note 4, St. Angelo's final offense level would be 12, which translates to a sentencing range of 10 to 16 months.[5] At this level St. Angelo would be

---

[5] Due to the inherent flexibility that is built into the Part Q Guidelines in the Application Notes, St. Angelo's final offense level could vary from a level 14 (15 to 21 months) to a level 24 (51 to 63 months) under the current guidelines. If the amendment is adopted, the Final Offense Level could vary from a level 10 (6 to 12 months) to a level 14 (15 to 21 months). Where an individual is sentenced within the range of 15 to 63 months, (or under the proposed amendments, 6 to 21 months) depends almost solely on the personal view an individual district court judge has of the seriousness of the offense and culpability of the defendant. These Application Notes are thus an invitation to disparate sentences and will result in widely varying sentences from district to district.

eligible to receive a split sentence pursuant to §5C1.1(c)(3)(d)(2). If the court were to choose to apply §2Q1.2(b)(4), the adjusted offense level would only be a level 12 and if a "guided" departure pursuant to Application Note 8 were made, St. Angelo's adjusted offense level would be 10 (a range of 6 to 10 months) and he would be eligible for probation with conditions of confinement pursuant to §5B1.1(a)(2).

2. U.S. v. Marvin Mueller
Crim. No. 91-00204CR(4) (E.D. Mo.)

Marvin Mueller entered a plea of guilty to the illegal transportation of hazardous waste and the illegal disposal of hazardous waste from his dry cleaning establishment in Saint Louis, Missouri. Marvin had been in the dry cleaning business for nearly twenty years and ran an industrial chemical and solvents supply company for fifteen years. From on or about November 1987 until March 1989, Mr. Mueller illegally stored various waste materials in trailers alongside his dry cleaning business. After the City of Saint Louis fire inspectors finally surveyed his out buildings and noted that there were drums of chemicals stored in the trailers, Mueller contacted someone to "dispose"of these drums for him.

Although Mueller had an existing contract with the Safety Kleen Corporation to dispose of canisters from his dry cleaners, Mueller contacted John Hall and arranged with Hall to have the drums loaded onto a rental truck, taken to a remote area of a neighboring county and "dumped" there. All 23 barrels containing various dry cleaning waste materials were left abandoned on the

roadside. Many of these barrels were ruptured during the unloading or leaking after they were abandoned.

Laboratory analysis done by the Missouri Department of Natural Resources Laboratory showed that these drums contained wastes that met the ignitability characteristic for hazardous wastes.

Based upon his extensive experience in the dry cleaning and industrial chemicals business, Marvin Mueller (1) knew he was involved with materials that were regulated; (2) knew the proper way to dispose of these wastes and deliberately chose to act illegally to save money.

Under the current guidelines, Mueller's presentence guideline calculation should be:

§2Q.2(a)	Base Offense Level	8
§2Q1.2(b)(1)(B)	Discharge, Release, or Emission of a hazardous substance	4
§2Q1.2(b)(4)	Transportation, Treatment or Disposal without a permit	4
FINAL OFFENSE LEVEL		16

Assuming this defendant has a criminal history category of I, the guideline range would be twenty-one to twenty seven months. Without the four level enhancement pursuant to §2Q1.2(b)(4), Mueller's final offense level would only be a level 12, which would result in sentencing range of ten to sixteen months.[6] Thus, under the proposed amendment, if a defendant

[6] At the sentencing in this case, the district court applied a three level "guided" downward departure pursuant to §2Q1.2(B)(4), comment (n.8), and a two level adjustment for acceptance of

illegally stored hazardous waste without a permit, he would end up with the same sentencing range as at a defendant who actually causes a release of hazardous waste into the environment.

II. Comments on Future Amendments to the Part Q Guidelines

The single most significant factor that undermines certainty when computing a guidelines sentence under Part Q is the wide range of discretion and flexibility afforded to the sentencing court pursuant to the Application Notes that accompany the Part Q Guidelines. These Application Notes act as a broad invitation to the sentencing courts to depart with the result that the adjustments for aggravating factors that are identified as part of the Specific Offense Characteristics are undercut. The uncertainty created by the Part Q guidelines Application Notes makes it very difficult to conduct meaningful plea negotiations and frequently leads to lengthy and protracted sentencing hearings. In addition, and most importantly, as is illustrated by an examination of several cases, it is possible for defendants to receive widely varying sentences for comparable crimes.

In United States v. Wells 922 F.2d 54 (1st Cir. 1991), John Wells and his company, Wells Metal Finishing, Inc, were convicted of knowingly discharging excessive amounts of zinc and cyanide into the City of Lowell's sewer system for approximately two years between 1987 and 1989. At sentencing, the district court

---

responsibility pursuant to §3E1.1(a). Thus Mueller's final adjusted offense level was level 11 with a sentencing range of 8 to fourteen months. The district court sentenced him to 4 months confinement and four months of house arrest.

assigned a base offense level of eight to the offense pursuant to U.S.S.G. § 2Q1.2. The court then looked to the Specific Offense Characteristics and increased the base offense level by six levels pursuant to §2Q1.2(b)(1)(A), since the crime involved a continuous or repetitive release of a hazardous substance.

The court also made a two-level upward adjustment pursuant to §2Q1.2(b)(3) finding that there was sufficient evidence to establish that a public utility, the Lowell Water Control Department, was disrupted by the defendant's conduct. As the First Circuit Court of Appeals noted, U.S.S.G § 2Q1.2(b)(3) requires a four level upward adjustment for disruption of a public utility, effectively making the district court's application of this subsection a two level downward departure. Since the district court did not make any specific findings to justify this two level departure, the First Circuit assumed that he had relied on Application Note 7 to §2Q1.2, which states:

> Depending upon the nature of the contamination involved, a departure of up to two levels either upward or downward could be warranted.

Finally, the district court reduced the offense level pursuant to §3E1.1 due to the defendant's acceptance of responsibility. Thus the final adjusted offense level was a level fourteen.[7] John Wells was sentenced to fifteen months imprisonment and one year of supervised release.

---

[7] Although this crime involved an offense that violated the terms of the defendant's permit with the City of Lowell, no adjustment was made to the offense level pursuant to §2Q1.2(b)(4).

When compared to pre-guideline sentences, John Wells' sentence would be considered to be a stiff sentence. However, under the guidelines as presently structured, this defendant's sentence could have been much longer. A straight forward guideline computation would include a base offense level of 8 pursuant to 2Q1.2(a); an increase of 6 pursuant to 2Q1.2(b)(1)(A) for a continuous or repetitive discharge; and increase of 4 pursuant to 2Q1.2(b)(3) since the offense resulted in disruption of public utilities; and increase of 4 pursuant to 2Q1.2(b)(4) since the company's permit with the municipal government was violated. If the defendant was given credit for acceptance of responsibility, as Wells was, then the final adjusted offense level would have been 18, which would have resulted in a sentencing range of 27 to 33 months. Even if the four levels that are applicable since the crime constituted a violation of a permit are exclude, the adjusted offense level would be 16, with a sentencing range of 21 to 27 months, a significantly different sentence than the sentence Wells actually received.

Well's sentence can be compared to that received by the defendant in United States v. David Boldt, Crim. No. 88- 00084 (D. Mass. 1990) who was convicted of a very similar crime. Boldt, a manager for Astro Circuit Corporation, was convicted by a jury on two counts under the Clean Water Act for discharging electroplating wastes, at the rate of approximately 58,000 gallons a day, into the Lowell, Massachusetts sewer system. The company had been engaged in this activity from approximately May, 1984 to April, 1988. The

evidence established that Boldt was the chemical processing engineering manager from June, 1987 through January 1988 and supervised the discharges during this period. The district court sentenced the defendant to 48 hours of imprisonment, one year of probation and fined him $1,000. The district court made several downward departures when calculating the 2Q1.2 guidelines, for example refusing to enhance the sentence due to the repetitive discharges pursuant to 2Q1.2(b)(1)(A). The district court also departed based on his finding that Boldt was a "minimal participant" pursuant to U.S.S.G. §3B1.2(a) and had "accepted responsibility" for his crimes. The president of Astro Circuit, Robert McKiel had pled guilty to eleven felony counts under the Clean Water Act and was sentenced to one year, with eight months suspended, and placed on probation for two years. The vice-president was sentenced to nine months, with six months suspended and placed on probation for two years. These sentences are inconsistent with a straightforward guidelines calculation which should have been made as follows:

§2Q1.2(a) Base Offense Level	8
§2Q1.2(b)(1)(A) - continuous or repetitive discharge of a hazardous or toxic substance	6
§2Q1.2(b)(4) - involved disposal without a permit	4
FINAL OFFENSE LEVEL	18

Even if the court had made two level downward departures pursuant to Application Notes 4 and 7, the resulting guideline offense level should have been a level 14, which would translate to a sentencing range of fifteen to twenty-one months of imprisonment.

The sentences in these cases, involving repeated discharges of hazardous substance, can be contrasted with United States v. Irby, (No. 90-5113, 4th Cir. Sept. 13, 1991), in which the defendant Irby received more than double the term of imprisonment that Wells received for offenses that did not involve hazardous wastes. Mark Irby was the plant manager of a wastewater treatment plant who ordered the discharge of approximately 500,000 gallons of partially treated sewage sludge to local river on a weekly basis for approximately two years. Irby directed subordinates at the wastewater treatment plant to discharge the sludge during night time hours.

At sentencing, the district court assigned a base offense level of six to the offense pursuant to U.S.S.G. § 2Q1.3. The court then looked to the Specific Offense Characteristics and increased the base offense level by six levels pursuant to §2Q1.3(b)(1)(A), since the crime involved a continuous or repetitive discharge of a pollutant and by four levels since the discharges violated the terms of a permit. Thus, the adjusted offense level pursuant to the environmental guidelines was a level 16. The court also increased the offense level by 2 points pursuant to 3B1.1(c) because the defendant was a manager or supervisor of a criminal activity which brought the adjusted offense level to 18 resulting in a sentencing range of 27 to 33 months. Irby was sentenced to 33 months imprisonment to be followed by twelve months of supervised release.

Irby can be compared to United States v. Ted Osborne, Cr. 90-38 (E.D. Ky.). Osborne operated two small wastewater treatment facilities and pled guilty to one felony count under the Clean Water Act for the knowing discharge of sewage pollutants into a creek without a permit. The violations occurred between July 1989 and May, 1990. The district court departed from the guidelines because he concluded that the violations did not cause a significant harm. Osborne was sentenced to six months of home detention, two years of probation and fined $7,319. Although the magnitude and effect of Osborne's conduct may have been less significant than Irby's, it is still difficult to reconcile the very large disparity in their sentences given the general nature of both crimes.

Another example of how the Part Q guidelines can be interpreted differently by different courts is found by comparing the cases of U.S. v. William Ellen, U.S. v. Ocie Mills, and U.S. v. John Pozsgai[8]

---

[8] The sentence imposed in the Pozsgai case has received considerable media attention as an example of the draconian nature of the environmental sentencing guidelines. However, in addition to factual distortions that are contained in many of the media accounts, it is important to note that the sentence in the Pozsgai case was a combination guideline and pre-guideline sentence. In fact, the sentence that the district court imposed on the non-guideline counts was longer than the sentence that he imposed on the guideline counts. At the sentencing hearing, the district court made it very clear that he imposed the sentence because of Pozsgai's flagrantly criminal conduct after seven separate notices from the U.S. Army Corps of Engineers and EPA. In addition, the sentencing court also noted that Pozgai had violated a Temporary Restraining Order issued by a federal district court judge and had committed perjury before a federal district court judge.

In U.S. v. William Ellen, the defendant was convicted on six felony counts under the Clean Water Act for illegally filling wetlands between October, 1988 and March 1990. During the trial it was established that 86 acres of wetlands were illegally filled despite the fact that Ellen was issued a cease & desist notice from the Army Corps of Engineers and received numerous other warnings from regulators and subcontractors.

Conservatively, Mr. Ellen's actions resulted in the illegal filling of at least 86 acres of very valuable and rapidly disappearing wetlands on Maryland's Eastern Shore. The unregulated filling that occurred at Tudor Farms under Mr. Ellen's supervision destroyed not only the wetlands themselves but also valuable habitat of a variety of animals, including the Delmarva fox squirrel and a bald eagle, two endangered species. One measure of the actual harm done to the site is the fact that the property owner, was required to conduct extensive restoration of the site in an attempt to minimize the adverse environmental impact of Mr. Ellen's conduct. The restoration and mitigation of the site cost close to one million dollars.

At sentencing, the district court arrived at an adjusted offense level of 12. This level was computed as follows:

2Q1.3 Base Offense level	6
2Q1.3(b)(1)(A) repetitive discharge	4
2Q1.3(b)(4) no permit	2
FINAL OFFENSE LEVEL	12

In this case, the district court gave Ellen two different "guided " departures. Relying on Application Note 4, the court applied Specific Offense Characteristic 2Q1.2(b)(1)(A) but made a 2 level downward guided departure because the pollutant was only dirt and because the court concluded that the damage to the marshland could be remediated by mechanical means and because, other than loss of habitat, there was no specific damage to human or animal health. The district court also applied Specific Offense Characteristic 2Q1.2(b)(4) and made and additional two level downward departure pursuant to Application Note 7 for primarily the same reasons that were the basis for the departure under §2Q1.2(b)(1)(A).[9]

In United States v. Mills, No. 88-03100-WEA (N.D. Fla. April 17, 1989), Ocie Mills and Carey Mills, a father and son, were convicted of five counts of unlawfully discharging pollutants into wetlands and one count of unpermitted dredging of a boat canal in navigable waters. The defendants had purchased the property after the prior owner had been issued a cease and desist order by the U.S. Army Corps of Engineers informing them that the area was a wetland which could not be filled. Despite receiving additional

---

[9] If the 2Q1.3 Guidelines were to be amended consistent with the proposed amendment to the 2Q1.2 guidelines, Ellen's offense level would be 12 if no additional guided departures were made. Thus under this proposed amendment, Ellen would end up with the same guideline level as a defendant who committed a $20,000 to $30,000 fraud scheme which involved more than minimal planning.

With the two "guided" departures discussed above, Ellen's offense level would be 8, which translates to 2 to 8 months of imprisonment. This is comparable to the sentence a bank teller would receive for embezzling $10,000.

warnings, approximately nineteen truckloads of fill were dumped on a half acre of wetlands. A canal was also dredged without a permit and the dredge material was spread on the site. When the Mills were sentenced on April 17, 1989, they received both pre-guideline and guideline sentences. Ocie and Carey Mills were both sentenced to serve twenty one months of imprisonment to be followed by one year probation. In addition they were fined $5,000 each and to restore the site during their probationary period. The Mills' guideline calculations were as follows:

2Q1.3 Base Offense level	6
2Q1.3(b)(1)(A) repetitive discharge	6
2Q1.3(b)(4) no permit	4
FINAL OFFENSE LEVEL	16

In United States v. John Pozsgai, No. 88-00450-01 (E.D. Pa.) Poszgai was charged with dumping at least 443 truckloads of rock and concrete onto approximately 5 acres of wetlands without a permit between the summer of 1987 and the fall of 1988. Prior to purchasing the land which was the subject of the indictment, Pozsgai was warned that it was wetlands and that a permit was required before he could fill the wetlands. Pozsgai ignored this advice and subsequent warnings he received from both the U.S. Army Corps of Engineers and EPA. When Pozsgai continued to ignore these warnings, a Temporary Restraining Order was issued by a federal district judge ordering Pozsgai to cease and desist filling the wetlands. Pozsgai ignored this court order and was indicted in

September, 1988. He was convicted and on July 13, 1989. His guideline calculations were as follows:

2Q1.3 Base Offense level	6
2Q1.3(b)(1)(A) repetitive discharge	6
2Q1.3(b)(4) no permit	4
FINAL OFFENSE LEVEL	16

Pozsgai's resulting guideline range was 21 to 27 months. Pozsgai was sentenced to three years imprisonment on the pre-guideline counts and to 27 months on the guideline counts, the time to be served concurrently. to be followed by five years imprisonment. He was also fined $200,000 and ordered to restore the wetlands.

As is obvious from a review of these cases, the acreage involved in the Ellen case is far more extensive than the other two cases yet he received by far a much lower sentence than the other two who committed similar offenses and who were charged under the same statute.[10]

---

[10] The sentence in the Ellen case, which involved discharges resulting in actual contamination of the environment can be compared to the case of U.S. v. Richard Pond. Pond was the superintendent of a wastewater treatment plant who falsified discharge monitoring reports and who failed to follow sampling protocols set forth as a condition of the wastewater treatment plant's NPDES permit. In this case, there was no evidence of actual discharges in violation of the permit limitations or of any environmental contamination. Pond's final offense level was a level 12 which translated to a sentencing range ten to sixteen months. He was sentenced to eight months of imprisonment to be followed by four months of home detention.

III. Conclusion

The 1980s was a decade that saw a dramatic increase in the overall number of environmental criminal prosecutions. Congress repeatedly expressed its intent that environmental crimes be treated as serious crimes and not mere regulatory annoyances. However, the sentences imposed in the majority of these cases reflected a reluctance on the part of many judges to impose significant periods of incarceration for violations of the environmental laws. With the advent of the federal sentencing guidelines, the expectations were that environmental criminals would actually be serving time in jail. A review of all of the cases which have been sentenced under these guidelines does not support this expectation. Environmental crimes are "serious" offenses and should be treated as such. Any structuring of the guidelines that results in sentences of probation or community confinement will undercut the deterrent effect of environmental criminal prosecutions.

Although we readily acknowledge that there are some problems with the implementation of the environmental crimes guidelines, the proposed amendment is a piecemeal approach that only exacerbates the problems. If promulgated, this amendment will result in some very bizarre and unfair sentences while not addressing some of the areas of the guidelines that do need to be changed. We strongly oppose this amendment and urge the Commission to undertake a overall re-evaluation of these guidelines in order to better effectuate the goals of honesty, uniformity and proportionality.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

#33

MAR 3 1992

OFFICE OF ENFORCEMENT

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

Dear Judge Wilkins:

On January 2, 1992, the United States Sentencing Commission, through the Federal Register, solicited comment on a draft amendment to Part Q (Offenses Involving the Environment) of the Sentencing Guidelines. The stated purpose of the proposed amendment is to rectify the perception of "double counting." As stated below, the Agency believes adoption of this amendment is not warranted because it goes beyond what is necessary to accomplish the Commission's purpose. The Agency suggests that a more limited amendment may accomplish the Commission's objective.

The Commission also solicited comment as to whether, if the above proposed amendment were adopted, a comparable amendment to Guideline Section 2Q1.3 is equally warranted. The principal distinction between the two sections is to have a two-level higher base offense level for offenses involving hazardous or toxic substances or pesticides as compared to other environmental pollutants. Insofar as the double counting issue is therefore equally pertinent to both, we recommend that they jointly be amended or not amended.

We note at the outset that the Sentencing Commission's Environmental Sentencing Guidelines Workgroup considered the possibility of eliminating both the permit and discharge factors as separate specific offense characteristics in favor of incorporating them into a higher base offense level or focusing more on the resulting environmental or community harm caused by a discharge or release. Although the Workgroup adjourned in November before reaching agreement as to a new structure for Part Q, it is our understanding that the Workgroup, in a different format, will resume its mission later this month. Rather than attempt a partial fix as now proposed by the Commission, it may be best to await the comprehensive amendments to Part Q likely to be forthcoming during the next year.

Should the Commission chose to proceed with amendments at this time, the Agency submits that the Commission's purpose of correcting possible double counting could be more precisely accomplished merely by deleting the words "or in violation of a permit" from (b)(4). The perception of double counting arises because the offense of violating a condition of a permit, as found in RCRA and the CWA, presumably is covered in the base offense level and yet serves also as the basis for an increase in the offense level under (b)(4). The focus of (b)(4) should be on whether the offense occurred outside the regulatory scheme. A violation of a permit condition usually constitutes a less serious disregard for the public welfare than totally circumventing the permitting process.

This is in keeping with the basic thrust of the Guidelines. Through a generic guideline, the Commission sought to broadly identify the relevant features of an environmental offense pertinent to determining the severity of the penalty. The occurrence of a discharge and the failure to have a permit are distinct elements of environmental offenses. Each of the two specific offense characteristics at issue (causing a release, and not having a permit) reflects a different indicator of the seriousness of an environmental crime and each is independently justifiable. Crimes where both apply are particularly serious, and neither alone would adequately capture that level of seriousness.

With respect to the Commission's question whether, in conjunction with its proposed amendment, the offense levels for (b)(1) should be increased 2-4 levels, the Agency is concerned that adoption of the Commission's amendment without a corresponding four-level increase in the offense levels for (b)(1) will have the effect of lowering the available range of imprisonment from twelve to twenty months for the large majority of defendants prosecuted for environmental offenses. Many cases identified as appropriate for criminal enforcement involve a discharge or release of a hazardous substance or other pollutant into the environment and the willfulness of the violation as demonstrated by a total failure to obtain a permit.

As every environmental statute has come up before Congress for reauthorization, Congress has consistently increased the severity of the punishment available for criminal violations. A lessening of the sentences that would result from adoption of the amendment without an accompanying increase in the offense levels would be contrary to Congressional intent. Furthermore, the Commission has stated that the purpose of the amendment is solely to correct any inappropriate double counting, and is not to cause a substantive altering of the sentences imposed for this type of crime. Accordingly, EPA strongly recommends that, if the

proposed amendment must be adopted, it be done in conjunction with a four-level increase in (b)(1) of both 2Q1.2 and 2Q1.3.

Sincerely,

Herbert H. Tate, Jr.
Assistant Administrator

cc: Barry M. Hartman
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

#16

AMERICAN BAR ASSOCIATION **Section of Criminal Justice**
1800 M Street, NW, 2nd Floor
South Lobby
Washington, DC 20036-5886
202/331-2260
FAX: 202/331-2220
ABA/net: ABA128

February 24, 1992

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

Re: Proposed Amendments to Sentencing Guidelines for Offenses Involving the Environment

Dear Chairman Wilkins:

These comments are submitted in response to the notice soliciting public comment published by the Commission in the Federal Register on January 2, 1992. 57 Fed. Reg. 90-118. The comments are submitted on behalf of the Subcommittee on Environmental Crimes of the Section of Criminal Justice of the American Bar Association, and reflect the views of the chairman of that subcommittee and not the views of the American Bar Association generally.

Members of the subcommittee have encountered a number of inconsistencies, structural problems and ambiguities with the guidelines for environmental offenses applicable to individuals. Addressing all of these issues requires careful consideration, especially because there is limited experience to date with sentencing environmental offenses. We therefore urge the Commission to continue its broadbased reexamination of these guidelines with a view toward their comprehensive revision and as a necessary precursor to revision of organizational guidelines for environmental offenses. The proposed amendment to Section 2Q1.2 is a beneficial step that we endorse.

Proposed Amendment to Section 2Q1.2

The Commission proposes to amend Section 2Q1.2(b)(4) to make clear that this specific offense characteristic should not be applied if an adjustment under Section 2Q1.2(b)(1) applies. 57 Fed. Reg. at 97. The stated purpose of the proposed amendment is "to

[09901-9700/DA920310.008]

clarify the intent of the guideline and eliminate 'double counting.'" Id. The source of the double counting is identified as an overlap between Section 2Q1.2(b)(1), which requires an adjustment for a "discharge, release, or emission" and Section 2Q1.2(b)(4), which requires an additional adjustment if the discharge occurred "without a permit or in violation of a permit." The notice recognizes that in many cases the "discharge, release, or emission" is not a violation of law unless it occurs without or in violation of a permit.

We applaud the Commission for proposing to correct what we have viewed as an obvious flaw in the structure of the guideline. We believe, however, that the cause of the double counting is more often an overlap between Section 2Q1.2(b)(4) and the base offense itself rather than an overlap between Section 2Q1.2(b)(4) and Section 2Q1.2(b)(1). Those statutes that are at the core of environmental criminal enforcement (Clean Water Act and Resource Conservation and Recovery Act) establish permit-based regulatory schemes. In almost all instances a requisite element of the base offense for a violation of these acts is the failure to obtain or to comply with a permit. Thus, analytically, double counting is avoided if Section 2Q1.2(b)(4) is not applied where the base offense violation requires proof of the failure to obtain or comply with a permit.

The Commission may wish to consider adding to the end of Section 2Q1.2(b)(4) slightly different amendatory language:

> Do not apply this adjustment if a requisite element of the base offense is the failure to obtain or comply with a permit.

In any event, the consequence of the language of the proposed amendment or the above language is the same. We strongly feel that an amendment correcting the double counting should be made.

Other Issues

The Federal Register notice solicits comments on two additional issues: 1) an increase in the offense levels of Section 2Q1.2(b)(1), and 2) if Section 2Q1.2 is amended, whether a comparable amendment should be made to the parallel guideline Section 2Q1.3.

1. An increase in the offense levels under Section 2Q1.2(b)(1) would appear to be predicated on the factual conclusion that sentences pursuant to this guideline, at least some of which involved double counting, nonetheless, appropriately penalized or underpenalized defendants. The Federal Register notice does not set forth any factual basis for an increase in the offense levels nor provide any further explanation for this action. Without any factual showing, we have difficulty reaching a conclusion on whether the proposed increase in offense levels is warranted or wise. An upward adjustment is inconsistent with the purpose, intent and history of the Commission in assessing sentences based on historical data. Such an adjustment may leave the Commission subject to the perception that it acted arbitrarily or ideologically.

We would note that for offenses that involve a discharge, release or emission, but do not occur in the context of a permit oriented system, an increase in the offense levels under Section 2Q1.2(b)(1) would significantly increase the severity of punishment for such offenses. Violations of the Toxic Substances Control Act, the Federal Insecticide, Fungicide and Rodenticide Act, the Deepwater Ports Act, the Safe Drinking Water Act, the Outer Continental Shelf Act and some violations of the Clean Air Act and the Comprehensive Environmental Response, Compensation, and Liability Act would receive more severe punishment. Although there may have been few criminal violations of these acts historically, this change would increase the period of imprisonment by 4-9 months for such violations.

2. If Section 2Q1.2(b)(4) is amended to eliminate double counting, we believe a comparable amendment to the parallel guideline, 2Q1.3, is necessary. Section

2Q1.3 is the relevant guideline for offenses involving nonhazardous and nontoxic substances. The two guidelines are parallel except for somewhat lower offense levels due, presumably, to the view that less serious offenses result from violations involving nontoxic and nonhazardous substances. Almost all of the offenses subject to application of Section 2Q1.3 (Clean Water Act, Rivers and Harbors Act, Clean Air Act) involve permit-based regulatory systems for which application of Section 2Q1.3(b)(4) would result in double counting. Since enactment of the guidelines, there have been no guideline sentences under the Ocean Dumping Act or the Act to Prevent Pollution From Ships, the other two statutes covered by Section 2Q1.3.

A brief hypothetical demonstrates the mischief that would result from the failure to make a comparable amendment to Section 2Q1.3. The knowing discharge of a hazardous substance (e.g., dioxin, kepone, toluene) into a river without a permit would result in an offense level of 12 without applying Section 2Q1.2(b)(4). Knowingly disposing of a truckload of clean topsoil on the bank of the stream would result in an offense level of 14 with application of 2Q1.3(b)(4), although the harm and culpability are less in this situation.

Conclusion

We strongly urge the Commission to amend Section 2Q1.2 to eliminate the structural flaw that results in double counting in assessing punishment for conduct done without or in violation of a permit. It is necessary that a comparable amendment of Section 2Q1.3 be made. We take no position with respect to the wisdom of increasing offense levels under Section 2Q1.2(b)(1) generally. It is not a sound amendment, however, if its purpose is solely to compensate for the amendment to Section 2Q1.2(b)(4) since it would be seriously overinclusive in increasing the penalty for violations that do not involve permits.

Sincerely yours,

Benjamin S. Sharp

Judson W. Starr

Chair of the Subcommittee
on Environmental Crime of
Section of Criminal
Justice

BSS:pap

STATEMENT OF FRED WARREN BENNETT,
Member of the Practioners' Advisory Group,
to the Sentencing Commission

I have been serving as the Chairperson of the working subcommittee of the Practitioners' Advisory Group in connection with proposed amendments dealing with relevant conduct, role in the offense and offense levels in drug cases. On behalf of the Practitioner's Advisory Committee is it my pleasure to comment on some of the proposed amendments.

RELEVANT CONDUCT

(Amendments 1(A) and 1(B))

Amendment 1(A) would advise Section 1B1.3(a)(1) in the area of relevant conduct to deal more specifically with jointly - undertaken criminal activity. The proposed amendment would modify and move existing commentary into the guideline, where we submit it more appropriately belongs. The proposed amendment also would add new commentary clarifying the applicability of Section 1B1.3(a)(1) to jointly - undertaken criminal activity.

Amendment 1(B) would add a new application note which would explain the terms "common scheme or plan" and "same course of conduct", which are used in the relevant conduct rule of Section 1B1.3(a)(2). We find the explanation to be helpful in understanding and differentiating among the terms.

We support both proposed amendment 1(A) and (B).

COOPERATION AGREEMENTS

(Amendments 2(A) and (B))

Amendment 2(A) would revise application note 1 of Section 1B1.8 to indicate that a sentencing court can consider information disclosed by a defendant under a cooperation agreement when determining whether (and to what extent) to depart in response to a government motion under Section 5K1.1.

We oppose this amendment because of the possibility that information provided by the defendant in a cooperation agreement might be unfavorable to him which would have a tendency to <u>limit</u> the extent of a downward departure granted by the Court.

The Practioners Advisory Group would support proposed Amendment 2(A) if the inserted additional sentence at the end of Application Note 1 were amended to read as follows:

> "In contrast, in determining whether a downward departure from the applicable guideline range is warranted pursuant to a

government motion under Section 5K1.1 (Substantial Assistant to Authorities) and the extent of any such downward departure, consideration of any information favorable to the defendant in the area of his background, character or conduct is appropriate."

The new language would help clarify Application Note 1 by making it clear that if a defendant waives his privilege against self incrimination in a cooperation agreement and provides useful information to the Government, information favorable to the defendant can be used by the Court in determining whether and to what extent a downward departure should be granted.

Amendment 2(B) would revise Section 1B1.8(a) to authorize cooperation agreements where the defendant's obligation is to provide information about the defendant's own unlawful activities. We support this proposed amendment, which should work to the benefit of both parties and the court. Although cooperation agreements in which the defendant is to provide information about his or her own activities will occur rather infrequently, the proposed change will accommodate the public interest in obtaining such information.

DRUG OFFENSES

(Amendments 7 and 20)

Proposed Amendment 7 is a request for comment upon a Justice Department proposal "regarding the removal or modification of the current limitations on offense levels for the distribution of Schedule III, IV and V controlled substances, anabolic steroids, and Schedule I and II depressants, so that violations involving large quantities of these substances would result in higher offense levels." No evidence has been offered by the Justice Department to suggest that there is any problem with the present guideline-which allows the sentencing court to depart upward for quantities significantly greater than the highest quantity accounted for in the drug quantity table. Before any amendment is undertaken, the Practioners' Advisory Group believes that it would be worthwhile for the Commission to study the feasibility and desirability of this proposal.

We note that the maximum penalty for Schedule V controlled substances under 21 U.S.C. § 841(b)(3) is one year (two years if the defendant has at least one other drug trafficking offense conviction), so the need to increase the offense levels for Schedule V controlled substances is certainly questionable.

Amendment 20 sets forth three options for dealing with running or managing a drug establishment (an offense under 21 U.S.C. § 856). We note that the present guideline operates unfairly. A

defendant whose house is involved with a large quantity of drugs is treated the same as the defendant whose house is involved with only small quantities. At the same time, we note that 21 U.S.C. § 856 is often used for plea agreement purposes and that all of the proposed changes (options 1, 2 and 3), to different extents, would discourage such plea agreements. We note that plea agreements benefit not only the defendant but also the government - to reward a cooperating defendant, or to ensure some punishment when the overall evidence of the government may be weak - so it would seem advantageous to retain the plea agreement utility of the guideline.

We support option two, which reduces the unfairness without completely rendering § 856 useless for plea agreement purposes.

ROLE IN THE OFFENSE

(Amendments 16(A)(B), 17, 18 and 19)

Proposed Amendment 16(A) clarifies a situation in which the defendant is not ordinarily eligible for a reduction under Section 3B1.2 (mitigating role) and would move existing language from the introductory Commentary of Chapter 3, Part B, to the Commentary in Section 3B1.2. We Support this Amendment.

Amendment 16(B) would revise the Commentary to Sections 3B1.1 and 3B1.2 to indicate that a defendant, who is otherwise entitled to a reduction for minor or minimal role but who supervised a limited number of participants of equal or lesser role, should not receive an aggravating role enhancement. The Commentary would indicate that a defendant's supervisory activity should be accounted for in determining whether the defendant should receive a reduction for minor or minimal role. The Practitioner's Advisory Group supports proposed Amendment 16(B) as consistent with appropriate guideline - application principals.

Amendment 17(A) would delete Section 3B1.4 and revise Section 3B1.1 and the accompanying commentary. The amendment would clarify the text of Section 3B1.1 and modify the definition of "participant" in Application Note 1 to state that undercover law enforcement personnel can be participants. We note that this reverses case law that the Commission seemingly embraced last year. United States v. Carroll, 893 F.2d 1502 (6th Cir. 1990); see also U.S.S.C. Appendix C, Amendment 414.

Thus, the Practioners' Advisory Group supports the clarifying changes to the text of Section 3B1.1 but we oppose the amendment to Application Note 1. Including undercover law enforcement personnel as participants is inappropriate. A criminal enterprise which is penetrated by law enforcement officials is significantly less of a threat than the threat from a criminal enterprise that does not include informants or undercover agents. A criminal enterprise penetrated by law enforcement can be broken up at any time while

criminal enterprises not including as co-conspirators law enforcement personnel or informants will not be uncovered until after it has undertaken to accomplish its objectives or completed its objectives. Sentencing policy should reflect the lesser threat.

Moreover, including undercover law enforcement personnel or informants as participants enables law enforcement personnel to manipulate the guidelines to drive up the offense level artificially. The Commission should not increase the opportunity for guideline manipulation.

Amendment 17(B) would revise the commentary to Section 3B1.1 to state expressly that the aggravating role adjustment applies only when the offense is committed by more than one participant. We support this amendment. We note that this proposed amendment is supported by developing case law. United States v. Badaracco, __ F.2d __, 1992 W.L. 8812 (3rd Cir. 1992); United States v. Anderson, 942 F.2d 606 (9th Cir. 1991).

Amendment 18(A) would revise the text of and Commentary to Section 3B1.2. We support the amendment to the text of the guideline, which would delete an instruction to decrease the offense level by three levels "in cases falling between (a) [minimal participant] and (b) [minor participant]." Since Subsections (a) and (b) define contiguous sets, there is no between into which to fall. We support revising the Commentary to Section 3B1.2 although we believe some of what is proposed is unnecessary or inappropriate. The mitigating role adjustment should be based upon the defendant's conduct during the offense and any relevant conduct - not upon how the defendant's conduct compares to the conduct of the participants in an abstract "typical" offense. We support the proposed Application Note 1, which states that the mitigating role adjustment is applicable only if there is more than one participant in the criminal activity.

We believe that proposed Application Note 2, which would make specified factors determinative, is inappropriate. We note that possession of a dangerous weapon undoubtedly will increase the defendant's offense level, so using that factor to preclude a mitigating role adjustment is similar to double counting. There is no question that possession of a weapon and the other factors set forth in proposed Application Note 2 are appropriate considerations, but these factors should not be dispositive.

We believe that the first option in proposed Application Note 3 (defendant is "plainly among the least culpable of the participants in a criminal activity") does set forth the appropriate test to determine if the defendant is entitled to a minimal role adjustment. Thus, we recommend deletion of all other bracketed language in the first paragraph of proposed application note 3.

As to the second paragraph of proposed Application Note 3 we believe that the Commission should simply list some factors that the sentencing court should consider in determining whether a defendant qualifies for an adjustment under Section 3B1.2 - we believe that it is inappropriate to make any factor dispositive. We note that if proposed Application Note 3 is so modified, proposed Application Note 4 would also have to be modified.

We support the first option in proposed Application Note 5 ("significantly less culpable than a defendant who carried out the same criminal activity without assistance") as the test to determine if the defendant is entitled to a minor role adjustment.

We also support proposed Application Note 6 but recommend deletion of the last clause in the final sentence ("and the quantity of controlled substances with which the defendant was personally involved"). We note that the test should be what the defendant did in relation to other participants, so the concern should not be with quantity but with percentage of the total quantity.

Finally, we support proposed Application Note 7 being consistent with the Commission's relevant conduct approach to determine the offense level. Proposed Application Note 7 sets forth the appropriate context in which to measure the relative role of a defendant.

Amendment 18(B) would add new Commentary to Section 3B1.2, stating that the sentencing court can depart downward on the basis that "minimal participation exists to degree not contemplated by the guidelines." The Practioners' Advisory Group supports the amendment, which simply points out departure authority that the sentencing court already has. We note that this new Commentary to Section 3B1.2 is supported by case law. See United States v. Restrepo, 936 F.2d 661, 666-68 (2nd Cir. 1991).

As to Amendment 19, we note preliminarily that the guidelines result in inappropriately high offense levels for persons who are minimal or minor participants in most criminal offenses. However, with the large number of drug cases in federal court, the role problem is most acute with respect to drug offenses. The Practioners' Advisory Group views Amendment 19 and the need to "cap" offense levels in drug cases for minor or minimal participants as **one of the most important** Amendments offered this amendment cycle.

The most direct way for the Commission to address the matter is set forth in option one and we support that proposal. Option 1 would amend Section 2D1.1 to provide a role adjustment based upon the type of controlled substance involved. Option 2 is similar but calls for a single reduction without regard to the controlled substance involved. Option 3 would provide a role adjustment but

only for a minimal role, and like option two calls for a single reduction without regard to the controlled substance involved.

We see no reason to treat drug offenses differently from other criminal offenses by eliminating the minor role adjustment in drug cases. We therefore strenuously oppose option three.

Options 1 and 2 differ only in that option 1 bases the extent of the reduction on the type of controlled substance involved in the offense. We prefer option 1, which is more consistent with the way in which the offense level is determined under Section 2D1.1.

Option 1 contains alternative sealings on the offense level when there is a mitigating role adjustment. We favor an offense level of eighteen (18) in subdivision (3)(A), twenty two (22) in subdivision (3)(B), twenty two in subdivision (4)(A) and twenty six in subdivision (4)(B). The higher alternatives in the bracketed language in these subdivisions appear to be driven by concern about defendants subject to mandatory minimums.

We submit that it is unnecessary to provide specially for a defendant subject to either a mandatory 5 or 10 year minimum sentence because, as Section 5G1.2(b) recognizes, the guidelines cannot override a statutory mandate. Thus, if the applicable range for a minimal or minor participant subject to a five year mandatory minimum is less than sixty months, the guideline sentence would be sixty months anyway under the statute. The effect of making a choice based upon concern for defendants subject to a five (5) or ten (10) mandatory minimum is to raise the offense level for all defendants not subject to a mandatory minimum.

By choosing level 22 for proposed subdivision (3)(B) [cocaine and heroin cases] this would enable a court to impose an appropriate sentence upon a defendant not subject to a mandatory minimum, while not preventing the court from imposing the mandatory minimum five year sentence on defendants that are subject to the mandatory minimum. The offenses level of 22 for 3(B) was chosen by taking the offense level under the Guidelines for defendants subject to the 5 year mandatory minimum (26) and dropping down 4 levels for minimal role to offense level 22.

SENTENCING PROCEDURES AND PLEA AGREEMENTS

(Proposed Amendment 35(A)

Although not in the area of relevant conduct, role in the offense or drug offense level, I wish to comment briefly on proposed Amendment 35(A). This proposed amendment would insert a following additional paragraph at the end of the Commentary to Section 6B1.2 which provides:

"The Commission encourages the government

> [in plea discussions] [prior to the Rule 11 colloquy] to disclose to the defendant facts and circumstances of the offense and offender characteristics, known to the government, that are relevant to the application of the Sentencing Guidelines."

We prefer the bracketed language "in plea discussions" as opposed to the language "prior to the Rule 11 colloquy" because we believe the bracketed language "in plea discussions" would move up the process during a criminal case, time wise, for the government to disclose information relevant to the application of the Sentencing Guidelines.

We note that this proposed amendment was defeated by a 4-3 vote in August, 1991. We urge the Commission to reconsider this proposed amendment. We note that the proposed amendment merely "encourages the government" - as such it would create no enforceable right on behalf of a defendant but would merely bring more fairness into the Sentencing Guideline system. We are simply at a lost as to why the Commission would not unanimously support proposed Amendment 35(A) -- this proposed Amendment clearly would lead to candor between the parties in plea negotiations and help eliminate mistakes on the part of defense counsel in making guideline computations.

U. S. v. Richardson - 5th Cir. - 8 counting
Role (counting law enf. people)

#45

THE NORTH CAROLINA ACADEMY OF TRIAL LAWYERS

POST OFFICE BOX 767 • RALEIGH, N. C. 27602-0767 • 919-832-1413 • FAX 919-832-6361 • 800-688-1413

EXECUTIVE DIRECTOR
Marjorie Putnam

March 20, 1992

William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave, NW
Suite 1400
Washington, DC 20004

Dear Chairman Wilkins:

The North Carolina Academy of Trial Lawyers, an Association representing more than 3600 trial lawyers in North Carolina, through its Criminal Law Section, has carefully studied the proposed amendments to the guidelines, policy statements, and commentaries to the Federal Sentencing Guidelines published in the January 2, 1992, Federal Register for the 1992 amendment cycle. The Section has also established a dialogue with your Practitioners Advisory Group and has studied the Group's responses to the amendments for this cycle.

The North Carolina Academy of Trial Lawyers fully endorses the positions taken on each of the proposed amendments by the Practitioners Advisory Group. The Academy urges that the Commission adopt changes proposed in Amendments 1A, 2B, 16A, 16B, 17B, 18B, 33A, 33B, 33D, 34 and 35A. We also urge the adoption of Amendments 18A, 19 and 23, and support the options and modifications proposed by the Practitioners Advisory Group.

The Academy strongly urges that the Commission reject the changes proposed in Amendments 2A, 17A, 28B, and those pertaining to expungements in 25A.

The North Carolina Academy of Trial Lawyers thanks the Sentencing Commission for this opportunity to express its view on the proposed amendments and remains available for future consultation on these and any other matters.

Sincerely yours,

William F. Horsley
President, North Carolina
Academy of Trial Lawyers

Joseph B. Cheshire V
Chair - Criminal Law Section, North Carolina
Academy of Trial Lawyers

UNITED STATES DISTRICT COURT
OFFICE OF THE PROBATION OFFICER
WESTERN DISTRICT OF VIRGINIA

G. WRAY WARE
CHIEF PROBATION OFFICER

RICHARD H. POFF FEDERAL BUILDING
P. O. BOX 1563
ROANOKE 24007

REPLY TO DIVISION OFFICE:

VIA FAX AND U.S. MAIL

November 26, 1991

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

ATTENTION: Public Information Office

RE: Comment on § 2D1.1, Application Note 10

Dear Sirs:

Following a review of the November 1, 1991 amendments promulgated by the United States Sentencing Commission, I noticed an inconsistency in § 2D1.1, specifically Application Note 10. The recent amendment requires conversion of drugs to marihuana equivalents as a means for combining differing controlled substances to obtain a single offense level. However, conversion of small quantities of certain common drugs to marihuana equivalents often does not reach the floor of Level 12 [§ 2D1.1(c)(16)], established for minimal amounts of substances including heroin, cocaine, cocaine base, PCP, methamphetamine, LSD, or fentanyl.

For example, an offender is convicted of selling one gram of cocaine and three ounces of marijuana. Application Note 6 states that where there are multiple drug types, the quantities of drugs are to be added using the tables for conversions. Accordingly, Application Note 10 refers to The Drug Equivalency Tables for combining different controlled substances and directs that the marihuana equivalents of the drugs be added to obtain the combined offense level for the total listed in the Drug Quantity Table. In this case, the cocaine converts to 200 grams of marihuana, and the three ounce marihuana weight is .085 kilogram for a total drug weight of .285 kilogram. The Drug Quantity Table lists at least 250 grams but less than one kilogram of marihuana as a Level 8 offense [§ 2D1.1(c)(18)] instead of the floor of Level 12 for the cocaine. Prior conversions to heroin equivalents when combining drugs allowed for the floor level for minimal amounts of certain substances, but the new amendment does not. Pursuant to the new amendment, it would require more than 12 grams of cocaine converted to marihuana to reach the quantity of marihuana listed at Level 12 (2.5 to 5 kilograms).

I suspect the new amendment intended to maintain the floor level of 12 for small quantities of the common substances because when the example was processed through the updated ASSYST program, the offense level was listed as Level 12, but no explanation was provided for this application.

This is the first instance where I have detected contradictory instructions in the commentary sections of the guidelines and believe the issue needs to be addressed to avoid confusion and disparity. I think Application Note 10 should explicitly note the floor of Level 12 for minimal amounts of heroin, cocaine, cocaine base, PCP, methamphetamine, LSD, or fentanyl, although the substances are converted to marihuana equivalents in combining different types of drugs.

Thank you for your consideration of this suggestion. Should you have any questions or find that I have failed to properly interpret the new amendment, please contact me at your convenience.

Sincerely,

William P. Ross III, Supervising
U.S. Probation Officer

WPR/ajw

cc: CUSPO Ware
Divisional offices, WD/VA

#35

CARROLL, GERMAIN, TOBBE & MINIARD

Attorneys at Law

THOMAS E. CARROLL
GORDON T. GERMAIN
L. LEE TOBBE
VERNON MINIARD, JR.

POST OFFICE BOX 727
LOCUST STREET
MONTICELLO, KY 42633

(606) 348-9767
(606) 348-9394
FAX (606) 348-6884

January 13, 1992

Mr. Mike Corlander
United States Sentencing Guidelines Commission
Suite 1400
331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mr. Corlander:

I am a practicing attorney in Monticello, Kentucky. As such, I have had numerous opportunities to appear in State and Federal Courts regarding a variety of matters. It was not until recently that I have had occasions to deal with the sentencing guideline as it pertains to the growing and cultivation of marijuana. Before I voice my opinion, let me give you a little of my background.

I am 44 years of age, married and have a 13 year old daughter. My wife is a school teacher as were my parents and as were her parents. I have served as the Wayne County Attorney and Assistant Commonwealth Attorney for the 40th Judicial District. I have prosecuted many felony and misdemeanor cases involving drugs, alcohol and firearms. I am not a user of illegal drugs nor an abuser of alcohol. For the past several years, my law practice has been primarily plaintiffs civil litigation with 10 to 20 per cent of my practice being criminal defense work.

I recently defended a case in the United States District Court for the Eastern District of Kentucky at London, Kentucky, styled United States of America versus Robert Kenneth Gregory, Jr. and Ralph Beckman. Mr. Gregory and Mr. Beckman were convicted of cultivation of approximately 120 plants of marijuana. Of these marijuana plants, a lesser number were actually plants of marketable size. The officers described it as approximately 40 good plants during the course of their investigation. Mr. Beckman and Mr. Gregory received sentences of approximately eight years without any probation or parole. These sentences were imposed at the bottom end of the guidelines.

Mr. Beckman was a member of the Somerset Country Club, a father of five children, a husband to a very fine young lady, and was active in his community. He was an employed college graduate and had no previous criminal record of any sort.

Mr. Gregory was employed as a mining engineer, married to a school teacher and the father of a four year old daughter. From the conversations which I had with the prosecutors and judges, the remarks made during the trial and sentencing hearings, I concluded that everyone connected to this prosecution felt that the sentences imposed were probably too harsh for the crime and the quality of individuals involved. Yet, both the judge and prosecutors had a job to do under the laws of the United States and all did their jobs in a commendable fashion. However, a system of justice that provides no discretion to the sentencing judge or the prosecuting attorney is a system that can easily result in inequities for the first time offender.

This is the first criminal case I have defended which I had difficulty sleeping at night both during the trial and after the return of the verdict. The thought that these two very fine young men, who incidently still maintain their innocence, serving nearly eight years in the penitentiary for an offense in which state courts would have resulted in most jurisdiction a very small amount of time, if any, spent incarcerated bothers me.

I am writing this letter to urge that the Sentencing Commission and/or Congress review the sentencing guidelines and statutes. First time offenders on marijuana charges should be eligible for some type of probation or parole or the sentencing guidelines should be so broad that a judge have considerable discretion in a sentence to be imposed.

Our trial lasted approximately five days. During that time, both defendants conducted themselves as gentlemen. They conducted themselves as gentlemen during the arrest, trial and sentencing. Justice has not been served in this particular case by a lengthy sentence. Justice could have been served had our Federal Judge and prosecutors had more discretion in this matter.

Thank you for your assistance in this matter.

Sincerely yours,

Thomas E Carroll

Thomas E. Carroll

TEC/dss

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
PROBATION OFFICE

#34

THOMAS J. WEADOCK, JR.
CHIEF PROBATION OFFICER

945 POST OFFICE & COURTHOUSE
BOSTON 02109-4561

February 24, 1992

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

Dear Sir:

Enclosed please find comments which have been made concerning the proposed amendments to the Guidelines. The packet which was forwarded did not contain pages 12 through 20 and 22 through 33. Additionally, it appears that there should have been additional information after page 40.

Very truly yours,

Gregory J. Wollaston
U.S. Probation Officer

By the defendant

criminal activity, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit or implicit (tacit) agreement, including any agreement fairly imputed to the defendant by his conduct and that of other participants in the criminal activity. For example, where a defendant benefited directly, or expected to benefit directly, from the conduct of others that occurred prior, contemporaneously or subsequently to the defendant's joining the criminal activity, such conduct ordinarily may be imputed to be within the scope of the criminal activity the defendant agreed to jointly undertake.

The concept of reasonable foreseeability has no bearing on conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes. The concept of reasonable foreseeability is considered only in relation to the conduct of other participants that is in furtherance of the jointly-undertaken criminal activity.".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 1 in the fifth (formerly second) paragraph by deleting "'would be otherwise accountable'" and inserting in lieu thereof "is accountable";

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 1 in example (a) by deleting "boat" wherever it appears and inserting in lieu thereof in each instance "ship"; by deleting "any claim on his part" and inserting in lieu thereof "his claim"; and by inserting the following additional paragraph:

"Because the defendant aided and abetted the unloading of the marihuana shipment, no determination of the reasonable foreseeability of the acts of others in unloading the shipment is required. If it were found that the defendant's actions, in this example, did not constitute aiding or abetting the importation of the entire shipment, the defendant appropriately would still be accountable for the entire one-ton quantity because the facts of the case (nine other off-loaders, marihuana in bales) clearly establish that a one-ton quantity of marihuana was reasonably foreseeable.".

to him,

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 1 in example (e) in the last sentence by deleting "if" and inserting in lieu thereof "because"; by inserting "(i.e., the importation of the single shipment of marihuana) that" immediately following "criminal activity"; and by deleting "(i.e., the importation of the single shipment of marihuana)".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 1 by inserting, immediately after example (e), the following additional paragraphs:

"Where the defendant enters an ongoing conspiracy, as in this example, the scope of the specific criminal activity that the defendant agreed to undertake, and thus the defendant's accountability for prior acts of other conspirators, must be determined. One factor that appropriately may be considered in determining the scope of the criminal activity undertaken by the defendant, particularly in a conspiracy that involves repeated conduct (e.g., a series of drug sales over time), is the benefit or expected benefit to the defendant. Where the defendant benefits directly, or expects to benefit directly, from the prior conduct, such conduct ordinarily will be within the scope of the defendant's criminal activity. Where there is no direct benefit, such conduct ordinarily will not be within the scope of the defendant's criminal activity.

f. Defendant J knows about her boyfriend's ongoing drug trafficking activity, but agrees to participate in this activity on only one occasion. Defendant J is held accountable only for the drug quantity involved on that one occasion.

g. Defendant K is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as the defendant sells. The defendant is not accountable for the quantities of drugs sold by the other street-level drug dealers, even if all share a common source of supply, because he is not engaged in a jointly-undertaken criminal activity with them. In contrast, Defendant L, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant L's behavior meets the criteria for a jointly-undertaken criminal activity. Therefore, Defendant L is accountable for the quantities of drugs sold by the four other dealers during the course of his agreement with them.".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 2 by deleting the first sentence.

Reason for Amendment: This amendment clarifies the operation of this guideline. Material is moved from the commentary to the guideline itself and rephrased for greater clarity, the discussion of the scope of this provision in the commentary is expanded, and additional examples are inserted. • The

Illustration of Section 1B1.3 as amended by Proposed Amendment 1

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

conduct under this provision. The conduct of others that was not in furtherance of the jointly-undertaken criminal activity, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit or implicit (tacit) agreement, including any agreement fairly imputed to the defendant by his conduct and that of other participants in the criminal activity. For example, where a defendant benefited directly, or expected to benefit directly, from the conduct of others that occurred prior, contemporaneous, or subsequent to the defendant's joining the criminal activity, such conduct ordinarily may be imputed to be within the scope of the criminal activity the defendant agreed to jointly undertake.

The concept of reasonable foreseeability has no bearing on conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes. The concept of reasonable foreseeability is considered only in relation to the conduct of other participants that is in furtherance of the jointly-undertaken criminal activity.

In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant ["would be otherwise accountable"] is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

Illustrations of Conduct for Which the Defendant is Accountable

* * *

a. Defendant A, one of ten off-loaders hired by Defendant B, was convicted of importation of marihuana, as a result of his assistance in off-loading a [boat] ship containing a one-ton shipment of marihuana. Regardless of the number of bales of marihuana that he actually unloaded, and notwithstanding [any claim on his part] his claim that he was neither aware of, nor could reasonably foresee, that the [boat] ship contained this quantity of marihuana, Defendant A is held accountable for the entire one-ton quantity of marihuana on the [boat] ship because he aided and abetted the unloading, and hence the importation, of the entire shipment.

occasion.

g. Defendant K is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as the defendant sells. The defendant is not accountable for the quantities of drugs sold by the other street-level drug dealers, even if all share a common source of supply, because he is not engaged in a jointly-undertaken criminal activity with them. In contrast, Defendant L, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant L's behavior meets the criteria for a jointly-undertaken criminal activity. Therefore, Defendant L is accountable for the quantities of drugs sold by the four other dealers during the course of his agreement with them.

2. ["Such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction," as used in subsection (a)(2), refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that were part of the same course of conduct or common scheme or plan as the offense of conviction.]

* * *

(B). Proposed Amendment: The Commentary to §1B1.3 captioned "Application Notes" is amended by inserting the following additional notes:

"8. 'Common scheme or plan' and 'same course of conduct' are two closely-related concepts.

Shaded to highlighted

(A) Common scheme or plan. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other, and linked by common evidence. Factors that appropriately are considered in this determination include common victims, common accomplices, common purpose, and similar modus operandi. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; i.e., the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), and similarity of modus operandi (the same or similar computer manipulations were used to execute the scheme). Offenses may meet the criteria of a common scheme or plan whether or not they fall within the time frame that

Commas not needed

would also qualify them as part of the same course of conduct.

(B) **Same** course of conduct. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors appropriate to consider in this determination are the time interval between the offenses and the similarity of the offenses. As §1B1.3(a)(2) applies only to offenses of a character that would be grouped under §3D1.2(d), such offenses will be similar in character (e.g., a series of thefts, a series of thefts and forgeries, or a series of drug sales). As a general -- but not absolute -- standard, offenses that are similar in character and are committed at intervals of 120 days or less appropriately are considered as part of the same course of conduct. Note that in the case of a series of such offenses committed at intervals of 120 days or less (e.g., a series of four thefts each 90 days apart) all the offenses ordinarily would be considered part of the same course of conduct even though the total time from the first to last offense may have exceeded 120 days.

Due to the nature of tax offenses, a different time interval between offenses is ordinarily appropriate for this determination. For example, a failure to file income tax returns for consecutive years, or the filing of fraudulent income tax returns in consecutive years, ordinarily would constitute the same course of conduct because such returns are required only at yearly intervals. The determination of the same course of conduct or common scheme or plan in tax cases is addressed in Application Note 3 of the Commentary to §2T1.1 (Tax Evasion).

Although the term 'same course of conduct' may also be used in connection with dissimilar offenses committed within a short span of time (e.g., a 'spree' in which a defendant assaults a neighbor, steals a car, and unlawfully possesses a controlled substance within a period of several hours appropriately might be considered the same course of conduct), this facet of the term has no applicability to cases under §1B1.3(a)(2) because §1B1.3(a)(2) only applies to offenses of a similar character.".

Reason for Amendment: This amendment provides guidance as to the scope of the terms "same course of conduct" and "common scheme or plan."

§1B1.8. Use of Certain Information

(I)	More than $10,000,000	add 16
(J)	More than $30,000,000	add 18
(K)	More than $80,000,000	add 20.

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft
§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery
§2F1.1. Fraud and Deceit

6. Proposed Amendment: Section 2B1.1(b) is amended by renumbering subdivision (7) as (8), and by inserting the following as subdivision (7):

"(7) If the offense affected a financial institution, increase by 4 levels.".

Section 2B4.1(b) is amended by renumbering subdivision (2) as (3), and by inserting the following as subdivision (2):

"(2) If the offense affected a financial institution, increase by 4 levels.".

Section 2F1.1 is amended by renumbering subdivision (5) as (6), and by inserting the following as subdivision (5):

"(5) If the offense affected a financial institution, increase by 4 levels.".

Reason for Amendment: This amendment would increase the sentences for financial institution fraud, theft, and bribery over the entire range of offense levels, including those at the lower and middle levels, in addition other enhancements already in these guidelines. Under this amendment, embezzlement of $5,000 from a financial institution, for example, would have an offense level four levels higher than embezzlement of the same amount from an individual or from another type of institution. The purpose of this amendment would be to reflect the increases by Congress during the past several years in the maximum terms of imprisonment from 20 to 30 years for violations of title 18 bank fraud and embezzlement offenses.

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

7. Issue for Comment: The Commission requests comment regarding the removal or modification of the current limitations on offense levels for the distribution of Schedule III, IV, and V controlled substances, anabolic steroids, and Schedule I and II depressants, so that violations involving large quantities of

of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.".

Reason for Amendment: This amendment clarifies a situation in which a defendant is not ordinarily eligible for a reduction under §3B1.2 (Mitigating Role), and moves existing language from the Introductory Commentary of Chapter Three, Part B, to the Commentary in §3B1.2.

(B). Proposed Amendment: The Commentary to §3B1.1 is amended by inserting the following additional note:

"4. When a defendant, who otherwise would merit a mitigating role reduction under §3B1.2 (Mitigating Role), exercised limited supervision over a limited number of participants with equal or lesser roles, do not apply an adjustment from this section. For example, an increase in offense level under this section would not be appropriate for a defendant whose only function was to offload a single large shipment of marijuana, and who supervised other offloaders of that shipment. Instead, consider such circumstances in determining the appropriate reduction under §3B1.2 (Mitigating Role). See also Application Note 4 of the Commentary to §3B1.2 (Mitigating Role).".

The Commentary to §3B1.2 is amended by inserting the following additional note:

"4. When a defendant, who otherwise would merit a mitigating role reduction under §3B1.2 (Mitigating Role), supervises a number of participants with equal or lesser roles, a lesser reduction than otherwise appropriate ordinarily is warranted. For example, in the case of a defendant who would have qualified for a minimal role adjustment but for his supervision of other participants, an adjustment for minor role, rather than minimal role, would be appropriate.".

Reason for Amendment: This amendment clarifies that a defendant who otherwise merits a mitigating role, and who supervises a limited number of participants of equal or lesser roles, is not subject to an aggravating role enhancement. Instead, such circumstances may be considered in determining whether a mitigating role reduction is appropriate under §3B1.2.

17(A). Proposed Amendment: The Introductory Commentary to Chapter Three, Part B is amended by deleting the first sentence of the second paragraph and inserting in lieu thereof:

"In the case of a criminal activity involving more than one participant, §3B1.1 or §3B1.2 may apply. When a criminal activity involves only one participant, or only participants of roughly equivalent culpability, neither §3B1.1 nor §3B1.2 will apply.".

Section 3B1.1 is amended by deleting "follows:" and inserting in lieu thereof "follows (Apply the greatest):".

Section 3B1.1(a) is amended by deleting "five or more participants, or was otherwise extensive" and by inserting in lieu thereof "at least four other participants".

Section 3B1.1(b) is amended by deleting "(but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive" and inserting in lieu thereof "of at least four other participants in a criminal activity".

A Section 3B1.1(c) is amended by deleting "other than described in (a) or (b)" and inserting in lieu thereof "that involved at least one other participant".

The Commentary to §3B1.1 captioned "Application Notes" is amended in Note 1 by deleting the second sentence and inserting in lieu thereof the following additional paragraphs:

"In addition, for the purposes of this guideline, a participant ordinarily includes any person who plays the role of a participant, even if such person is not actually criminally responsible for the offense (e.g., if two persons were recruited to assist in transporting marihuana, they would be deemed participants even if they were undercover law enforcement agents and, thus, not criminally responsible for the offense). However, if an undercover agent were recruited to assist in transporting marihuana and that agent recruited three other undercover agents, only the first undercover agent would be counted as a participant.

terminology leaves a great deal to interpretation as to what constitutes a "significant" role.

Furthermore, for purposes of this guideline, a participant includes any person recruited to play a [[significant]] role in the offense, even though their lack of awareness that an offense was being committed is a bar to their criminal liability (e.g., a person recruited to drive the getaway car from a robbery who is unaware that a robbery is to be committed; or a person expressly hired to collect money for charitable purposes, who is unaware that a fraud is being perpetrated). Persons such as postal employees, messengers, or taxi drivers who are performing their normal duties, and are not otherwise criminally responsible for their conduct, are not included under this paragraph.".

what is meant by this

The Commentary to §3B1.1 captioned "Application Notes" is amended

A Objections to application of 3B1.1A or 3B1.(B) will be made since the amendment to 3B1.c has no upper limit. The wording not more than 30 other participants could clarify the situation.

by deleting Note 2.

Section 3B1.4 is deleted in its entirety.

Reason for Amendment: This amendment clarifies the definition of participant to include the defendant and other persons who are criminally responsible. "Participant" also includes, in most cases, law enforcement officers, and those who are not criminally responsible for their conduct in the offense but who play a role in furthering the offense, even if unwitting. The amendment also deletes §3B1.4, which is untitled, and is inconsistent with the remainder of the guideline format. The substance of the Commentary to §3B1.4 is more appropriately placed in the Introductory Commentary to this Part.

Illustration of Chapter Three, Part B, as amended by Proposed Amendment 17(A)

PART B - ROLE IN THE OFFENSE

Introductory Commentary

* * *

[When an offense is committed by more than one participant, §3B1.1 or §3B1.2 (or neither) may apply.] In the case of a criminal activity involving more than one participant, §3B1.1 or §3B1.2 may apply. When a criminal activity involves only one participant, or only participants of roughly equivalent culpability, neither §3B1.1 or §3B1.2 will apply. Section 3B1.3 may apply to offenses committed by any number of participants.

§3B1.1.Aggravating Role

Based on the defendant's role in the offense, increase the offense level as [follows:] follows (Apply the greatest):

(a) If the defendant was an organizer or leader of a criminal activity that involved [five or more participants or was otherwise extensive] at least four other participants, increase by 4 levels.

(b) If the defendant was a manager or supervisor [(but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive] of at least four other participants in a criminal activity, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal [other than described in (a) or (b)] that involved at least one other participant, increase by 2 levels.

participants in a criminal organization may receive increases under §3B1.1 (Aggravating Role) while others receive decreases under §3B1.2 (Mitigating Role) and still other participants receive no adjustment.]

(B). Proposed Amendment to §3B1.1 (Aggravating Role): The Commentary to §3B1.1, captioned "Application Notes," is amended in Note 1 by inserting the following additional sentence as the first sentence:

"This adjustment applies only when the offense is committed by more than one participant.".

Reason for Amendment: This amendment clarifies that this adjustment is restricted to cases in which the defendant participates in the commission of the offense with at least one other person who is also criminally responsible for the commission of the offense.

18(A). Proposed Amendment: Section 3B1.2 is amended by deleting "In cases falling between (a) and (b), decrease by 3 levels.".

The Commentary to §3B1.2 is deleted in its entirety and the following notes are inserted in lieu thereof:

"1. This section applies only in the case of criminal activity involving more than one participant. "Participant" is defined in Note 1 of the Commentary to §3B1.1.

[[2. No mitigating role adjustment under this section shall be applied to a defendant who, in connection with the offense, threatened the use of force, possessed a dangerous weapon, or caused another person to threaten the use of force or possess a dangerous weapon.]]

Should be included

3. Subsection (a) (Minimal Role) applies to a defendant who is [[plainly among the least culpable of the participants in the criminal activity]] [[plainly among the least culpable when compared to all other participants who typically participate in the particular type of criminal activity]]. [[It is intended that the downward adjustment for a minimal participant be restricted to a narrow group of defendants whose function in the criminal activity and whose culpability for the offense, relative to that of other participants, indicates that such defendants are plainly among the least culpable.]]

This is suggested since it appears to be more directed to the events of the instant offense.

To receive a reduction under subsection (a) (Minimal Role), the defendant [[ordinarily]] shall have:
(a) only performed unskilled or unsophisticated tasks;
(b) no proprietary interest in the criminal activity, and

received no benefit from the criminal activity, other than a [[fixed-fee]] payment that is a small amount both absolutely and in comparison to the expected profit of those who have employed the defendant.

(c) no [[significant]] decision-making authority in the criminal activity;

[[(d) participated in the criminal activity [[on no more than one occasion]] [[for no more than a short period of time]] ; and

[[(e) no more than limited knowledge of the scope and structure of the criminal activity and of the criminal conduct of the more culpable participants.]]

[[Frequently, such defendants will have little or no knowledge of the scope and structure of the criminal activity or of the activities of the more culpable participants.]]

4. In a controlled substance trafficking offense (any offense for which the offense level is determined under §2D1.1) --

(a) "no proprietary interest" excludes (1) any defendant who owned any portion of the controlled substance; and (2) any defendant who financed any aspect of the importation, manufacture, cultivation, transportation, or distribution of the controlled substance;

(b) "no [[significant]] decision-making authority" excludes (1) any defendant who sold, negotiated the sale of, or determined the terms of a sale of the controlled substance, (2) any defendant who exercised [[significant]] decision-making authority with respect to the importation, manufacture, cultivation, transportation, or distribution of the controlled substance, and (3) any defendant who exercised control of the controlled substance for a significant period of time, such that the defendant [[had the ability to control]] [[was essential to]] the success of the criminal activity. In contrast, "no [[significant]] decision-making authority in the criminal activity" includes any defendant who did not exercise control over the controlled substance for any significant period of time, such that the defendant [[had the ability to control]] [[was essential to]] the success of the criminal activity. For example, a defendant who merely offloaded one ship, or permitted use of a residence in furtherance of the criminal activity did not exercise control over the controlled substance for any significant period of time.

5. Subsection (b) (Minor Role) applies to a defendant who is [[significantly less culpable than a defendant who carried out the same criminal activity without assistance]] [[substantially less culpable when compared to all other

#27

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
PROBATION OFFICE

ROBERT M. LATTA
CHIEF PROBATION OFFICER

600 U.S. COURTHOUSE
312 N. SPRING STREET
LOS ANGELES 90012-4708

March 2, 1992

Memorandum to: United States Sentencing Commission
1331 Pennsylvania Avenue N.W., Suite 1400
Washington, D.C. 20005

Subject: 1992 Proposed Amendments

The following pages are comments regarding the 1992 proposed amendments. The clarifying amendments are helpful, when they satisfy their own definition; however, the number of amendments alone can result in overload to those who must apply the guidelines. The last set of guidelines are not yet thoroughly absorbed by staff, and it is abundantly clear that criminal history score calculations are not being uniformly applied from district to district. Working toward a better product is understandable, but there must be an effort to minimize these amendments. The ex post facto problems are becoming a "nightmare" in some situations, and varying approaches of dealing with the issue do not aid the reduction of disparity in sentencing.

Nancy Reims

Nancy Reims, Deputy Chief
United States Probation Officer

Expanded Availability of Non-Prison Sentencing Options
Amendment 29

Options 1, 2, 3, and 5 are recommended. Options 4 and 6 are not recommended in order to avoid the expansion of straight probation for those with both higher offense levels and criminal history categories.

These increased options do not compromise the structure of the guidelines as originally drafted. They merely provide for more sentencing options within a given range, recognizing that particularly in the lower ranges there are many differences between offenders, in the context of the crime committed, which can best be addressed by separate options rather than more or less time in custody.

The offense-by offense approach risks too many sentencing distinctions that are essentially based upon offender characteristics (e.g., white collar offenders).

Alternatives to traditional incarceration should involve some restriction of liberty (e.g., home detention). To equate imprisonment with community service or even intensive supervision is a purely theoretical comparison; for an alternative to serve the purposes of sentencing as delineated at 18 USC 3553, it needs to be perceived by the offender as reasonably comparable to imprisonment.

Departures Based On Offender Characteristics

Part(B) - Age combined with other factors can be a very mitigating factor that is recognized by all parties in the sentencing process, particularly a young age combined with an extreme lack of sophistication. In many cases where these offender characteristics are combined the overall behavior is more similar to the acts of a juvenile delinquent.

Part(C) - Allowing for departures on the basis of factors such as "lack of youthful guidance" or "history of family violence", opens a pandora's box for the vast majority of offenders with significant criminal records. Poor parenting as well as emotional and physical abuse are common experiences among those who engage in ongoing criminal conduct. Cases with this kind of history are the "heartland" of bank robbers and violent offenders not the exception; should they benefit from a downward departure when the first time offender with a reasonably normal upbringing does not?

Part(D) - If advanced age in conjunction with the listed criteria was a basis for departure, in effect, the older white collar offender would be the beneficiary, and their sentences are not that high as it is. Advanced age alone should not be a basis for

departure.

Departures Based on Inadequacy of the Criminal History Score
Amendment 26

Option 2 is more practical and avoids the necessity of explaining the structure of the sentencing table to arrive at a Category VII.

Part(B) - Judicial Conference recommendation 6 would be a helpful clarification.

Part(C) - There are some cases that technically and linguistically satisfy the definition of career offender, but truly differ dramatically from the heartland of career offenders. To preclude any means of legitimately departing would only lead to manipulation of the guidelines.

Acceptance of Responsibility

Option 3 would serve to reward guilty pleas and make a distinction between those who admit to the bare bones of a crime and those who completely acknowledge and demonstrate full responsibility for all of their criminal conduct.

Relevant Conduct

All of the proposed amendments to clarify this guideline would be helpful.

Role in the Offense

Amendment 16, Parts (A) and (B) - Clarification helpful.

Amendment 17, Part (A) - Changes regarding number of participants for higher aggravating role and including undercover officer as a participant are not recommended. There are too many substantive amendments as it is; it is time to limit them, including only those that are most crucial.

Amendment 17, Part (B) - Clarification helpful.

Amendment 18, Part (A) - Keep the interpolation to allow room for resolution.

The concern as to whether the adjustments for mitigating role are sufficient, primarily, and almost exclusively, occurs in drug cases. Some functions in drug activity are more minimal than others (e.g., lookout, driver, tag-along), but it is too nebulous and subjective to determine the adjustment on the basis of comparing a defendant to others who typically participate in similar criminal conduct. The criteria given in the commentary relating to minimal

role is good, but could be expanded with more examples. The adjustment should apply when the criteria (defining function) is satisfied, but only when the defendant has been held responsible for the appropriate amount of drugs (reasonably foreseeable, etc.). If an adjustment is given only because the individual was held responsible for more drugs than he actually trafficked, without regard to function, then the source of drugs who may well be removed from the majority of overt acts of dealing could conceivably get a reduction for role.

The caps proposed in option 1 seem the most comprehensive, and it is reasonable to gear them according to type of substance because this is a factor for which even a minimal participant should be held accountable.

Redefinition of Career Offender 4B1.1
Amendment 27

Part (A) - The guideline ranges for career offender are sufficiently punitive even without using the enhanced statutory maximum.

Part (B) - This amendment seems fair and reasonable.

Part (C) - Makes sense.

Part (D) - Such identification would be helpful and reduce disparity; the definition of crime of violence leaves much room for dispute, especially when the determination has to be made as to what constitutes "...otherwise involves conduct that presents a serious potential risk of physical injury to another" - what about Grand Theft Person or Possession of Unregistered Firearm (26 USC 5861)?

Part (E) - The entire criminal history calculation is becoming far too complicated - to the extent that uniformity of application is highly jeopardized. The process might be simplified if consolidation for trial or sentencing did not translate into "related case", only "same occasion" and "common scheme or plan". Counts within the same indictment could be treated separately if there was an intervening arrest between counts. Separate indictments would be treated as separate convictions unless there was no intervening arrest and they were a string of the same type of criminal conduct, hence joinable under Rule 8(a).

Part (F) - If guidelines require sentencing on the predicate priors for career offender classification, there could be three separate criminal acts with convictions, but one prior sentencing might purposely be delayed to avoid career offender status. In the example given of rape and robbery in the same criminal activity, wouldn't they be treated as only one prior conviction anyway if they occurred on the same occasion?

Plea Bargaining Policies; Use of Acquittals

Part (B) - This amendment is necessary to resolve the inter-circuit conflict.

Part (C) - The conflict needs to be resolved. Regardless of the difference in standards of proof, there would be a stronger sense of fairness if the acquitted conduct was not considered, thereby increasing compliance.

Amendment 36, Part (W) - More specific and thus clearer.

Amendment 36, Part (X) - Essential amendment - otherwise there will be virtually no uniformity in guideline application between circuits when there are decisions such as U.S. v Fine in the Ninth Circuit.

Amendment 20 - Option 2 seems the better course. It would conform with the changes in 2D1.6, and allow for the consideration of the truly peripheral participant who is subject to the guideline.

Amendments 4, Part (A), 9, 36, Part (G), and Part (P) - Recommended.

#41

United States District Court
Eastern District of Michigan
Detroit 48226

Julian Abele Cook, Jr.
Chief Judge

March 3, 1992

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1440
Washington, D.C. 20004

Dear Commission Members:

I write to you in response to your request for the views of the judges within the Eastern District of Michigan regarding proposed amendments to the sentencing guidelines. Many of our opinions are substantively the same as those that we expressed to you last year.

In order to glean a consensus of thought among my colleagues, a deliberative process was adopted and followed. Initially, I asked our Probation Department to examine the proposals and submit their reactions to our Probation and Pretrial Services Committee for its consideration. Following a lengthy and thorough discussion of the issues, our Probation and Pretrial Committee incorporated some of, and made several modifications to, the comments that had been originally submitted to it by the Probation Department staff. Copies of these comments have been enclosed for your examination and evaluation.

The Committee also made the following recommendations which, if adopted, will be forwarded to your Commission for its consideration:

1. The time limitations of the comment period do not allow a sufficient length of time for serious discussion and comment by the affected parties.

2. The judges of the Eastern District of Michigan support those amendments proposed by the Judicial Conference of the United States.

3. The judges also support Amendment 34 which allows consideration for departure in cases of defendant cooperation.

4. The Sentencing Commission should give greater consideration to those amendments which increase the discretion of the sentencing judge as that discretion has been shifted to the prosecutor in many cases under guideline sentencing.

5. The Sentencing commission should consider a moratorium on submitting new amendments as the process of sentencing becomes more complicated and confusing each time new amendments take effect.

Finally, permit me to offer a constructive suggestion for your consideration. It is our general belief that the format which has been used by your Commission to elicit comments from the bench and bar to the proposed amendments to the sentencing guidelines makes them somewhat difficult to comprehend. Thus, we urge you to consider the development of a different and "reader friendly" format whereby (1) the old material could be easily distinguished from the new material, and (2) the reasons and justifications for the proposed changes to the sentencing guidelines could be outlined in a better manner.

Thank you.

Very truly yours,

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

JAC:pf

THE FEDERAL JUDICIAL CENTER
DOLLEY MADISON HOUSE
1520 H STREET, N.W.
WASHINGTON, D.C. 20005

#25

Writer's Direct Dial Number:
FTS/202 786-6281

March 2, 1992

Mr. Michael Courlander
Public Information Specialist
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Courlander:

Enclosed please find comments on the proposed sentencing guideline amendments sent to Judge Vincent Broderick, care of the Research Division of the Federal Judicial Center.

Sincerely,

Pamela B. Lawrence

Pamela Lawrence

Attachment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PROBATION OFFICE

JAMES D. PROVENCE
CHIEF PROBATION OFFICER
P.O. BOX 201
237 U.S. COURT HOUSE
LEXINGTON, KY 40584-0201
(606) 292-3171
FTS: 355-2646

MICHAEL R. JOHNSON
SUPERVISING USPO
DONALD E. FIELDS
STEVEN M. GYALAI
CARL C. HAYS, II
JAY HEITZ
PROBATION OFFICERS

REPLY TO:

P.O. BOX 746
300 FEDERAL BUILDING
7TH AND SCOTT STREETS
COVINGTON, KY 41012
(606) 292-3171
FTS: 778-3171

February 27, 1992

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

RE: 1992 GUIDELINE AMENDMENTS:
COMMENTS ON A.O. MEMO
DATED 1/29/92

To Whom It May Concern:

These comments are being offered for consideration in regards to the 1992 proposed guideline amendments.

1) AMENDMENTS RESPONSIVE TO JUDICIAL CONFERENCE RECOMMENDATIONS

Expanded Availability of Nonprison Sentencing Options:

It is my opinion the options proposed regarding expanding the availability of nonprison sentencing options does not compromise the guidelines as originally drafted. Instead, it appears to be a consideration or concession to those individuals who feel the guidelines are too punitive and restrictive, and do not provide for sufficient discretion.

If the commission does decide to adopt these expanded alternatives, they certainly should adopt an "offense by offense" approach and remove from consideration people such as white collar offenders.

In my opinion, there is no need to include additional alternative programs at the low end of the guideline.

Departures Based on Offender Characteristics

The Commission should be cautious in wording departures that may be appropriate when offender characteristics are present to an unusual degree, either alone or in combination. The use of discretion and judgement lead to disparity among offenders in opposition to the purpose of guidelines. Offender characteristics are currently considered under terminology stating that they are "not ordinarily relevant," and there is no reason why one cannot argue in a specific instance why a departure may be relevant to the sentencing process.

One should be careful in considering age; particularly as it relates to young offenders, because they are the most criminally active group in society.

Status of being elderly should not receive leniency simply because it is fair to attribute to these individuals sufficient decision making skills to hold them accountable for their errors in judgement, or their free choices.

An infirm defendant should not be able to use that to obtain leniency.

A defendant's lack of youthful guidance, history of family violence, or similar factors as grounds for departure would place the offender's parents, sociocultural and socioeconomic background on trial in the sentencing process as opposed to the offender.

Downward departure for advanced age should not be considered because those individuals should possess considerable background and experience that would lead them to make good judgements.

Departures Based on Inadequacy of Criminal History Score

Option #1 is preferable to Option #2, as it seems to provide a more structured process. Part B does not appear to be necessary. In Part C, there should be a prohibition against the use of adequacy of criminal history as sufficient reason to depart below the career offender and the armed criminal provisions.

Acceptance of Responsibility

As to Option #1, I have no difficulty with limiting the scope of what is required to receive acceptance of responsibility,

as long as this does not impact the use of relevant conduct in calculating the offense level. This is a practical approach. An individual could be expected to object to his offense level being raised by the use of relevant conduct. However, I have no problem with one acknowledging his responsibility for the offense of conviction, and receiving a downward adjustment while objecting to the relevant conduct which might raise his offense level. This option is expedient and should receive consideration.

Option #2 should not receive consideration. There is an old saying, "If you're going to make a mistake, make it a good one," or "If you're going to make a mistake, make it a big one." Why should one receive more leniency just because he participates in a more serious offense. The guidelines should treat serious offenses seriously.

Option #3 does not appear to be one which would produce sufficient incentive for the defendant to plead guilty. In addition to this, there is no clear indication as to whether one would be entitled to a one level reduction for acceptance of responsibility if there were no relevant conduct issues involved.

Option #4 appears to be better than Option #3 because there is some continued emphasis on offenders not receiving a reduction when they put the government to its proof at trial. In my opinion, this increases pleas of guilty when they are appropriate. One should not receive a one level reduction after the trial has begun. Additionally, this option does not address the issue of whether one would receive a reduction if there were no contested issues regarding relevant conduct.

NOTE: I would also like to suggest to the commission that they consider a revision of USSG 3E1.1, comment (n.4), which indicates "that conduct resulting in enhancement under USSG 3C1.1, Obstructing or Impeding the Administration of Justice, ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. However, there may be extraordinary cases in which adjustments under both USSG 3C1.1 and USSG 3E1.1 may apply." I do not feel acceptance of responsibility should be tied so closely to obstruction of justice. Obstruction of justice may occur early on in the proceedings, and the defendant may later make an adequate demonstration of acceptance of responsibility. The terminology in the application note which bothers me in the interpretation process is the use of the word "extraordinary." There are not many extraordinary cases. I feel this application note is being ignored. Consistency of application would be increased if this application note were revised.

RELEVANT CONDUCT

All of the information presented in this section is essentially positive except the 120-day time frame relating to the same course of conduct, and being significantly connected. I believe 120 days is too short and restrictive.

NOTE: It would be helpful in applying this guideline if there was some emphasis placed on what a defendant must do to withdraw from a conspiracy or concerted activity, and to be no longer accountable. In the commentary, and in the new proposals, there is considerable emphasis on definitions that lead to assessments in other areas. However, one can enter a conspiracy and later withdraw from the conspiracy, or argue that they have done so. I think it should be made clear as to whether this withdrawal is passive or active, and these terms should be defined.

2) ADDITIONAL AMENDMENTS OF SPECIAL INTEREST

ROLE IN THE OFFENSE, ESPECIALLY OFFENSES INVOLVING DRUGS

Amendment 16, Part A, is a good thought. Part B still appears to be vague, and probably should be stated as a factor under which one would receive no aggravating or mitigating adjustments.

Amendment 17 is essentially good but I do not feel you should exclude the terminology "otherwise extensive."

Amendment 18 calling for the deletion of the interpolation is good, and so is the further definition proposed regarding adjustments for mitigation of role, and eligibility and ineligibility for mitigating role reductions.

The commission further requested comments on several items. In regards to Item #1, if one is to receive a mitigating role, it should be clear on the surface, and he should be less culpable than the other participants in the same case, and not someone who is less culpable than individuals who typically participate in similar conduct.

In reference to Item #2, there should be no specific functions that are either eligible or ineligible for mitigating role because this would cause everyone to claim or seek such eligibility or definition.

Item #3, a mitigating role reduction should be available to those in lower positions of priority decision making functions in a structured offense behavior. There are also obviously individuals who should receive no mitigating or aggravating

role as well. The factors considered should be those factors that are situation specific to the offense that tend to set this defendant apart from other defendants as one who deserves a mitigating role.

Item #4, there should not be any bar to receiving role adjustment because one has not been held accountable for all of his relevant conduct. This is a situation and circumstance that can be taken care of under the relevant conduct guideline, and does not need to affect the assessment of role.

Item #5 is no different than Item #4. One should not receive consideration under one guideline just because another guideline has not been correctly applied or assessed.

In regards to Part B of Amendment 18, I do not feel that commentary such as that mentioned is warranted. It would appear to me that if the proper role adjustment had been made, and the proper offense level determined through the use of relevant conduct, that all the appropriate information has been considered, and because of this, there is no departure justified.

In reference to Amendment 19, I do not think it is necessary to establish caps for a minor or minimal participant, as that is already accounted for in the establishment of the offense level through relevant conduct and the role reduction. It would seem to me that these adequately address the issues which this amendment is attempting to focus on.

NOTE: Reference the Commission's request for comments on questions; in particular, that dealing with mandatory minimum sentencing statutes. It is very possible that some of these amendments may place certain offenders below the mandatory minimum, when in fact they will not receive any benefit from the actual guideline application procedures, if they do not receive a 5K1.1 motion from the government.

REDEFINITION OF CAREER CRIMINAL GUIDELINE 4B1.1

As it relates to Amendment 27, Part A, I recommend that the enhanced statutory maximum sentence be used. As it relates to Part B of the amendment, I recommend the definition of prior felony conviction remain unchanged. As it relates to Part C, I think the date should be the date of sentence. As it relates to Part D, I do not think it is necessary to develop a category of "lessor" crimes. As it relates to Part E, I think the guidelines should remain as they are. As it relates to Part F, I think it should remain unchanged, and I do not think there should be any requirement for a "strictly consecutive sequence."

PLEA BARGAINING POLICIES, USE OF ACQUITTALS

As it relates to Amendment 35, I believe these are good ideas. As it relates to Amendment 36, Part W & Part X, I believe they are also good ideas.

As it relates to Amendment 20, I believe that Option #3 is the more appropriate.

As to Amendment 4, Part A, I have had little involvement with these types of cases, and am not familiar with information relating to this guideline. The same is true for Amendment 9.

As it relates to Amendment 36, Part G, I do not think it would be a good idea to remove these citations. They help give structure and direction to the guidelines. Removing them would possibly make the guidelines more flexible, but may also lead to inconsistency in application. As it relates to Part P, I believe the cross-reference idea is good.

ITEM #3, LIST OF ADDITIONAL PROPOSED AMENDMENTS

CHAPTER 1, GUIDELINES & POLICY STATEMENTS

Amendment 2, Parts A & B are both appropriate ideas. So is Amendment 3.

CHAPTER 2, GUIDELINES & COMMENTARY

I have no difficulty with Amendment 4. As it relates to Amendment 5, if you're going to remove the more than minimal planning adjustment, then there should be some corresponding increase in the base offense level.

Amendment 6 is appropriate.

As it relates to Amendments 7 & 8, I have had no significant dealings with these issues, and do not really know how these amendments might impact the guidelines.

As it relates to Amendment 10, it appears to be a logical and appropriate amendment.

As it relates to Amendment 11, I have had no dealings with this guideline.

Amendments 12, 13, & 14 all appear to be appropriate amendments.

CHAPTER 3, GUIDELINES & COMMENTARY

NOTE: No opinion or comments offered.

NOTE: It would be helpful to give some attention to examples relating to grouping issues involving money laundering guidelines and other offenses. This is something that, to my knowledge, is currently not in the application notes in Chapter 3, Part D, and I believe it would be useful.

CHAPTER 4, GUIDELINES & COMMENTARY

As it relates to Amendment 24, I do not believe an additional criminal history point is necessary because I think those sentences that deal with time actually served of 5 years or more reflect serious offenses that are often times given consideration. In such instances as armed career criminal and career offender enhancement, or possibly they also might reflect themselves in enhancements to the instant offense, such as mandatory minimums for second convictions, etc.

Amendment 25, Parts A & B are both good ideas.

Amendment 28, Part A, is unnecessary.

Amendment 28, Part B, is also a good idea, and of the options offered, Option #3 seems to be more appropriate.

CHAPTER 5, GUIDELINES & COMMENTARY

Amendments 30, 31, & 32 all appear to be good amendment ideas.

Amendment 34 is unnecessary and would complicate the sentencing procedure. The most effective aspect of USSG 5K1.1 is that it can only occur when the government does make a motion. It has been my experience that those who have substantially assisted authorities have received credit for doing so. It appears this amendment would allow for input from other parties as it relates to the substantial assistance issue, and would in effect result in less substantial assistance being provided. It would allow people other than those receiving substantial assistance to in fact make some determination as to the quality and substance of this assistance. Those people are actually not in a position to evaluate that substantial assistance.

MISCELLANEOUS AMENDMENT #36

Part A, Part B, Part C, Part D, and Part F are all appropriate amendments.

Part D, Part E, & Part F are all appropriate amendments.

Part H, the market value should continue to be the retail value. It should make little difference where the product was embezzled or stolen from. The retail value is still a fair and logical way to deal with monetary loss. Such an amendment would only complicate the determination of such a factor.

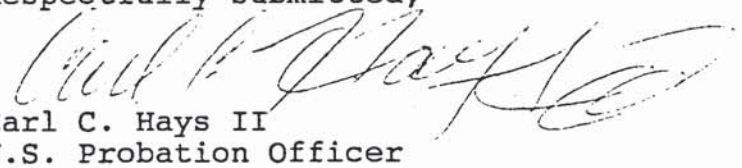
Part I is difficult to evaluate, but if one is to assume that the items were not intended for circulation because they were simply poor items is not sufficient reason for such a change. Quite frankly, had they been good items, they would have been circulated. I do not think this is a good amendment. It will cause arguments surrounding the intentions which will be difficult to resolve. If someone is counterfeiting something, one should be able to fairly state that they would intend to misrepresent its true value or status if they could.

Parts J, K, L, M, N, O, P & Q are all good amendments.

I do not understand enough about the proposed change in Part R to make any comment.

Parts S, T, U, V & Y are all good ideas.

Respectfully submitted,



Carl C. Hays II
U.S. Probation Officer

CCH/smh

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
PROBATION OFFICE

Frank D. Hall, Jr.
Chief Probation Officer
323 U. S. Courthouse
Indianapolis, IN 46204
317-226-6751
FTS: 331-6751

219 U. S. Courthouse
New Albany, IN 47150
812-948-5255

368 Federal Building
Evansville, IN 47708
812-465-6436

101 Federal Office Bldg.
225 N. High Street
Muncie, IN 47305
317-747-5567

202-A College Square
Bloomington, IN 47401
812-334-4212

208 U. S. Courthouse
Terre Haute, IN 47808
812-232-0200

Reply To: Indianapolis

February 25, 1992

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

To Whom It May Concern:

I have received and reviewed a copy of the proposed 1992 amendments to the U.S. Sentencing Guidelines and would like to offer the following comments:

Amendment 29: Expanded Availability of Non-Prison Sentencing Options

1. Do the proposals "compromise the structure of the guidelines as originally drafted?"

   No, they don't compromise, but would allow opportunity for more offenders to be placed on probation. I like the idea of changing the "split" in option #1, but I think that is as far as it should it go. There is nothing wrong with the present table in the guidelines so why mess with it.

2. Should the Commission adopt an offense by offense approach under which certain types of offenders within the alternative eligible guideline cells would be excluded from eligibility?

   No this gets too involved. Keep it simple.

3. Should the available sentencing options be expanded...

   No, USPO's have enough "options" to keep track of now. I'm curious, would there be "boot camps" for females or is this only a male option?

Amendment 33

This amendment is ridiculous. It shows a return to pre-guideline thinking. Every defense attorney around will argue his defendant is young and naive or elderly and infirm. I'm sure defense attorneys will probably "coach" their clients to say they were misguided as a child just so they can qualify for a departure. I can see probation officers telling offenders, "It's a shame you didn't come from a broken home, etc., you could have qualified for a downward departure!" If this amendment is passed we might as well chuck the guidelines.

Amendment 26: Departures based on inadequacy of the criminal history score.

I prefer option 2 because many of the defendants who have criminal history categories more serious than VI are also more serious than VII. Using option 2, the court may sentence to a category VII but can also depart above this category if needed. I like parts B and C of option 2 because I think they address areas which should be given consideration in determining the criminal history category.

Amendment 23: Acceptance of Responsibility

I believe under option 1 the defendant should be required to accept responsibility for his offense of conviction. For example, a defendant is charged with Rape and Felon in Possession. The Rape charge is filed in state court and the Felon in Possession is charged in federal court. In applying the guidelines in the federal case a cross reference to consider the rape conduct is considered using the preponderance of evidence standard. Requiring the defendant to admit he did commit the Rape in the federal case is requiring him to compromise his defense in the case at the state level. For cases such as this I believe the defendant's acceptance of responsibility for the offense of conviction alone should be sufficient.

In my experience, most judges have equated acceptance of responsibility with entering a plea of guilty. Consequently, many times the probation officer does not give a defendant acceptance of responsibility because that acceptance did not go beyond entering a plea of guilty. Option 3 allows the courts to continue to do what they have always done in the past yet allows a person who has truly demonstrated acceptance of responsibility to receive a further reduction. However, I

would recommend the defendant receive one point for pleading guilty and two points for further demonstration of acceptance, instead of the other way around.

Amendment 1, Part A and Part B: Relevant Conduct

Relevant conduct continues to be a major problem area and any commentary, illustrations or definitions to clarify are helpful to everyone trying to compute the guidelines.

Amendments 16, 17 and 18: Role in the Offense, Especially in Offenses Involving Drugs

I think these changes to the commentary concerning mitigating and aggravating role guidelines are very good, especially amendment 16, part A and amendment 17, part A. I have seen several defendants charged by way of information, limiting the scope of their involvement in the instant offense, receive a further reduction for playing a minor role in the offense. I think the proposed changes in the commentary will help clarify the proper application.

I believe when determining whether a mitigating role adjustment should apply in a case the comparison should be between participants in the same case. When you try to gauge culpability based on "typical participant" you have the age old problem of defining what is a typical participant.

Amendment 19

I believe the sentencing guidelines appropriately address minimal participants and minor participants through reductions in the offense level. Consequently, I do not believe there should be a cap based on the defendant's participation in the offense. However, perhaps a cap could be considered for a defendant who is a first time offender in conjunction with being a minimal or minor participant.

Amendment 27: Re-Definition of Career Criminal

Part A. I agree with option number 2. Offenders who fall under this section deserve to receive the maximum sentence available. Therefore, I believe the enhanced statutory maximum sentence should be the one used.

Part D. I do not believe crimes of violence can be quantified. Therefore the definition at 4B1.2 is sufficient.

Part E. When two cases are not related they should be considered as two convictions for purposes of the career criminal guideline.

Part F. A requirement for a defendant to have been arrested, convicted and sentenced for one offense before he commits the second excludes those defendants who commit a second offense while they are on bond for the first offense. In my opinion, a defendant should be held accountable for all prior arrests and convictions which occurred prior to his commission of the instant offense.

Amendment 35 Plea Bargaining Policies: Use of Acquittals

Part B. I agree the defendant should be held accountable for conduct contained in counts dismissed as part of a plea agreement.

Part C. I believe the preponderance of the evidence standard should be sufficient in considering conduct in which the defendant was acquitted. I do not believe it should be a basis for a departure but should be used to determine the offense level and/or to select a sentence within the guideline range.

Amendment 36, Part X

Defendants should be sentenced based on their real offense conduct and not merely the offense of conviction. The purpose of the cross references from the guideline of conviction to the guideline for the underlying behavior allows the court to pronounce a more just sentence. However, when the defendant incriminates himself by giving the government information they would not otherwise have access to, he should not be punished for that information.

Amendment 20

I agree with option number 3.

Amendment 4, Part A

I agree with the proposed amendment.

Amendment 9

I agree with option number 2.

Amendment 2, Part A and B: Chapter 1 Guidelines and Policy Statements

I agree with this amendment.

Amendment 3

I agree with this amendment.

Chapter 2 Guidelines and Commentary

I agree with amendments 4 through 14 as provided in chapter 2.

Chapter 3 Guidelines and Commentary

Amendment 21. I believe a floor offense with additional levels for degree of risk is a good modification to be considered for reckless endangerment enhancement.

Amendment 22: Multiple Counts

This is a difficult area of the guidelines. Perhaps more examples would help clarify the rules.

Chapter 4, Guidelines and Commentary

Amendment 24. I believe one additional point for sentences of imprisonment exceeding one year and one month in which the defendant actually served five or more years of imprisonment is a good idea.

Amendment 28. I believe the criminal history category I is sufficient to address defendants who are first time offenders.

Part B. I believe a category VII should be added to the sentencing table as listed in option 3. This would give the court the option of departing above a category VII and departures could be structured to establish "pseudo" categories in three point increments as is presently done in the sentencing table.

Chapter 5, Guidelines and Commentary

Amendment 34. As much as I believe the U.S. Government abuses § 5K1.1 of the guidelines, I do not believe the answer is to eliminate the requirement for a government motion. I believe there should be requirements for the government to structure

any departure under this section and limit the departure to two levels, four levels or six levels. This would eliminate the "free fall" that we currently have with 5K1 motions.

I hope my comments will be considered. If you have any questions please feel free to call me at 317-226-6756.

Sincerely,

Barbara J. Roembke

Barbara J. Roembke
U. S. Probation Officer
Sentencing Guidelines Specialist

BJR/njh

cc: The Honorable Vincent L. Broderick
c/o The Research Division
Federal Judicial Center
1520 H Street N.W.
Washington D.C. 20005

Honorable Vincent L. Broderick
C/O The Research Division
Federal Judicial Center
1520 H Street, N.W.
Washington, D.C. 20005

RE: Comments to Proposed Amendments to the Sentencing Guidelines

Dear Sir:

The following are my comments to the proposed amendments to the Sentencing Guidelines as outlined in the "Synopsis of Proposed 1992 Amendments to the Federal Sentencing Guidelines".

AMENDMENT 29.
1. Do the proposals "compromise the structure of the guidelines as originally drafted?"

Yes, I believe the proposals do compromise the structure of the guidelines as originally drafted. The guidelines were meant to eliminate or reduce the disparity of sentencings throughout the country. The guidelines as they currently stand do not allow for a considerable amount of disparity as they limit the options available. If the range for probation is expanded and the "split-sentence" options are enhanced thereby eliminating the service of at least one-half of the minimum guideline range in prison will cause an increase in sentencing disparities nationwide. A district which believes white-collar offenses, for example are serious and harmful to the community may sentence an offender to a term of imprisonment while another district may sentence that offender to a term of probation.

Additionally, the proposals compromise the structure of the guidelines as originally drafted as the proposals do not adhere to the sentencing objectives of deterrence, just punishment, incapacitation and rehabilitation. By allowing for an increase in the sentencing disparities, the philosophies of deterrence and just punishment become obsolete.

2. Should the Commission adopt an "offense-by-offense" approach under which certain types of offenders within the alternative-eligible guideline cells (e.g. white-collar offenders) would be excluded from eligibility?

No, I do not believe the adoption of an "offense-by-offense" approach would be a viable option to the expansion of the range of probation or the "split-sentence" options. Again, this type of proposal does not adhere to the sentencing objectives of deterrence, just punishment, incapacitation and rehabilitation. By having an "offense-by-offense" approach it appears at least on the

surface as being an unfair practice. Who shall decide which offenses shall be excludable when they fall within the same guideline categories and have comparable offense levels and criminal history categories. Shall each district decide which offenses are excludable? If an offense shall be excluded from straight probation or the "split-sentencing" options then the offense level for that offense should be increased.

3. Should the available sentencing options be expanded to include additional alternative programs such as intensive supervision, public service, shock incarceration (boot camps), day reporting centers, or other programs?

No. Although alternative programs such as boot camps, day reporting centers, etc are good sentencing alternatives in theory, they are extremely difficult to monitor, as well as impossible to finance. The Probation Offices are expected to run or monitor these programs while not being provided additional personnel or financial backing to provide for the increased workload. The existing personnel is expected to take on the extra work without monetary compensation for the overtime hours needed.

Alternative sentencing programs are for the offender who will not be a recidivist and learns from his/her mistake. However, when the offender does not comply with the conditions imposed with the alternative sentence, it is necessary for the Probation Officer to have the backing of the court in enforcing the ordered sanctions. When the courts fail to reprimand the non-compliant probationer, the alternative sentencing program loses the intended purpose of punishment and general deterrence.

AMENDMENT 33
Part (A). No comment.

Part (B). "Age may be a reason to impose a sentence below the applicable guideline range if combined with another factor (e.g., young and naive or elderly and infirm.)"

I do not agree with the reasons for downward departure being "young and naive" or "elderly and infirm". How does one determine whether an individual is young and naive? Even though offenders may be of a young age does not in itself mean the individual is in any way naive. Naivety is an ambiguous term at best and should not be open to anyone and everyone's interpretation.

Additionally, because someone may be young and naive or elderly and infirm does not lessen the fact that a crime has been committed. Should a young person or an elderly individual be rewarded because they decided to begin their life of crime at an early age or because they happen to become physically infirm after commission of the offense?

Part (C). "Should the court consider "a defendant's lack of

youthful guidance, history of family violence, or a similar factor as a ground for departure from the guidelines?"

NO! This kind of reasoning is a regression to pre-guideline thinking. The large portion of today's society is a product of a broken home, exposed to substance abuse and violence, or are not afforded the same moral guidance which was abundant during the "June Cleaver days". However, the majority of these children do grow up to be law-abiding citizens. Again, should we reward those who wish to make excuses for their abhorrent behavior rather than take responsibility for their actions. This would be the message given to society should the court use these reasons for downward departures.

Part (D). Downward departure based on advanced age (60 or older). No, I do not believe a downward departure based on age should be a consideration.

AMENDMENT 26

Part (A). I agree with Option 2. Most offenders who exceed Category VI usually do so with many more points than would come within the limits of a Category VII. I believe the court should be able to depart upward to the point to adequately reflect the seriousness of the offender's past criminal conduct.

Part (B). I do not agree with departures due to inadequacy of the Criminal History Category based on the degree of risk or type of risk. Whether the degree of risk is financial or physical, both provide for their own degree of harm to the community.

Part (C). I agree with this provision.

AMENDMENT 23

I propose an Option 5 which is similar to Option 3. However, I believe a one point reduction should be awarded to the offender who pleads guilty and an additional two level reduction be given to the offender who provided substantial assistance to authorities, admits to relevant conduct, voluntary payment of restitution etc. This provides for more incentive for the offender to be cooperative with authorities etc. More can be earned by this offender than just by pleading guilty.

I disagree with allowing for a three level reduction to an offender who has a high offense level. This individual should not be rewarded more than someone who commits a less serious offense. For offenders who have higher offense levels, there is a greater chance that this individual can provide more information to assistance authorities. Therefore, they may be able to be considered for a 5K1.1 departure.

AMENDMENT 1
Relevant Conduct. I agree with the provisions provided for this section. Relevant conduct continues to plague presentence writers. Any and all definitions and clarifications are greatly appreciated.

AMENDMENTS 16, 17 and 18
1. Whether mitigating role adjustments should apply in cases in which the defendant is less culpable...individuals who typically participate in similar criminal conduct.

I do believe mitigating role adjustments should only apply in cases in which the defendant is less culpable than other participants in the same case. When you try to group all offenders into one neat package none will be identical. Therefore, the term "individuals who typically participate" in similar criminal conduct" is ambiguous and will open the door for all kinds of interpretation for "individuals who typically participate".

2. Whether defendants performing certain functions in a drug activity should be eligible or ineligible for a mitigating role adjustment by virtue of the function performed.

I do not believe a person should be excluded from receiving or not receiving a mitigating role adjustment by virtue of the function performed. The guidelines adequately defines who should receive an adjustment for mitigating roles. The guidelines should not incorporate a specific function for defining who receives the adjustment. For instance, one may say a "mule" function warrants an adjustment for mitigating role. This is fine if the "mule" only carries or unloads one shipment of drugs. However, if the "mule" carts several separate shipments involving hundreds of kilos of drugs should he also be eligible for the same reduction based on the function performed?

3. Factors to be considered for a mitigating role reduction.

The definition for application of a mitigating role reduction is adequately addressed in the guidelines and should not be changed.

4. Should a mitigating role reduction apply to someone who has not been held responsible for the full amount to the crime?

No. The offender who is not held responsible for the full extent of the criminal activity is already in receipt of a role reduction by the fact he is not being held accountable for the entire conspiracy. The offender would not have a mitigating role in an offense he fully completed and was aware of.

5. If a defendant does not merit a mitigating role but has been held responsible for the full amount, should he be considered for a mitigating role?

This question could only be answered by reviewing the facts surrounding the case. Depending on what his role is in the overall activity compared to the relative culpability of the other defendants.

AMENDMENT 19

A. I do not agree with setting caps for minimal or minor participants in drug cases. The role adjustments available in chapter 3 of the guidelines adequately addresses the number of levels the base offense level should be reduced. By placing a cap on the guideline level, the mitigating role adjustments in Chapter 3 are of no value. If an adjustment is made for mitigating role after the cap is in place then the offender is being rewarded twice for mitigating role when the spirit of the guidelines is for a one time reduction for a single offense characteristic.

B. "To what extent do mandatory minimum sentencing statutes, on which the Commission has set its base offense levels for drug offenses, further influence the Commission's consideration of these possible amendments?"

I do not believe the guideline offense levels should be below the minimum sentencing statutes. Congress has determined the penalties of offenses based upon the overall harm it does to society as a whole as well as to individuals. In setting a mandatory minimum sentence, Congress is addressing the serious nature of the offense as well as the harm it inflicts on society. Therefore, allowing an individual to be sentenced below the mandatory minimum penalty is sending a message that these offenses are not as serious or harmful as Congress or the public deem them to be.

AMENDMENT 27

Part (A). I agree with Option 2.

Part (B) and (C). No comment.

Part (D). The Commission should not address certain categories of crimes of violence that would be considered "lesser" crimes of violence and thereby not counted. By amending the penalty for a felony from one year to two years, the Commission addresses offenses which could be considered "lesser" crimes of violence. Additionally, be stating certain crimes of violence are less serious opens the door for defense attorneys to argue crimes of violence involving spousal abuse should be considered lesser crimes of violence based on the victim.

Part (E). The convictions should continue to be counted as two convictions.

Part (F). I believe the definitions contained in Section 4B1.2(3) adequately define "two prior felony convictions" and an amendment specifying an offender who engages in a single short-lived crime spree is unnecessary and unwarranted.

AMENDMENT 35
Part (B). The Commission should amend its guidelines to provide that conduct described in a count dismissed pursuant to a plea agreement may be considered in determining whether or not to depart from the applicable guideline range.

Part (C). If a defendant has been acquitted of an offense, he should not be held accountable for that offense conduct even though the court holds there is a preponderance of the evidence.

AMENDMENT 36
Part (X). The guidelines should be based on the real offense conduct and not just limited to the offense contained in the plea agreement. Judicial discretion has become prosecutorial discretion as a result of plea agreements which limits the defendant's offense behavior, the actual charge for which the defendant can be convicted and even the guideline in which the defendant can be sentenced within.

AMENDMENT 20
I agree with Option 3.

AMENDMENT 4
I agree with the proposed amendment to Section 2A3.1,2 and 4.

AMENDMENT 9
I agree with Option 2.

CHAPTER 2 GUIDELINES AND COMMENTARY

AMENDMENT 5
I agree with the four level increase as proposed in Amendment 6 and with the deletion of "more than minimal planning".

AMENDMENT 7
I agree with an increase of offense levels on the drug tables at 2D1.1 for distribution of large amounts of Schedule III, IV, and V controlled substances, anabolic steroids, nd schedule I and II depressants.

AMENDMENT 8
I agree with an increase in the offense level from one to five levels for the number of aliens smuggled. I believe an enhancement for death or bodily injury should be incorporated into this guideline. However, I do not agree with the stipulation it should be conditional on the defendant's state of mind. If an alien or someone who smuggles aliens causes death or bodily injury to anyone, he should receive an upward adjustment regardless of the circumstance. An enhancement should be given for the possession of

a firearm. An increase of 2 levels for possession of a firearm would be an adequate adjustment as that is the level assessed in drug cases.

AMENDMENT 10
The specific characteristics contained in Section 2Q1.2 should be increased by 4 levels. Environmental crimes are life-threatening to society as a whole and should be penalized accordingly. Section 2Q1.3 should be similarly amended.

AMENDMENT 11
I agree with the proposed amendment to guideline 2Q2.1. I believe an adjustment should be added for more than minimal planning and an upward adjustment should be increased from a two to four for pecuniary gain.

CHAPTER THREE GUIDELINES AND COMMENTARY

AMENDMENT 21
The commentary to Section 3C1.2 is innocuous in defining Reckless Endangerment during Flight. The range of behavior is not adequately covered in this section. A floor offense with additional levels for degree of risk would be beneficial to the presentence writer in calculating the guideline enhancement.

AMENDMENT 22
Section 3D1.4 is clear in defining the multiple count rules. However, when an offender is convicted of several offenses which can not be grouped together and the offense levels are too low to be given any units, he does not receive any additional levels for those offenses. Thereby not receiving any guideline penalty. This section needs modification so multiple counts result in an increase in the guideline range.

CHAPTER FOUR GUIDELINES AND COMMENTARY

AMENDMENT 25
Part (A). I agree with the proposed amendment.

AMENDMENT 28
Part (A). I agree with the establishment of a Category 0 for first time offenders. However, I do not believe the criminal history category should be used to measure likihood of recidivism. Also, I do not agree with Category 0 offenders being eligible for reduced sentences. A Category 0 could make it possible for a higher offense level to be eligible for straight probation or the "split-sentence" options.

Part (B). I agree with adding a Criminal History Category VII. Option 3 adequately addresses how Category VI and VII should be structured. Therefore offenders who have criminal history points above 18 would be considered for an upward departure based on the inadequacy of their criminal history.

I hope my comments to the proposed amendments are helpful. Should you have any questions or if I may be of assistance to you, please contact me at FTS 331-6751 or (317) 226-6751.

Respectfully,

Dae Lynn Hollis
U.S. Probation Officer

United States District Court
Northern District of West Virginia
Post Office Box 1275
Elkins, West Virginia 26241

Robert E. Maxwell
Chief Judge

#32

February 12, 1992

Honorable Vincent L. Broderick
United States District Judge
Chairman of the Committee on
Criminal Law of the Judicial
Conference of the United States
United States Courthouse
101 East Point Road
White Plains, New York 10601-5086

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

Attention: Guideline Comment

Dear Judge Broderick and Members of the United States Sentencing Commission:

In response to Judge Broderick's correspondence of January 22, 1992, with enclosures, the opportunity to comment on amendment proposals, now being considered by the Sentencing Commission, is appreciated.

Rather than addressing the proposals on a one-to-one basis, I believe my comments can be helpful to the Judicial Conference's Committee on Criminal Law, and the Sentencing Commission, if I would address the overall results and effects of the Sentencing Guidelines as they now exist and, as we shall hope, will be improved with the proposed amendments. I will then address several specific proposed guideline amendments, but time constraints limit my ability to adequately comment on all proposed amendments.

My first observation is not particularly addressed directly to the Sentencing Guidelines; however, the guidelines are applicable to criminal actions, regardless of size and importance of the crimes alleged; therefore, the involvement of judicial time and effort is noticeable. In this regard, it is observed that prosecutors are bringing large numbers of small quantity drug cases which could and should be prosecuted in state courts. This action persists despite the Federal Court Study Committee's report of April 2, 1990; the year-end address of Chief Justice Rehnquist delivered at the conclusion of calendar year 1991; and the numerous complaints of trial and appellate judges as to the unnecessary volume of work being visited upon the federal court system.

Chief Justice Rehnquist's year-end report parallels many of my personal observations, particularly in cautioning Congress to "consider the serious implications" of passing legislation that would "unnecessarily expand the jurisdiction of the federal courts and intrude into areas of the law that have traditionally been reserved to state courts."

I am sure that you are aware of the commentaries set forth in Chapter 2 of the April 2, 1990 report of the Federal Courts Study Committee, particularly paragraph designated:

> A. Federal and State Prosecution of Narcotics Violations
>
> Federal prosecuting authorities should limit federal prosecutions to charges that cannot or should not be prosecuted in the state courts and should forge federal-state partnerships to coordinate prosecution efforts. Congress should

> direct additional funds to the states to help them to assume their proper share of the responsibilities for the war on drugs, including drug crime adjudication.

These pronouncements do not appear to be impacting the federal prosecution of drug cases, which could and should be prosecuted in State Court, in this the Northern District of West Virginia. A recent drug sweep in this District resulted in 31 arrests on federal drug charges which prompted a local county prosecutor to publicly comment that these individuals were being prosecuted in federal court because "they could get more time." The Court is advised from the Magistrate Judges before whom the individuals were brought for initial appearances that many of those arrested were street runners with no prior convictions and that a majority of these cases resulted from controlled buys involving small amounts of cocaine.

Also, in recent weeks, the Court received guilty pleas from approximately eight young men who had become involved in marijuana usage while first and second year students at West Virginia University. The facts revealed no interstate or international connections, with most of the drug sales being made to fraternity brothers, roommates, and other college students who may have been equally culpable.

The Court has seen a mass of similar examples which result in unnecessary prison terms under the Guidelines, in many instances because controlled buys are intentionally arranged to occur within a protected zone. These examples direct our professional attention

to seek greater flexibility in guideline sentencing, particularly for the youthful, first time offenders who are totally unaware of the seriousness of the matters with which they are charged.

I quite agree that these youthful offenders should be required to cooperate with prosecuting authorities in locating sources of supply and assisting as witnesses in the state prosecution of low-level offenders and in the federal prosecution of interstate and international traffickers in narcotics; however, I do not believe that young, impressionable individuals should be encouraged to participate in making undercover purchases of illegal substances in order to receive probation or alternative sentencing which would be the result only of a motion by the government for substantial assistance. The Courts must be given discretion to impose alternative sentencing in such instances.

As left in the sole discretion of federal prosecutors, the Court has observed what appears to be completely arbitrary application of substantial assistance motions. In some cases, motions are made and vehemently supported when the offender has made merely one phone call. In other cases, the prosecutor might refuse to make the motion even when it appears that the defendant has performed as much assistance as others who have benefitted from such a motion. In this District, the arbitrariness has resulted in disparity of sentencing for individuals of equal culpability and cooperation.

Perhaps most disturbing, the withholding of pertinent information from the Court, under the guise of § 1B1.8, continues

to persist in this District. Often, the Court learns of a defendant's greater culpability, after his sentencing, when reviewing pre-sentence reports of co-conspirators. It becomes readily apparent that this so-called incriminating evidence was known by investigators long before the defendant agreed to cooperate or was learned from other cooperating individuals. The Court welcomes any suggestions or revisions to § 1B1.8 which would require the Government to detail intelligence information known to them prior to the defendant's cooperation. At present, the Court perceives that the purpose of § 1B1.8 is being seriously undermined.

In applying these general observations to specific amendment proposals, I believe that the adoption of Options 1-5 to Amendment 29, which provide for the expanded availability of non-prison sentencing options, would alleviate some of the problems mounting in this and many other Districts. Adoption of all of these options would not compromise the purpose of the sentencing guidelines. It appears unnecessary to adopt an offense-by-offense approach; sentencing judges are in a unique position to exercise discretion appropriately, given individual circumstances. As many as possible additional alternative sentencing programs should be made available. The sentencing judge should be given complete discretion to determine the appropriate alternatives once it is determined that the defendant qualifies.

Consistent with my earlier general comments, I also support Amendment 33 (A-D) which covers departures based on offender

characteristics. With regard to 33-C, to the extent that a defendant's lack of youthful guidance or history of family violence contributed to the commission of the offense, the sentencing judge should be given the discretion to consider it as grounds for a departure.

In addition to my general concern of the misuse of § 1B1.8, I would oppose Amendment 2A to the extent it proposes to disallow the sentencing judge from using the information to determine where within the range the sentence can fall. This amendment presumes that such information would always compel the judge to sentence higher within the established range, when in fact, the so-called incriminating evidence may reveal mitigating circumstances which might compel sentencing at the lower end of the range. Of course, this might be the exception, but the amendment also seeks to limit sentencing discretion even further and is not justified. Sentencing judges should be given, at a minimum, full discretion to sentence anywhere within the range.

In considering Amendment 23, which covers the acceptance of responsibility guideline, I believe it would be beneficial for the Sentencing Commission to determine whether an individual must merely accept responsibility for the offense of conviction or for all relevant conduct. Although the Fourth Circuit has interpreted the guidelines to require the offender to accept responsibility for all relevant conduct, I believe that the better policy would be to require acceptance of responsibility for the count of conviction, keeping in mind that the individual will still be held accountable

for all relevant conduct, even conduct he may not be willing to acknowledge, if the sentencing judge finds by a preponderance of the evidence that he was involved in such conduct.

In applying the adjustment in this manner, guilty pleas will be encouraged where appropriate, and offenders will not be compelled to confess to conduct in which they may not have participated in order to receive the two-level adjustment. I oppose any further amendments to acceptance of responsibility, in that Option 2 appears unjustified, Option 3 appears to make the adjustment much too complicated and subjective, and Option 4 strips an individual of the right to trial and the presumption of innocence, to the extent that it prohibits a reduction for anyone who puts the government to its proof at trial.

Consistent with my earlier comments, I support the adoption of Amendment 28, Part A, which proposes to create a criminal history category 0.

I believe the adoption of Amendment 34, which eliminates the requirement of a government motion under § 5K1.1, except where departure would go below a statutory minimum, would result in a vast improvement in the Sentencing Guidelines, particularly in light of my earlier comments regarding the arbitrary usage of substantial assistance motions. In several instances, individuals have been encouraged to enter into plea agreements without legal representation and have been refused substantial assistance motions because the plea agreements did not require them, despite their reported extensive undercover work performed prior to judicial

intervention and appointment of counsel. It is for such unjust circumstances that the Court encourages adoption of Amendment 34.

One final proposed amendment which it is believed deserves attention is Amendment 35, Part (C). The sentencing judge should be given complete discretion to determine whether conduct of which the defendant has been acquitted should be used to determine the offense level, to select a sentence within the guideline range, or as a basis for departure. During the trial, the sentencing judge has listened to the evidence as an objective observer and should be given complete authority to consider the acquittal, if he is convinced that punishment is deserved or not deserved despite the acquittal, keeping in mind that the defendant would not be before him for sentencing if the defendant had been tried only upon the counts of which he was acquitted.

The general concerns I have expressed and the amendments which I have attempted to address raise interesting questions which could be discussed in much more detail; however, I have attempted to remain as brief as possible, aware that the Committee on Criminal Law and the Sentencing Commission will be reviewing many, many comments. Once again, the opportunity to address these issues is most appreciated.

Sincerely,

Robert E. Maxwell
United States District Judge

REM/lef

UNITED STATES DISTRICT COURT

#28

WESTERN DISTRICT OF TEXAS
PROBATION OFFICE

H. H. WHITEHILL
CHIEF PROBATION OFFICER
655 E. DURANGO
SUITE 421
SAN ANTONIO 78206

SAN ANTONIO

March 2, 1992

307 U.S. COURTHOUSE
200 WEST 8TH STREET
AUSTIN 78701

POST OFFICE BOX 1265
DEL RIO 78841-1265

POST OFFICE BOX 86
EL PASO 79941

POST OFFICE DRAWER 1034
MIDLAND 79702

320 S. OAK, SUITE 4
PECOS 79772

800 FRANKLIN, ROOM 305
WACO 76701

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

RE: **PROPOSED AMENDMENTS TO SENTENCING GUIDELINES**

Dear U.S. Sentencing Commission:

The following are comments regarding the Proposed Amendments to the Sentencing Guidelines memo distributed by Mr. Chamlee on January 29, 1992:

1. Expanding the availability of non-prison sentencing options is encouraged. Option 1 on page 3, which eliminates the requirement that defendants must serve at least one-half of the minimum guideline range in prison under the "split sentence" provision is believed to be an appropriate adjustment to the guidelines.

2. Acceptance of Responsibility as it now stands is actually an acknowledgement of guilt. It is believed that this acknowledgement should include an admission of involvement in the offense of conviction and relevant conduct as noted in Amendment 23, Option 1 on page 5. In addition, a one level reduction for demonstrations of acceptance is also believed appropriate because some defendants take affirmative steps to demonstrate acceptance of responsibility and do not just acknowledge their guilt. Option 2 on page 6 is also believed an appropriate adjustment to the sentencing guidelines An increased reduction for acceptance of responsibility for an offense level higher than 30 appears very reasonable.

3. A redefinition of a career offender appears appropriate. A concern in this office involves younger defendants who are arrested, convicted, and sentenced to periods of imprisonment for drug distribution offenses involving very small quantities of controlled substances. A third conviction in federal court results in a career offender guideline which results in a

seemingly excessive period of imprisonment of 17 years plus. Can this be what Congress intended? Street dealers are a menace to society, but their careers in crime are many times a result of drug addiction and a poor socio-economic upbringing. Career offender guidelines would seem more appropriate for the violent offender or the upper echelon drug distributor whose "successful" career has been the result of large scale drug distribution.

4. In response to Amendment 5 on page 14, it is believed that the removal of the "more than minimal planning" adjustment would be a disservice to probation officers. This is a practical and realistic specific offense characteristic. Increasing the offense levels based on the loss tables is likewise recommended. Recently, the president of a non-profit agency was convicted of accepting bribes totaling over $150,000, was given a lesser sentence (18 months) than a street dealer who was sentenced to 24 months for sales totaling less than two ounces of heroin.

5. Amendment 8 on page 14 is supported in its entirety. However, the increase for previous convictions need not be deleted. An enhancement for possession of firearms is believed especially appropriate due to the increased danger of violence when alien traffickers possess weapons.

6. Amendment 28, (Part A) on page 16, which discusses the establishment of a new category zero criminal history is again encouraged. A Chapter 4 two level reduction for a Category 0 criminal history level could provide for a more lenient guideline imprisonment range for an offender who has no previous arrests or convictions, i.e., no prior involvement in the criminal justice system.

7. Finally, it is believed that Judicial Conference Recommendation Number 5 on page 5 of Appendix A is unnecessarily re-opening the door to disparity in sentencing.

Thank you for your time in reviewing these comments. They are brief but to the point. Sentencing guidelines, when not circumvented by the defense attorney, the U.S. Attorney, and/or the court, appear to be generally satisfying the purposes of sentencing as outlined in 18 U.S.C. § 3553.

Sincerely,

Michael C Fisher

Michael C. Fisher
Senior U.S. Probation Officer
Guideline Specialist

MCF/vsg

cc: Honorable Vincent L. Broderick
c/o The Research Division
Federal Judicial Center
1520 H Street, NW,
Washington, D.C. 20005

H.H. Whitehill
Chief U.S. Probation Officer
655 E. Durango, Suite 421
San Antonio, Texas 78206

#29

FEDERAL PUBLIC DEFENDER
District of Connecticut
241 Main Street, 1st Fl S
Hartford 06106

Thomas G. Dennis
FEDERAL PUBLIC DEFENDER

(203) 240-3357
(FTS) 244-3357

February 21, 1992

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

Attn. Guideline Comment

To Whom This May Concern:

I have read the notice of proposed amendments to the sentencing guidelines, policy statements and commentary contained in the Federal Register, Vol. 57, No. 1, of January 2, 1992, wherein comments were solicited. I have a particular comment not to any proposed amendments but rather to the lack of a proposed amendment where, I believe, one is necessary. Specifically, Application Note 3 to the Commentary to §4A1.2 needs to be clarified because judges are finding it unduly vague.

The government has commenced "Operation Triggerlock" wherein many people convicted of state crimes are being prosecuted federally for possession of firearms discovered during the investigation of the state crime. A typical example is a recent client of mine. He was a native of Guyana who was living unlawfully as an alien in the United States. Specifically, he was living in an apartment in Hartford, Connecticut. At midnight one night the police, armed with a search warrant for narcotics, kicked down his door and found him in bed. Near his bed they found some narcotics and a firearm. He found himself arrested for the first time in his life. He was a "first offender" for the criminal justice system.

The firearm belonged to my client's father and was not possessed for any reason relating to the possession of the narcotics. My client was prosecuted in state court for possession of narcotics with intent to sell by a drug dependent person, pled guilty, and received a sentence of 7 years suspended after 4. He was thereafter prosecuted federally under 18 U.S.C. § 922(g) for being an illegal alien in possession of the firearm. He pled guilty to that offense as well. The United States Probation Officer assigned 3 criminal history points to my client based upon his state drug conviction. I objected in a letter dated January 30, 1992, a copy of which is enclosed. My point was that Application Note 3 to the Commentary to §4A1.2 clearly states that "prior sentences are considered related if they resulted from offenses that occurred on the same occasion." The prosecutor responded in a letter dated February 4, 1992, a copy of which is

enclosed. The prosecutor stated that the probation officer was correct because my client came into possession of the firearm before he came into possession of the drugs and therefore the offenses were not "related" despite the fact that the drugs and the gun were discovered by the police on the same occasion. The prosecutor thereafter argued on the day of sentencing that § 4A1.2(a)(2) only applies to construing whether two prior sentences are related to each other, not to a case such as my client's where the court is determining whether a prior sentence is related to the case at bar. The probation officer and the judge agreed with the prosecutor and, as a consequence, my client found himself in criminal history category II despite the fact that he was a first offender in the criminal justice system.

The case I have described is not an isolated or unusual case under "Operation Triggerlock" but rather illustrates the norm. My client could have been charged in a single federal indictment with one count of possession of narcotics and in another count with possession of the firearm, but instead due to circumstances completely beyond his control he was not. The judge, consistent with the practice of most judges in "Operation Triggerlock" cases, departed downward based upon a conclusion that the elevated criminal history score based on the drug conviction overrepresented the seriousness of the defendant's "criminal history." Neither side is appealing. Nevertheless, I remain convinced that judges are misconstruing §4A1.2(a) and Application Note 3 to the Commentary because they find those provisions to be unduly vague. In my view, the Commission did not intend to say that individuals such as the man whose case I described are more likely to become recidivists if they are prosecuted by separate sovereigns than if they are prosecuted by a single sovereign. I would therefore respectfully suggest that Application Note 3 to the Commentary to §4A1.2 should be amended to provide further examples to illustrate cases that are "related" for criminal history purposes.

Very truly yours,

Gary D. Weinberger
Asst. Federal Public Defender

GDW/aw

FEDERAL PUBLIC DEFENDER
District of Connecticut
450 Main Street, Room 710
Hartford 06103

Thomas G. Dennis
FEDERAL PUBLIC DEFENDER

(203) 240-3357
(FTS) 244-3357

January 30, 1992

Ms. Virginia Swisher
United States Probation Officer
450 Main Street
Hartford, CT 06103

Re: United States v. Malvin Joseph
Criminal No. 2:91CR61(EBB)

Dear Ms. Swisher:

Please let this letter serve as my written objections to the Presentence Report in the above-entitled case. All of these objections stem from the fact that, due to circumstances completely beyond his control, the state of Connecticut and the federal government split one case into two and prosecuted the two aspects of this case separately. I object to the conclusion in paragraph 31 on page 4 that Mr. Joseph should receive three criminal history points for his state of Connecticut conviction on the drug aspect of this case. I would respectfully direct your attention to the commentary to Guidelines § 4A1.2. Application Note 3 states that, "prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." The drug conviction was "unrelated" in the sense that the drugs and the gun were not part of a common scheme or plan -- that is, the gun was not possessed to protect the drugs. However, the Guidelines do address the matter in the disjunctive through the use of the word "or" and thus consider offenses that occur on the same occasion to be related even if not part of a common scheme or plan. I therefore believe that Mr. Joseph should obtain zero criminal history points from the conviction on the drugs that were found on the same occasion as the gun which is the gravamen of this case. In discussing this objection with you, you have stated that the offenses did not "occur on the same occasion" because they did not begin on the same occasion. That is, Mr. Joseph came into possession of the gun before he came into possession of the drugs. I believe that you have misconstrued the meaning and intention of the sentencing commission in their use of the word "occur". Stepping back and looking at the broad picture as set forth in the Introductory Commentary to Chapter Four, Part A of the guidelines manual, it is clear that the purpose of the criminal history score is to distinguish the first offender from the repeat offender. Malvin Joseph is a first offender for the criminal justice system, the bifurcation of his offense

notwithstanding.

I object to paragraph 36 because I believe that Mr. Joseph's criminal history category is I because he has zero criminal history points and that, therefore, his guideline imprisonment range is 6-12 months. I object to paragraph 40 for the same reason.

I disagree with paragraph 64 because I believe that there is a mitigating factor that warrants a downward departure. Mr. Joseph has been incarcerated since May 22, 1991, as a result of the police kicking down his door in the middle of the night and, with his assistance, discovering a firearm and some drugs. But for the decision of the state and federal governments to bifurcate that incident into separate prosecutions, Mr. Joseph would receive credit toward the imposition of his sentence commencing May 22, 1991. Instead, he is now facing a concurrent sentence that is blind to the imprisonment that he has already suffered. As of the time of sentencing he will have been incarcerated approximately 9 months as to which he will receive no credit. I would respectfully submit that any sentence considered appropriate by the Court should be reduced 9 months, thereby deriving an effective guideline range of 0-3 months.

Very truly yours,

Gary D. Weinberger

Gary D. Weinberger
Asst. Federal Public Defender

GDW/aw

cc: Nora Dannehy, AUSA

U.S. Department Justice

United States Attorney

District of Connecticut

450 Main Street
Hartford, Connecticut 06103

FTS 203/244-3270
CONN 203/240-3270

COPY

February 4, 1992

Ms. Virginia Swisher
United States Probation Officer
450 Main Street
Hartford, CT 06103

RE: United States v. Malvin Joseph
Criminal No. 2:91Cr00061(EBB)

Dear Ms. Swisher:

The defendant has objected to the criminal history computation contained in the Presentence Report for Malvin Joseph. Specifically, he has objected to the conclusion in ¶ 31 that the defendant should receive three criminal history points for his drug conviction in the State of Connecticut. Based on the facts of the instant case, the Government is in agreement with the computation contained in the Presentence Report.

The defendant was arrested on May 22, 1991 and charged by the State of Connecticut with possession of narcotics and by the federal government as being an illegal alien in possession of a firearm. The defendant was convicted of possession of narcotics by a drug dependent person in state court. Subsequent to his state conviction, the defendant entered a plea of guilty to the firearms charge in federal court. You have indicated in your report that the defendant informed you that he did not possess the gun in connection with the drugs but rather used the gun over a period of time when closing his father's business.

In United States v. Banashefski, 928 F.2d 349 (10th Cir. 1991), the court affirmed the district court's assessment of three points for a prior conviction under facts very similar to the instant case. The defendant in Banashefski was arrested while driving a stolen vehicle. A firearm was found at the time of his arrest. He was arrested by the state on the stolen vehicle charge and indicted on the firearm charge by the federal authorities. The defendant was convicted on the stolen vehicle charge prior to being sentenced on the federal charge. For purposes of computing his criminal history, the defendant was assessed two points for the prior state conviction. On appeal the court noted that "the commentary to §4A1.2 explains that a sentence imposed after the

defendant's commencement of the instant offense, but prior to sentencing on the offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense." As in the instant case, there was evidence in Banashefski that the defendant had possession of the gun prior to the driving the stolen vehicle. Because the possessory acts were separable, the court held that the conduct was not part of the instant offense and did not occur on the same occasion. See U.S.S.G. §§4A1.2(a)(1), 4A1.2(a)(2). See also United States v. Garcia, 909 F.2d 389, 392 (9th cir. 1990); United States v. Cox, 934 F.2d 1114, 1125 (10th Cir. 1991).(state drug conviction properly included in computing criminal history because presence of cocaine, although seized with the guns, not part of the firearms charge).

Malvin Joseph was not charged by the government with a narcotics violation nor was he charged under 18 U.S.C. §924(c). The defendant's possession of narcotics is not part of the instant offense and should not be considered related for purposes of sentencing.

Very truly yours,

ALBERT S. DABROWSKI
UNITED STATES ATTORNEY

Nora Dannehy

NORA R. DANNEHY
ASSISTANT UNITED STATES ATTORNEY

cc: Gary Weinberger, Esq.

#30

AMERICAN FARM BUREAU FEDERATION

225 TOUHY AVENUE • PARK RIDGE • ILLINOIS • 60068 • (312) 399-5700 • FAX (312) 399-5896
600 MARYLAND AVENUE S.W. • SUITE 800 • WASHINGTON, D.C. • 20024 • (202) 484-3600 • FAX (202) 484-3604

February 28, 1992

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

Dear Sir/Madam:

The American Farm Bureau Federation (AFBF) is the largest voluntary general farm organization in the United States, representing the interests of nearly four million member families. Our purpose is to promote, protect and represent the interests of farmers and ranchers across the United States. AFBF has member state Farm Bureaus in every state and Puerto Rico.

Our purpose in submitting comments is to point out a mistake in the revision to Section 2Q2.1 entitled "Specially Protected Fish, Wildlife and Plants; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife and Plants." The example in paragraph 1 under "Application Notes" of "for pecuniary gain" cites "when a farmer destroys migratory birds to prevent their consumption of cereal grains." We submit that this is not the type of activity referred to in the guidelines and unfairly establishes a criminal burden on farmers and ranchers who protect their crops in good faith. Further, the reach of this provision will likely include and render as criminal activities that are established agricultural practices and methods of crop protection, which, by extreme liberal definition, could be interpreted as threatening or destructive of wildlife.

The section is really aimed at trafficking in parts of endangered and threatened species, and we submit that it is that activity that should be included as the example. The migratory bird example does not fit the section because they are not endangered or threatened species, nor are they marine mammals that are listed as "depleted." Furthermore, the application of "for pecuniary gain" to a farmer trying to make an honest living is inappropriate and offensive to our members. Such an interpretation stretches the term to unacceptable limits, and would encompass any activity done in furtherance of a lawful business.

The federal Animal Damage Control Act (7 U.S.C. 426) provides for the control of depredating animal pests. The Animal Damage Control program within the U.S. Department of Agriculture carries out actions required to control such pests, including actions to control depredating bird species. Not only are such activities lawful, but they are required by law.

We therefore request that you strike the example set forth in Section 2Q2.1 because it is inapplicable and inaccurate, and further that it not be included by definition or otherwise as an element of criminal activity. Thank you for your attention to our request.

Sincerely,

John Datt

John C. Datt
Executive Director
Washington Office

[redacted]